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

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

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This is a Key-Numbered Volume

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

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

JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

FIRST CIRCUIT

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[1] Resigned June 10, 1916.

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Hon. WALTER EVANS, District Judge, W. D. Kentucky.....Louisville, Ky.
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Hon. CLARENCE W. SESSIONS, District Judge, W. D. Michigan....Grand Rapids, Mich.
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Hon. JOHN E. SATER, District Judge, S. D. Ohio.....Columbus, Ohio.
Hon. HOWARD C. HOLLISTER, District Judge, S. D. Ohio.....Cincinnati, Ohio.
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Hon. JULIAN W. MACK, Circuit Judge.....Chicago, Ill.

[1] Appointed June 1, 1916.

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Hon. HENRY THOMAS REED, District Judge, N. D. Iowa..... Cresco, Iowa.
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Hon. WILBUR F. BOOTH, District Judge, Minnesota..... Minneapolis, Minn.
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Hon. ARBA S. VAN VALKENBURGH, District Judge, W. D. Missouri... Kansas City, Mo.
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Hon. JOSEPH W. WOODROUGH, District Judge, Nebraska ..... Omaha, Neb.
Hon. WM. H. POPE, District Judge, New Mexico..... Santa Fé, N. M.
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Hon. JOHN H. COTTERAL, District Judge, W. D. Oklahoma..... Guthrie, Okl.
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Hon. TILLMAN D. JOHNSON, District Judge, Utah ..... Ogden, Utah.
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Hon. WM. W. MORROW, Circuit Judge..... San Francisco, Cal.
Hon. WM. H. HUNT, Circuit Judge..... Washington, D. C.
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Hon. EDWARD E. CUSHMAN, District Judge, W. D. Washington..... Seattle, Wash.
Hon. JEREMIAH NETERER, District Judge, W. D. Washington..... Seattle, Wash.

CASES REPORTED

REHEARINGS DENIED

[Cases in which rehearings have been denied, without the rendition of a written opinion, since the publication of the original opinions in previous volumes of this Reporter.]

FOURTH CIRCUIT.

City of Baltimore v. Tracher, 230 F. 1022. Rehearing denied May 10, 1916.

Western Maryland R. Co. v. Eastern Cement Gun Co., 231 F. 620. Rehearing denied May 9, 1916.

EIGHTH CIRCUIT.

Griggs, In re, 227 F. 795. Rehearing denied May 27, 1916.

NINTH CIRCUIT.

Marshall v. Backus, 229 F. 1021. Rehearing denied May 22, 1916.

DISTRICT COURT.

J. L. Phillips & Co., In re, 224 F. 628. Rehearing denied Aug. 1, 1916.

CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

B. F. STURTEVANT CO. v. CHAMPION FIBRE CO.

(Circuit Court of Appeals, Sixth Circuit. April 12, 1916.)

No. 2712.

1. SALES ⟸445(4)—BREACH OF WARRANTY—SUFFICIENCY OF EVIDENCE.
In an action on a written warranty of a draft-inducing apparatus, evidence as to the tests of the apparatus *held* not to show that its failure to produce the guaranteed power was due to the insufficient supply of coal, instead of the insufficient draft, so conclusively as to require a directed verdict for defendant.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1306; Dec. Dig. ⟸445(4).]

2. SALES ⟸445(4)—BREACH OF WARRANTY—DEFENSES—MISREPRESENTATION BY BUYER.
The inaccuracy of information furnished to a seller, who installed a draft-inducing apparatus, does not authorize a directed verdict for it in an action on the warranty, where its manager admitted that it did not prevent making an apparatus of the warranted power.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1306; Dec. Dig. ⟸445(4).]

3. SALES ⟸442(3)—BREACH OF WARRANTY—MEASURE OF DAMAGES.
The measure of damages applicable to actions for fraud in inducing sales of personal property, which allows recovery of the difference between the purchase price and the actual value, does not apply to an action for breach of an express warranty.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1286; Dec. Dig. ⟸442(3).]

4. APPEAL AND ERROR ⟸882(13)—PRESENTING QUESTIONS BELOW—INSTRUCTIONS—MEASURE OF DAMAGES.
In an action for the breach of an express warranty of a draft-inducing apparatus, where defendant offered no evidence as to the cost of making the apparatus conform to the warranty, and objected to evidence on that issue offered by plaintiff, which evidence showed that such cost would exceed the damages allowed defendant by the jury, and defendant's only theory as to the measure of damages was the erroneous one that it was the difference between the purchase price and the actual value, defendant cannot complain that the court instructed the jury that the measure of

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damages was the difference between the value if it had been as warranted and the actual value.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3603; Dec. Dig. ⊂⊃882(13).]

5. EVIDENCE ⊂⊃543(4)—OPINION EVIDENCE—COMPETENCY OF EXPERT—VALUE OF MACHINERY.

In an action for the breach of an express warranty of a draft-inducing apparatus, a consulting engineer of education and experience, who had bought 16 induced-draft apparatuses, including one of the type made by defendant, one of which he bought within 60 days of the trial, and the others within one year of the purchase by plaintiff, is competent to testify as to the actual value of the apparatus, and as to its value if it had been as warranted, though he had not bought an apparatus with that particular type of engine, and did not know how many pounds of structural steel were in it, nor what parts were to be put up by defendant and what by plaintiff, which facts were stated in the contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2358; Dec. Dig. ⊂⊃543(4).]

6. SALES ⊂⊃442(10)—BREACH OF WARRANTY—DAMAGES—INTEREST.

Interest does not as a matter of law follow a claim for unliquidated damages for breach of warranty of machinery to be installed by defendant.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1293; Dec. Dig. ⊂⊃442(10).]

7. APPEAL AND ERROR ⊂⊃1140(5)—DISPOSITION OF CASE—MODIFICATION OF JUDGMENT—REMISSION OF INTEREST.

Where the only evidence as to the damages under the measure submitted by the court fixed it at about $5,000, and the verdict was for an amount which would be $5,005, with interest to the time the jury were instructed to allow interest on defendant's counterclaim, it was reasonably clear that the verdict was for that amount and interest, and plaintiff, who was not entitled to interest, can remit the amount of it to avoid a reversal of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4467; Dec. Dig. ⊂⊃1140(5).]

8. APPEAL AND ERROR ⊂⊃1052(5)—HARMLESS ERROR—ADMISSION OF EVIDENCE —CURE BY VERDICT.

Error, if any, in admitting, in an action for breach of warranty, evidence as to the breakdowns of the draft-inducing apparatus, which evidence was restricted by the court to how it affected the power of the apparatus, and was not referred to in the charge, except in connection with claims for damages which were not allowed by the jury, was not so prejudicial as to require a reversal, especially where the verdict was for the amount established by the only evidence on the claim for damages allowed by the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4175; Dec. Dig. ⊂⊃1052(5).]

In Error to the District Court of the United States for the Southern District of Ohio; John E. Sater, Judge.

Action by the Champion Fibre Company against the B. F. Sturtevant Company to recover damages for breach of warranty. Judgment for plaintiff, and defendant brings error. Reversed, and new trial ordered, unless the plaintiff shall remit a portion of the judgment.

Cobb, Howard & Bailey and Henry L. Rockel, all of Cincinnati, Ohio, for plaintiff in error.

C. D. Robertson and C. B. Matthews, both of Cincinnati, Ohio, for defendant in error.

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

KNAPPEN, Circuit Judge. Plaintiff below (defendant in error here) sued for alleged breach of guaranty in a contract for installation of certain mechanical apparatus. There was trial by jury, resulting in verdict for plaintiff and judgment thereon.

Plaintiff was engaged, at Canton, N. C., in manufacturing wood pulp and paper. Its plant contained 20 boilers, each of 316 rated H. P., thus aggregating 6,320 B. H. P. The boilers were arranged in two series of 10 each, each furnace having V-shaped grates whose projected area was 8 feet by 7 feet, fed by automatic stokers. To aid in producing power and to save fuel, the hot gases from the furnace passed through economizers (of which there were four). Each economizer consisted of an inclosure containing a series of feed water pipes, arranged in sections, through which inclosure the hot gases from the furnaces passed, thereby considerably heating the water before it entered the boilers. These economizers had been supplied, but not installed, by defendant. The plant had but one stack. An enlargement of the plant requiring increased power and thus increased draft, plaintiff contracted with defendant for delivery and installation, at a price of $9,995, of a specified induced-draft apparatus, to work in connection with plaintiff's boilers, grates, stokers, and economizers. This draft-inducing apparatus consisted of four engines of specified type and dimensions, having a normal speed of 400 R. P. M., each engine operating a fan of given type and size for delivering the gases to and operating in connection with the stack, there being one upper fan and one lower fan for each of the two series of furnaces and boilers. The guaranty was in this language:

"We guarantee this apparatus under the above working conditions, to furnish sufficient draft to develop 10,000 B. H. P., it being understood that 1 B. H. P. will require not over 4¼ pounds of coal."

The draft-inducing apparatus was installed in June, 1909, before the enlargement of the plant. About October, 1910 (after the plant was enlarged), plaintiff, believing that the guaranteed 10,000 B. H. P. was not furnished, made a test of the plant, at which defendant was not represented. On November 30th and December 1st following, a two days' test was had, at which defendant was represented by a mechanical expert; at this test less than 8,000 H. P. seems to have been developed. Defendant did not accept this as a convincing test, and on July 1, 1911, a ten-hour test was had, at which defendant was represented by another mechanical expert. It is undisputed that at this last test only about 7,800 B. H. P. was developed.

Upon the trial plaintiff gave evidence regarding the first test, and both parties presented testimony as to the second and third tests. The first two tests seem not to have been regarded by either party as entirely adequate, and the conflict centered generally upon the conclusiveness of the test of July 1, 1911, the ultimate meritorious question being reduced to this: Whether defendant furnished draft enough to burn coal enough to produce the required power, or whether the

failure to produce more power was due to the delivery of insufficient coal upon the furnace grates. Plaintiff insisted that it delivered upon the grates all or substantially all the coal the draft supplied would burn; defendant insisted that it furnished more than enough draft to consume the coal required to develop the 10,000 B. H. P.

At the conclusion of the testimony defendant moved for directed verdict in its favor, which was denied, and the question of fact whether the guaranty was fulfilled was submitted to the jury, with instructions that the measure of plaintiff's general damages (in case of breach of the guaranty) was the difference between what the induced-draft apparatus was worth as actually delivered and what it would have been worth if as guaranteed. Such difference was found by the jury to be $6,080, and the general verdict was for this amount less an established counterclaim. Judgment was entered for the difference between these sums, after correction by the addition of interest upon the counterclaim. Plaintiff's claims for special damages for loss of power in the engines and for fuel and heat loss were submitted to the jury, but wholly disallowed.

[1] 1. The most prominent ground of the motion to direct verdict was that the evidence did not reasonably tend to show that the failure to develop the required boiler horse power was due to the insufficiency of the induced-draft apparatus. Disregarding the first two tests, if it be assumed that the test of July, 1911, was suitable for developing the maximum capacity of the plant, the fact that the guaranteed 10,000 B. H. P. was not developed has a tendency to show the ineffectiveness of the apparatus. There was express and direct testimony that the test was suitable for developing the maximum capacity, and that, although the fans were run at a speed in excess of 400 R. P. M., they produced insufficient suction, due to the obstruction to the draft by the economizers, and loss in draft in the flues through collision of the gases owing to alleged improper pitch of the fans. True, there was testimony on defendant's part that the test in question was insufficient; that a satisfactory test would require a much longer preparation than was had; and that the conditions under which the test was made were unfavorable to accuracy in several respects, including failure to "blank" the valves of certain pipes leading into the boilers, an inaccurate meter, an improper pump, and exposure to the weather of steam pipes leading from the boilers to the engines operating the fans. But these criticisms of the conditions surrounding the test presented only questions of fact for the jury, in view not only of the express testimony by experts that the conditions were suitable to develop maximum capacity, and that the exposure of the steam pipes to the weather (the out-door temperature being 100 degrees) caused a drop in pressure of no more than 4 to 6 pounds between the boilers and the fan engines, but also of testimony that defendant's expert approved everything that was done.

Defendant denies that the "collision of gases" impaired the draft, and insists, moreover, that its contention that the failure to develop the required power was due to the feeding of an insufficient amount of coal is shown to a demonstration by undisputed tests, and that the verdict is thus opposed to established physical facts. The amount of

coal actually burned during the test was between 21 and 23 pounds per square foot of grate surface per hour, or about 3 1/10 pounds per boiler horse power developed. There was testimony on defendant's part that the carbon dioxide test of the flue gases showed that there was furnished about 25 pounds of air per pound of coal burned, and that in practice 15 pounds of air per pound of coal is enough; that the amount of air so furnished would have burned 30 pounds or more of coal per square foot, producing more than 10,000 B. H. P., the amount keeping within the maximum of coal consumption recognized by the guaranty; that the draft furnished (about 16/100 of an inch) was sufficient to burn this required amount of coal; that the burning of an insufficient amount of coal was shown by the small percentage of coal in the ash, as well as by the alleged fact that during the test the coal was completely burned out by the time it reached seven-eighths or less of the full travel of the grates; and that the automatic stokers employed were incapable, without coarser gearing, of supplying more coal than actually delivered to the grates. But the testimony that the coal was consumed before completing its travel was disputed; there was testimony tending to show that the carbon dioxide test indicated no greater excess of air than accorded with actual everyday practice, made necessary to prevent loss of heat energy through the formation of carbon monoxide; that the 16/100 inches of draft produced was not ordinarily enough to burn 30 pounds of coal per square foot of "fair grade of coal"—that at least 22/100 inches was required to produce the rated boiler horse power (6,320), and more in proportion to meet the "overload"—it appearing that defendant's published table of the "relation of draft and rate of combustion" gave 26/100 inches of furnace draft as "required to burn 22 pounds of dry coal per hour per square foot of grate," and that the feeding of the coal, which was shovelled by hand into the magazines (instead of being automatically delivered from the bunkers), was accelerated by hand-cranking. It also appeared that defendant's expert made no claim during the test of an insufficient feeding of coal. And while one or more of plaintiff's witnesses admitted that there was draft sufficient to have burned some more coal than was burned, the testimony taken together was sufficient to support a finding that the draft was insufficient to burn coal enough to produce the guaranteed horse power; and upon the motion to direct verdict, the testimony must be viewed most favorably to plaintiff.

The proposition that plaintiff failed to show that its boiler system produced 6,320 B. H. P. before the draft-inducing apparatus was installed needs no special consideration. Some evidence of the fact is found in the undisputed testimony that the accepted rate of boiler horse power is based upon an allowance of one horse power for each square foot of heating surface in the boiler, and defendant presumably so understood in making its guaranty.

[2] The alleged inaccuracy of certain information as to the existing draft, furnished by plaintiff, did not justify a direction of verdict for defendant, especially in view of the admission of defendant's manager that it did not influence the making of a plant of the required power.

The motion for directed verdict was properly denied.

[3, 4] 2. Defendant contends that the measure of plaintiff's general damages for breach of the guaranty is not as the jury was instructed, viz.: The difference between the value of the machinery as delivered and its value if as warranted, but the difference between the purchase price and the actual value. The latter is the measure ordinarily applied in actions for fraud and deceit in inducing sales of personal property.[1]

The measure adopted by the trial court is accepted by the leading text-writers as generally applied in actions by the vendee of personal property which has been paid for in full (as is the case here) for breach of an express warranty of capacity or quality. 3 Sutherland on Damages (3d Ed.) § 670; 2 Mechem on Sales, § 1817; Williston on Sales, § 613; Benjamin on Sales (7th Ed.) p. 962. The rule stated is supported by numerous decisions of state courts generally.

The Supreme Court of the United States has not, so far as we have found, in terms either adopted or rejected the rule as applied in the instant case. In several cases, however, the measure applied "as the only one accomplishing full and exact justice to both parties" has been held to be "the reasonable cost of altering the construction and setting of the machinery so as to make it conform to the contract." Benjamin v. Hillard, 23 How. 149, 167, 16 L. Ed. 518; Marsh v. McPherson, 105 U. S. 709, 717, 718, 26 L. Ed. 1139; Stillwell & Bierce Mfg. Co. v. Phelps, 130 U. S. 520, 526, 527, 9 Sup. Ct. 601, 32 L. Ed. 1035; Pullman Car Co. v. Metropolitan Ry. Co., 157 U. S. 94, 111, 15 Sup. Ct. 503, 39 L. Ed. 632.

In the United States Courts of Appeals the rule is not uniform. For example: In the Circuit Courts of Appeals of the Fifth, Seventh, Eighth, and Ninth Circuits the measure has been held to be the difference between the value as delivered and the value as warranted.[2]

On the other hand, in the Circuit Court of Appeals for the First Circuit the applicable measure has been held to be the actual cost of supplying the defects. Nashua Iron & Steel Co. v. Brush, 91 Fed. 213, 215, 33 C. C. A. 456. In that case, however, there was no express warranty, and the rule adopted was not in terms declared exclusive. We have not attempted a complete examination of the decisions in the various circuits. In this court the question has not been definitely passed upon. The nearest approach is in Thomas China Co. v. Ray-

[1] Smith v. Bolles, 132 U. S. 125, 10 Sup. Ct. 39, 33 L. Ed. 279; Sigafus v. Porter, 179 U. S. 116, 21 Sup. Ct. 34, 45 L. Ed. 113; Simon v. Goodyear Co. (C. C. A. 6th Cir.) 105 Fed. 573, 579, 44 C. C. A. 612, 52 L. R. A. 745; Hindman v. Bank (C. C. A. 6th Cir.) 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108; Chesbrough v. Woodworth (C. C. A. 6th Cir.) 195 Fed. 875, 885, 116 C. C. A. 465.

[2] English v. Spokane Commission Co. (C. C. A. 9th Cir.) 57 Fed. 451, 456, 6 C. C. A. 416; McDonald v. Kansas City Bolt & Nut Co. (C. C. A. 8th Cir.) 149 Fed. 360, 365, 79 C. C. A. 298, 8 L. R. A. (N. S.) 1110; Crane Co. v. Columbus Construction Co. (C. C. A. 7th Cir.) 73 Fed. 984, 991, 20 C. C. A. 233; The Nimrod (D. C.) 141 Fed. 215, 217 and (C. C. A. 5th Cir.) 141 Fed. 834, 72 C. C. A. 300 (but see Vulcan Iron Works v. Roquemore [C. C. A. 5th Cir.] 175 Fed. 11, 16, 99 C. C. A. 77). See, also, Boiler & Tank Co. v. Columbus Mach. Co. (C. C. A. 3d Cir.) 55 Fed. 451, 453, 5 C. C. A. 190; Cleveland Co. v. Buchanan & Sons (C. C. A. 2d Cir.) 120 Fed. 906, 910, 911, 57 C. C. A. 498.

mond Co., 135 Fed. 25, 28, 67 C. C. A. 629, where a recovery by the vendee of the expense incurred in putting the machinery in condition called for by the contract (and for which amount only it sued) was approved.

We do not think the record such as to require us to decide whether the rule adopted by the District Court is generally applicable to suits by a vendee for breach of a guaranty of quality or capacity of machinery. There was no testimony that the alleged defective apparatus could be readily made good, as was the case in Pullman Car Co. v. Metropolitan Ry. Co., supra. On the contrary, one of plaintiff's witnesses testified that the plant could be changed so as to produce 10,000 H. P. only by the installation of new equipment, and (under defendant's objection of irrelevancy) that the cost thereof would be $13,000. Later, another of plaintiff's witnesses testified that nothing could be done with the apparatus to make it accomplish the guaranteed result and (under defendant's objection) an offer to show that it would cost "with that boiler plant" $13,000 to produce 10,000 H. P. was rejected.

There was no other testimony as to the cost of making the apparatus conform to the guaranty, except that defendant, while offering no proof of such cost, gave testimony that no changes in the apparatus were necessary, and that changes not connected therewith (as in the stoker feed) were alone needed to develop the guaranteed capacity. The court called on defendant's counsel to suggest some rule of damages other than the one announced on the trial and afterwards applied in the charge. Defendant contended for no rule except that embodied in its request and urged here, viz.: The difference between the purchase price and the actual value. In this court, again, the latter is the only rule advocated by defendant, its brief admitting that the rule applied below is the "usual rule," although it is said not to be applicable to conditions presented here. The rule applicable to deceit cases manifestly does not apply to actions for breach of express warranty. In the former class of cases, as said in Smith v. Bolles, supra, "what the plaintiff might have gained is not the question; but what he had lost by being deceived into the purchase." In the latter class of cases the vendee is entitled to the benefit of a profitable contract. "The amount that would have been received, if the contract had been kept, is the measure of damages if the contract is broken." [3] Full compensation to the injured vendee is what is aimed at. It is enough to hold, as we do, that defendant's requested measure of damages was properly rejected, and that as the case stood defendant is not in position to complain of the measure adopted.

[5] The objection to the competency of plaintiff's sole witness as to the respective values of the apparatus as furnished and as warranted is not well taken. The witness was a consulting engineer of education and experience; he had bought 16 induced-draft apparatus, including one or more of the Sturtevant type. He had bought one outfit within 60 days of the trial below, and had bought others in 1909. He was

[3] Expression in Alder v. Keighly, 15 M. & W. 117, quoted in Benjamin v. Hillard, supra. See, also, Benjamin on Sales (7th Ed.) p. 962.

not rendered incompetent to testify from the fact that he had never bought a Sturtevant outfit with a compound engine, nor from the fact that he did not know exactly how many pounds of structural steel there were in the apparatus in question, nor precisely what parts of the structure were to be put up by defendant and what parts by plaintiff. He had general knowledge and experience on the subject; the contract provided generally what was to be furnished by each of the parties, and the testimony was not subject to the objection that it was based upon mere conjecture. He had seen the figures, and "that is all any engineer goes by."

[6] 3. The jury found the difference between the value of the apparatus as delivered and its value if as represented, to be $6,080. Defendant assails this verdict as excessive. The only testimony upon the subject by way of definite figures gives the value as delivered as about $10,000, and if as represented about $15,000, a difference of about $5,000. The verdict is thus excessive unless it may be thought properly to include either plaintiff's expense incurred in making the test of the apparatus or interest upon the damages measured by the difference in value stated. While the court submitted the question of expenses of the test, we think the language of the jury's verdict negatives its inclusion. The damages being unliquidated interest did not follow as matter of law. Illinois Surety Co. v. United States (C. C. A. 4th Cir.) 215 Fed. 334, 340, 131 C. C. A. 476; Stephens v. Phœnix Bridge Co. (C. C. A. 2d Cir.) 139 Fed. 248, 250, 71 C. C. A. 374. The question of interest was not submitted to the jury's discretion as part of the damages, and the natural inference is that the jury supposed interest followed as matter of law, and so improperly included it.

[7] The question is whether, as defendant contends, the judgment should be reversed on this account, or whether the case is a proper one for allowing plaintiff to remit. The test is whether it is reasonably clear what the jury intended to find as the measure of plaintiff's damages without interest. If this is clear, the case is a proper one for allowing remittitur (in case no other reversible error is found); otherwise not. See decisions of this court cited in the margin.[4]

We think it apparent that the award was intended to be $5,000 (or possibly $5,005), as the difference between the purchase price of the apparatus and its value if as represented, plus interest thereon. There was no testimony of value except as just stated, and the jury presumably found accordingly. $1,080 is 3 years 7 months and 6 days' interest at 6 per cent. on $5,000, and $1,075 is exactly 3 years and 7 months' interest on $5,000. The undisputed testimony is that the enlargement of plaintiff's plant was completed in May or June, 1910. The trial below occurred in February, 1914. The court instructed the jury to allow interest on defendant's counterclaim to February 3, 1914. From July 1, 1910, to February 3, 1914, is 3 years 7 months and 2 days. We have no reasonable doubt that the jury intended to find

[4] Huebel & Co. v. Leaper, 188 Fed. 769, 774, 110 C. C. A. 475; Mosby v. United States, 194 Fed. 346, 351, 116 C. C. A. 74; N. Y. C. & St. L. R. R. Co. v. Niebel, 214 Fed. 952, 957, 131 C. C. A. 248; Pennsylvania Co. v. Sheeley, 221 Fed. 901, 906, 137 C. C. A. 471; Chesbrough v. Woodworth, 195 Fed. 875, 116 C. C. A. 465; Id., 221 Fed. 912, 916, 137 C. C. A. 482.

the value without interest as either $5,000 or $5,005, and included the balance for interest.

[8] 4. The trial court admitted, against defendant's objection, certain testimony that the engines operating the fans had in their earlier use more or less breakdowns calling for repairs, and that one of the engines became completely demolished; also a photograph of one of the engines in a brokendown condition; also testimony that defendant's employé in charge of the installation of the fan system on the occasion of a little breakdown, in answer to a question whether they "usually gave that much trouble," said that "under the conditions here" he thought they would; and on another occasion that "he didn't think they would ever give satisfaction the way they was put up."

Assuming, for the purposes of this opinion (but without so deciding), that none of this testimony was admissible, the question is—is it to be presumed to have been so far prejudicial as to require reversal of the judgment? The trial court seems to have had doubts of the competency of the testimony under the pleadings, and expressed the view that it should be "restricted to how it affected the power of the apparatus." The most definite theory on which it seems to have been offered was that the breakages were due to vibration. Although defendant moved at the close of the evidence to strike out considerable testimony, the testimony now in question was not included in the motion. It was not referred to in the charge, except as the subject of breakages was mentioned in connection with instructions on the subject of damages for expenses incurred by way of loss from operation, and by reason of loss in fuel by keeping the by-passes open; both of which elements of damage were rejected by the jury. Upon the question of general damages found by the jury, measured by the difference between the value of the plant as furnished and what it would have been if as warranted, the relevancy of the testimony in question would have been quite remote, especially in view of the fact that the only testimony as to such difference placed the value of the apparatus as delivered at about $10,000, which was in fact $5 more than the contract price. In view of the jury's rejection of the two classes of special damages mentioned, and its express confining of the damages to the difference in value stated; the fact that when the test of July, 1911, was made the fans were running at a speed exceeding that specified in the contract, and that the court in commenting upon the evidence of breakages before referred to stated that the "evidence shows that all four of the fans and the engines were running at that time;" the fact that the case practically turned at the last upon the question whether the failure to produce the required power was due to insufficient fuel or to lack of draft, we think a presumption that the testimony mentioned affected the verdict would unwarrantably discredit the jury's intelligence, and that the error in receiving the testimony (if there was error) is not so vital as to justify reversal.

Questions of evidence and instructions relating to the two classes of special damages rejected by the jury are of course out of the case.

There was no error in the charge on the subject of plaintiff's alleged acceptance of the apparatus. Other errors are alleged, and while we have not discussed all of them, we have considered all argued by

defendant's counsel, and find no prejudicial error except as respects the excess in the verdict.

For this error the judgment will be reversed and a new trial ordered, unless the plaintiff below sees fit to remit from its judgment $1,080 as of the date of the judgment. If within 30 days plaintiff files here the certificate of the clerk of the district court that such remittitur has been there filed, the judgment as so reduced will be affirmed. In either event, plaintiff in error will recover costs of this court.

HIGHLAND PARK MFG. CO. v. STEELE et al.

(Circuit Court of Appeals, Fourth Circuit. March 4, 1916.)

No. 1276.

1. COURTS ⊜367—FEDERAL COURTS—FOLLOWING DECISIONS OF STATE COURTS—RULES OF PROPERTY.

J. S. conveyed land to his son, J. A. S., in trust as to one-half thereof for a grandson, J. G. S., for life, and at his death to transfer and convey it to such persons as J. G. S. might by his will direct, or in default of such will and direction to his heirs at law in fee. J. A. S. died intestate, and J. G. S. thereafter attempted to convey the land in fee. The Supreme Court of South Carolina held that the trust created was executed as to the life estate, but executory as to the remainder, because of the duty imposed on the trustee to convey the land to the remaindermen, and that the rule in Shelley's Case therefore did not apply. *Held*, that an executory trust was created, and the trustee was required to hold the legal title for the purpose of effectuating the trust, and, on the death of J. G. S. intestate, his heirs were entitled to a conveyance of the fee; the question being balanced with doubt, so as to require a federal court to follow the state court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 958, 959; Dec. Dig. ⊜367.]

2. DEEDS ⊜128—RULE IN SHELLEY'S CASE—ESTATES OF DIFFERENT QUALITY.

While the rule in Shelley's Case applies to equitable as well as legal estates, it does so only when the life estate and the remainder are of the same quality.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 413–415, 419–421, 427; Dec. Dig. ⊜128.]

3. REMOVAL OF CAUSES ⊜116—EFFECT—LEGAL OR EQUITABLE ACTIONS.

A proceeding for partition, when removed into a federal court, was properly transferred to the equity calendar.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 246; Dec. Dig. ⊜116.]

4. TRUSTS ⊜112—CONSTRUCTION—INTENTION.

Courts of equity, having sole cognizance of the interpretation and administration of executory trusts, have regard to and effectuate the intention of the maker of the instrument.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 162; Dec. Dig. ⊜112.]

5. COURTS ⊜367—UNITED STATES COURTS—STATE LAWS AS RULES OF DECISION—RULES OF PROPERTY.

In determining whether the question as to the construction and operation of a deed is balanced with doubt, so as to require a federal court to

lean to an agreement with the state court, the law of the state where the land is situated is the question for determination, and not the law as declared in other states or elsewhere.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 958, 959; Dec. Dig. ⇐367.]

6. TRUSTS ⇐154—MERGER OF ESTATES.

A grantor conveyed land to J. A. S., in trust as to one-half thereof for J. G. S. for life, and at his death to transfer and convey it to such persons as J. G. S. might by will direct, or in default of such will or direction to his heirs at law. J. A. S. died intestate, and J. G. S. subsequently attempted to convey the land in fee, and thereafter died intestate. *Held* that, while in South Carolina the rule of primogeniture still applies to the title of a trustee, and the legal title therefore descended upon the death of J. A. S. to J. G. S., his oldest son, there was no merger of the legal and equitable titles, since, when a valid trust has been created, the court enforces it according to the intention of the maker, and, if for any reason the trustee named cannot execute it, or if no trustee can be named, it appoints a trustee, and so molds its decree that the rights of the beneficial owners are preserved.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 199; Dec. Dig. ⇐154.]

7. PARTITION ⇐83—SUITS FOR PARTITION—ENFORCEMENT OF TRUSTS.

In a suit for partition by the heirs of J. G. S. after his death without exercising the power of appointment, the intention of the grantor could be effectuated by treating the heirs as the owners in fee of a one-half undivided interest in the land; the legal title having descended upon the death of J. G. S. to his oldest son, who was a party to the record and would be bound by the decree.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 228, 229; Dec. Dig. ⇐83.]

8. REMAINDERS ⇐10—DESTRUCTION OF REMAINDER BY LIFE TENANT'S CONVEYANCE.

Assuming that the conveyance by J. G. S. estopped him from afterwards exercising the power of appointment, it did not destroy the rights of the remaindermen, his heirs, or bring about any other result than a failure to exercise the power of appointment would do; it being conceded that the deed was not a valid execution of the power.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 7; Dec. Dig. ⇐10.]

9. TENANCY IN COMMON ⇐43—CONVEYANCE BY ONE TENANT—EFFECT.

Though one tenant in common executes a deed to a stranger to the title, describing and purporting to convey the entire tract, the deed is effectual to convey only his undivided interest, and does not in any degree disturb the rights of the other tenants.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 130–132, 136, 137; Dec. Dig. ⇐43.]

10. PARTITION ⇐83, 85—BETTERMENTS AND IMPROVEMENTS—ADJUSTMENT OF EQUITIES.

If one tenant in common makes a deed purporting to convey the entire tract, and the grantee, in the bona fide belief that he has acquired a good and valid title to the entire tract, places improvements upon it, the court, in directing partition, while preserving the rights of the other tenants, will direct the partition to be so made as to conserve the equities of all parties, both by providing for compensation for the betterments, and if practicable, and without prejudicing the rights of other tenants, directing the allotment of the part upon which improvements have been made to the tenant who made them.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 228, 229, 236–245; Dec. Dig. ⇐83, 85.]

11. PARTITION ⟸65—RELIEF OBTAINABLE—RELIEF INVOLVING OTHER LAND AND PARTIES.

Where land in which plaintiffs owned an undivided half interest in remainder had been divided and subdivided, and conveyances had been made between those holding fractional parts, under some of whom defendant claimed, in a suit for partition of the only part of the tract owned in common by plaintiffs and defendants, relief would not be granted, necessitating the presence of other parties and involving collateral questions foreign to those properly cognizable in such suit.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 188; Dec. Dig. ⟸65.]

12. LIMITATION OF ACTIONS ⟸19(4)—PARTITION—SUITS BY REMAINDERMEN.

Where land was conveyed in trust as to one-half thereof for J. G. S. for life, and at his death to convey it to his appointees by will, or in default of such will to his heirs, and J. G. S. died in 1905, without making such appointment, a suit brought by his heirs in 1910 for partition was not barred by limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 77; Dec. Dig. ⟸19(4).]

13. PARTITION ⟸60—PLEADING—AMENDMENT—DISCRETION.

In a suit for partition, the refusal to permit an amendment to a cross-bill was a matter of discretion in the District Court.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 166–173; Dec. Dig. ⟸60.]

Appeal from the District Court of the United States for the Western District of South Carolina, at Greenville; Henry A. Middleton Smith, Judge.

Suit by E. G. Steele and others against the Highland Park Manufacturing Company. From a decree in favor of plaintiffs (212 Fed. 972) defendant appeals. Affirmed.

Charles W. Tillett, of Charlotte, N. C., and C. E. Spencer, of Rock Hill, S. C. (Tillett & Guthrie, of Charlotte, N. C., on the brief), for appellant.

J. A. Marion and D. E. Finley, both of Yorkville, S. C., and E. M. Blythe, of Greenville, S. C., for appellees.

Before PRITCHARD and KNAPP, Circuit Judges, and CONNOR, District Judge.

CONNOR, District Judge. For the purpose of presenting the questions raised by the assignments of error, the transcript discloses the following facts:

On November 16, 1860, John Steele, of the county of York, in South Carolina, executed a deed whereby he conveyed to his son, Joseph A. Steele, in consideration of love and affection, a tract of land in York county, containing 494 acres, to have and to hold to Joseph A. Steele, his heirs and assigns:

"In trust, as to the one-half of the said piece, parcel or tract of land, to stand seised and possessed of the same for the use and benefit of my grandson the above named John G. Steele, for, and during, the term of his natural life, and at his death, to transfer and convey the same to such person, or persons, as he, the said John G. Steele, may by his will direct, or in default of such will and direction to the heirs at law of the said John G. Steele, in fee."

Joseph A. Steele died intestate, leaving as his heirs at law his widow, Eliza Jane Steele, his son, John G. Steele, and five daughters.

On August 3, 1868, and after the death of his father, John G. Steele executed a deed of statutory form, sufficient to convey in fee, with general warranty, the entire tract to James Pagan. Appellant, Highland Park Manufacturing Company, by successive conveyances, acquired all of the title which passed to, and vested in, Pagan by virtue of the deed of John G. Steele, to that portion of the original tract described in the pleadings herein. Appellant, and those under whom it claims, have been in possession of the land in controversy, since October 13, 1884. Improvements, alleged to have cost $250,000, have been placed upon the land, by appellant and its immediate grantor. John G. Steele died July 5, 1905, without having published a last will. Plaintiffs are his widow and children, and, under the canons of descent of South Carolina, his heirs at law. This proceeding was instituted on June 6, 1910, in the court of common pleas of York county, for the purpose of having partition of the portion of the land, described in the bill, and removed into the District Court of the United States for the Western District of South Carolina, upon petition of appellant, a North Carolina corporation. Appellant denies that appellees have any title to, or interest in, the land, and avers that it is sole seised thereof, in fee. Other facts, pertinent to other phases of the controversy, will be noted later. The cause was referred to Hon. Ernest Moore, special master, who, after hearing the testimony, reported as his conclusion of fact and law that the appellant and appellees were seised of the land in controversy as tenants in common—each being entitled to one-half undivided interest therein. He also passed upon, and made report in regard to, the claim for betterments and rents and profits, with his conclusion as to the value of the interests of the respective parties, and the equitable method of making partition. Upon the coming in of the report, appellant filed exceptions thereto, which were heard and, after argument and consideration, overruled, and a decree entered, by the District Judge, to which appellants assigned error and appealed.

[1] We are confronted, at the threshold, with the contention that the questions presented upon appellant's assignments of error, are not open to an exercise, or expression, of the independent judgment of this court, for that the same questions have been litigated in, and decided by, the Supreme Court of South Carolina; that by the decisions of that court, a rule of property has been established in the jurisprudence of that state, in accordance with the contention of appellees and the decision of the District Court. Our attention is called to the decision rendered in the case of Steele v. Smith (on November 30, 1909) 84 S. C. 464, 66 S. E. 200, 29 L. R. A. (N. S.) 939, and the cases cited by the court in the opinion therein.

Before proceeding to an examination of the decision made by the court in that case, we pause to ascertain the principle, or rule, by which this court should be governed in disposing of this contention. The question, in different phases, and under different aspects, has been frequently before the Supreme Court. In Kuhn v. Fairmount Coal

Co., 215 U. S. 349, 30 Sup. Ct. 140, 54 L. Ed. 228, Mr. Justice Harlan reviewed the decisions and, writing for the majority of the court, said:

"We take it, then, that it is no longer to be questioned that the federal courts, in determining cases before them, are to be guided by the following rules: (1) When administering state laws and determining rights accruing under those laws, the jurisdiction of the federal courts is an independent one, not subordinate to, but co-ordinate and concurrent with, the jurisdiction of the state courts. (2) Where, before the rights of the parties accrued, certain rules relating to real estate have been so established by state decisions as to become rules of property and action in the state, those rules are accepted by the federal courts as authoritative declarations of the law of the state. (3) But where the law of the state has not been thus settled, it is not only the right, but the duty of the federal court to exercise its own judgment, as it also always does, * * * upon the doctrine of commercial law and general jurisprudence. (4) So, when contracts and transactions are entered into and rights have accrued under a particular state of the local decisions, *or when there has been no decision by the state court on the particular question involved*, then the federal courts properly claim the right to give effect to their own judgment as to what is the law of the state, applicable to the case, even where a different view has been expressed by the state court after the rights of parties accrued. But even in such cases, for the sake of comity and to avoid confusion, the federal court should always lean to an agreement with the state court, if the question is balanced with doubt."

The doctrine is discussed, and applied, in Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359, and numerous other cases cited in the opinion.

In Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865, Mr. Justice Story, construing the thirty-fourth section of the Judiciary Act (Act Sept. 24, 1789, c. 20, 1 Stat. 92 [Comp. St. 1913, § 1538]), says that:

It is limited in "its application to state laws, strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character."

So, in McGoon v. Scales, 9 Wall. 23, 19 L. Ed. 545, Mr. Justice Miller said:

"It is a principle too firmly established to admit of dispute at this day that to the law of the state in which land is situated must we look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of conveyances."

The same learned justice in Brine v. Insurance Co., 96 U. S. 627, 24 L. Ed. 858, discussing the suggestion that the federal court should exercise its independent judgment upon a question affecting the title to real property, there an equity of redemption, in regard to which there was in force a state statute, said:

"To do so is at once to introduce into the jurisprudence of the state of Illinois the discordant elements of a substantial right which is protected in one set of courts and denied in the other, with no superior to decide which is right."

While we do not deem it of importance, we note the fact, pressed upon our attention, that the statute of uses, 27 Henry VIII, is in force in South Carolina, by virtue of an enactment of the Legislature of

that state. Code 1912, vol. 1, § 3673. It is manifest, therefore, that we must endeavor to ascertain and declare the law of the state of South Carolina in regard to the determinative question involved.

In Steele v. Smith, 84 S. C. 464, 66 S. E. 200, 29 L. R. A. (N. S.) 939, it appears that plaintiffs were the same persons as appellees in this case, and claimed title to a portion of the same tract of land conveyed by John Steele to Joseph A. Steele, in the same right as they claim in this record. Defendants, in that case, claimed under the same right as appellant does here, and had such title as was conveyed by John G. Steele to Pagan. The case so far is, therefore, on all fours with that presented in this record. The opinion of the court was written by Chief Justice Jones. Several of the counsel appearing here were of counsel in that case and many of the authorities cited and relied upon in this court were cited upon the argument of that case. The Chief Justice states the contention made by the parties:

"Plaintiffs claim that John G. Steele had only a life estate, and having died without executing the power * * * by will, they are entitled to partition * * * as heirs of John G. Steele, and remaindermen under the deed of John Steele, Sr. The court sustained this contention. The defendants appellants contend that under the rule in Shelley's Case John G. Steele had a fee-simple estate, * * * which they acquired."

The Chief Justice, after stating the rule in Shelley's Case, as laid down by Mr. Preston, proceeds to say:

"The case of Porter v. Doby, 2 Rich. Eq. (S. C.) 53, shows that executory trusts are exempt from the operation of the rule in Shelley's Case, and that the test of an executory trust is whether the trustee has some duty to perform, for the performance of which it is necessary that the title be regarded as abiding in him."

Referring to the argument made by defendant's counsel, in which it was sought to bring the case within the rule, by showing that the trust is executed, the Chief Justice says:

"The argument to this point is keen and forceful, and there is some high authority for the view. But we think it is clear that the trust in this case is such an executory trust as will prevent the application of the rule in Shelley's Case. In order to convey the fee to the appointee of the life tenant, it was essential to the performance of his duty that the trustee retain the title in fee until it was ascertained that there was default of such appointment at the termination of the life estate. The trust was not a perfect trust, as it involves for its full execution the exercise or failure to exercise discretionary power of appointment by the life tenant. * * * Hence the case clearly falls within the definition of an executory trust in Perry on Trusts, relied upon by appellant."

He quotes, at length, the language of Mr. Perry (section 359), and continues the discussion, saying:

"The trust in the case at bar would be executory with respect to the statute of uses. The test whether the trust is active or passive is: Has the trustee any duty to do, the performance of which requires that the legal title shall remain in him? If so, the trust is active and executory under the statute; if not, it is passive and executed under the statute."

The principle upon which the decision is to be placed is thus clearly stated. It was strongly urged that, applying the principle, the words

used by the grantor in the deed, do not create an executory trust—that it is executed. The Chief Justice says:

"The duty of the trustee to convey to the appointee by the will of the life tenant required that the trustee hold the legal estate until it was ascertained that there was default of appointment."

Referring to the argument of the counsel for appellants, he says:

"While there are authorities elsewhere that a simple direction to 'convey' in a trust fully and plainly declared does not make the trust executory, the authorities in this state warrant the conclusion that the duty to 'convey' in a case like this will prevent the execution of the trust in the remainderman * * * until after the death of the life tenant."

He cites several cases—

"which recognize the duty to convey as an active duty, requiring that the legal title shall remain in the trustee, at least, for the performance of the duty to convey the fee upon the termination of the life estate. It may be conceded that the statute executed the use * * * in the life tenant, and his equitable estate was thereby, immediately on the execution of deed, transformed into a legal estate for life with general power of appointment by will, but it was necessary for the fee to remain in the trustee to execute the trust, dependent on the contingency of the life tenant designating the beneficiary by his will. As the trust would be executory under the statute of uses, we see no good reason for holding it not executory when considering the application of the rule in Shelley's Case."

He concedes that the case of Cushing v. Blake, 30 N. J. Eq. 689, cited by counsel for appellants, strongly supports their contention, and says:

"But in New Jersey, as well as in some other jurisdictions, it is held that the duty of the trustee to convey is not sufficient to render the trust executory in the true sense; whereas, in this state, such duty is regarded as active and executory, and the trend of our cases is to regard that which is executory under the statute as executory when considering the applicability of the rule in Shelley's Case. Further, in order for the rule in Shelley's Case to apply, the estate for life and the estate in remainder must be of the same quality, both legal or equitable; otherwise they cannot coalesce. Our cases show that the statute may execute the use in either the life tenant for life, or the remainderman in remainder, according as it may be determined whether the trustee has any active duty to perform with respect to either, rendering it necessary that the life estate shall remain in the trustee."

The Chief Justice reaches the conclusion that:

"The trustee having no duty to perform with respect to the life tenant in this case, immediately on the execution of the deed the equitable estate of the life tenant becomes legal by the 'potential magic' of the statute, but it being necessary for the trustee to retain the legal fee in remainder during the lifetime of the life tenant to carry out the purpose of the trust, the estate in remainder, not being executed, remained executory and equitable; hence the rule in Shelley's Case could not apply when the deed was delivered because of the difference in the quality of the two estates. If we consider whether the rule should apply on the death of the life tenant without exercising the power of appointment, and should hold that the statute then executed the use in those who answered the description of the heirs at law of John G. Steele, it would only follow that such heirs then became vested with the fee in remainder as a legal estate, which had not previously coalesced with the estate for life, and could not then coalesce with an extinct estate. In such case the intention of the settlor is not defeated by the rule, but those answering the description of heirs of John G. Steele at his death take, not by inheritance

from the ancestor, but as purchasers under the grant of John Steele, Sr., in accordance with the manifest intention of the grantor."

Several decisions of the Supreme Court of South Carolina, made prior to and since August 3, 1868, are cited in support of the conclusion reached by the court. It is, we think, manifest that, with one exception to be hereafter noted, the court in Steele v. Smith, decided every question raised and argued before us in this appeal. If the decision had been rendered before the rights of appellant, under the deed of John G. Steele to James Pagan, August, 3, 1868, accrued, we should not find it necessary, being controlled by the second resolution in Kuhn v. Fairmount Coal Co., supra, to further discuss the assignments of error, notwithstanding the very "keen and forceful," able, and interesting argument of the learned counsel for appellant. We should deem it our duty, as this court did, in regard to the decision of the Supreme Court of West Virginia, in Kuhn v. Fairmount Coal Co., 179 Fed. 191, 102 C. C. A. 457, 66 W. Va. 711, to regard the decision as the "law of the state," applicable to and controlling the rights of the parties in this appeal.

For the purpose of avoiding this result, the learned counsel for appellant vigorously insist that the decision is not in accordance with principle or authority, that it is erroneous in its conclusion, and that either it is in conflict with the decisions of the Supreme Court of South Carolina, made prior to August 3, 1868, or that there were no authoritative decisions of that court prior to that date, upon the questions involved in this case—that they are res integra and that, therefore, this court must, in reaching its conclusion, exercise its independent judgment. The special master, in a very able and carefully considered report, reached the conclusion that the judgment in Steele v. Smith was correct and that the decisions cited were "ample to sustain the conclusion not merely of the present, but of the pre-existent, rule of property in South Carolina." The learned District Judge, after a careful consideration of the questions involved and review of the authorities, came to the conclusion that:

"While he was doubtful of the conclusion reached by the Supreme Court of South Carolina, in its construction of this will [deed], and might, if the case were res integra, reach a different conclusion, yet the court finds that it cannot be said that the conclusion reached by the Supreme Court of South Carolina, in its construction of this will [deed] is clearly at variance with the announcement as to the law made by the courts of highest jurisdiction in South Carolina prior to 1868, and it is therefore the duty of this court, when the question is doubtful, to lean to an agreement with the state court for the sake of comity and to avoid confusion"—citing Brine v. Insurance Co., supra.

Appellant draws into controversy almost every essential element in this conclusion and the process by which it is reached by the District Judge. The case has been twice argued in this court and a number of elaborate and exhaustive briefs filed by counsel. The value of the property, together with the improvements put upon it, is large, and the questions upon which the rights of the parties depend are, as said by the District Judge, not free from doubt, either in respect to the extent to which we are authorized to deal with them, as res in-

tegra, or their solution, if open to us. As said by Mr. Justice Ashe, in Patrick v. Morehead, 85 N. C. 62, 39 Am. Rep. 684:

"There perhaps is no branch of the law that has given rise to more conflicting decisions, or a greater display of legal learning, than the application of the rule in Shelley's Case to the construction of deeds and wills."

The zeal of counsel in this case, evidenced by their very thoroughly considered arguments and exhaustive briefs and the decision in the Supreme Court of South Carolina, followed by a petition for rehearing, recall the sharp and long drawn out controversy in Perrin v. Blake, which Lord Campbell says "divided the profession of the law into bitter factions for many years and which is still famous in the traditions of Westminster Hall," and which before the conclusion of the war of pamphlets waged around it drew such eminent judges and authors as Lord Mansfield and Mr. Fearne into an acrimonious controversy. Campbell's Chief Justices, vol. 3, p. 329.

The learned counsel for appellant strongly insist that, until the decision of Steele v. Smith, it was never held for law in South Carolina that the duty imposed upon a trustee to "convey" the legal estate, in the absence of any other duty, or of inability on the part of the cestui que trust to take and hold the legal title, such as a feme covert, or other disability, created an executory trust. Counsel for the appellee, with equal confidence, insist that the decision in Steele v. Smith is sustained by the current of authority in that state.

As we have seen, the learned District Judge was in doubt in respect to the state of the law. It is clear that, in Steele v. Smith, the court held that the duty imposed upon the trustee, to convey the legal title to the appointee of the life tenant, or upon his failure to exercise the power of appointment to his heirs, created an executory trust, and that the legal title remained in the trustee, for the purpose of enabling him to convey it to those who were entitled in remainder, upon failure of the life tenant to exercise the power of appointment. It is equally certain that the court intended to decide the question in accordance with what it construed to be the law of the state as declared by former decisions of that court—that it did not intend to or suppose that it was declaring a new rule of property in South Carolina, in regard to the distinction between executory and executed trusts or the application of the rule in Shelley's Case to such cases. This, however, does not relieve us of the duty, in disposing of this appeal, to examine the former decisions of that court.

The first proposition upon which the contention of the appellee is based is that, by the decisions of the South Carolina court prior to and since August 3, 1868, it is held that, when by the terms of the deed creating the trust the duty was imposed upon the trustee to hold and to convey the legal title to the cestui que trust, either for life or in remainder, the statute of uses did not execute the use and that the legal title remained in the trustee. It appears, from a careful examination of the cases decided by that court, that it recognizes and enforces the rule that, when by the express terms of the deed, or will, or by reasonable implication from its language, the intention of the maker

appears that the trustee has something to do, some duty to perform, with respect to the property, or the title, the trust is executory. When the trustee is to hold for the use and benefit of a feme covert, certainly prior to the radical changes in the law, enlarging her power in regard to her separate estate, or to preserve contingent remainders, or to exercise a discretion in regard to the use of the property or to the ultimate conveyance of the title, there is but little difficulty in applying the test. While it would extend this discussion beyond proper limits to set forth, at length, the facts and discussion by the court in each case, yet, on account of the insistence, with manifest confidence, of divergent opinion of counsel, and of language used in some of the opinions of the Supreme Court of South Carolina, we deem it proper to analyze some of the cases cited by counsel.

The first in order of time is Wilson v. Cheshire, 1 McCord's Eq. (S. C.) 233 (1826). The language of the deed creating the trust in that case clearly imposed duties upon the trustee. The trust was executory and the legal title remained in the trustee. The court said that:

"Where the trustee was required to act, and not merely to hold the estate, * * * the use is not executed, and when, therefore, there is a conveyance to trustees in trust *to convey* [italics ours], or to sell, or to pay the profits to a feme covert, * * * the legal estate remains in the trustees, unexecuted by the statute."

In Posey v. Cook, 1 Hill's Law (S. C.) 413 (1833), duties were imposed upon the trustee which required that the legal title remain in him. He was to hold the title until the youngest of the cestui que trustent arrived at full age, with a provision to meet certain contingencies, which might happen prior to that period. When the youngest child arrived at full age, the land was to be equally divided between the persons named, who were to have and hold their shares in fee. It was held that the trust was executory. Chancellor Harper, after noticing the language of the note to 2 Blackstone, said:

"Perhaps the rule might be more accurately expressed to say that, where the intention is that the estate shall not be executed in the cestui que trust, and any object is to be effected by its remaining in the trustees, then it shall not be executed."

Here we find the recognition of two elements preventing the operation of the statute—the intention of the maker of the deed, or will, and the existence of an object to be effected. This language is in harmony with decisions of the courts in other jurisdictions, both English and American. It expresses, accurately, the opinion of a very learned chancellor.

The next case in order is Jenney v. Laurens, 1 Speers' Law (S. C.) 365 (1843), and here counsel for appellant insists is found a departure from the rule as laid down in the other two cases. In that case the trust declared in the will was "to hold to the use and benefit, and to apply the rents, issues, and profits to and for," etc. The court, by Judge Evans, expressed no doubt that under the rule, which distinguished executory from executed trusts, the words "to hold to the use and benefit" did not create an executory trust; the doubt arose upon the duty

imposed "to apply the rents." The justice, writing the opinion, notes two English cases, and says:

"I have quoted these two cases to show that it is not sufficient to prevent the estate from being executed that there may be something for the trustee to do. I would rather think the rule may be laid down that the trust will be executed, unless the object of creating it would be defeated, as in the cases of trusts for married women, and to preserve contingent remainders, or where the trustee has some discretion to be exercised in relation to the estate or the manner of applying the proceeds."

If the justice had stopped at this point, it would seem that he had adopted a test or rule differing, to some extent, from that announced by the same court in former cases—that it is not sufficient to prevent the "estate" from being executed "that the trustee have something to do," but that the trust would be executed "unless the object of creating it would be defeated," etc., and in the illustrations which he makes, except in the two specific instances named, the necessity that the trustee have "some discretion to be exercised." He goes on to say, however:

"Or, as said by Chancellor Harper, in Posey v. Cook, 1 Hill's Law (S. C.) 414, there must be some object to be effected by the estate remaining in the trustee."

He reaches the conclusion that "in this case no discretion is to be exercised by the trustee"; hence, the trust was executed. The *point decided* therefore is that the duty to "apply the rents to and for the use of" the cestui que trust did not prevent the operation of the statute, and that, therefore, the trust was executed. We concur with the learned District Judge that "there is some conflict between the reasoning in Jenney v. Laurens and that in the other cases."

Passing, at this time, the next case decided, in order of time, for the purpose of ascertaining the authoritative value which has been given to the reasoning of Judge Evans in Jenney v. Laurens, we proceed to examine the opinion of Mr. Justice McIver in Ayer v. Ritter, 29 S. C. 135, 7 S. E. 53 (1888). After stating the question, he says:

"This question has been considered by this court in several recent cases, and it has been uniformly held 'that the statute will not execute the use as long as there is anything remaining for the trustee to do, which renders it necessary that he should retain the legal title in order fully to perform the duties imposed upon him by the trust.'"

After reviewing a number of cases, decided since 1868, and distinguishing several of them, he says:

"The older cases also, with perhaps one exception, recognize the same doctrine."

He proceeds to examine "the older cases" and says:

"It is true that the case of Jenney v. Laurens, 1 Speers' Law (S. C.) 356, appears to be an exception to the current of authority above cited, for in that case Evans, J., does say" (quoting the language quoted by us herein).

Judge McIver says:

"On turning to that case (Posey v. Cook, 1 Hill's Law [S. C.] 414), it will be seen that Chancellor Harper, after indicating some dissatisfaction with

one of the modes of creating a trust not executed by the statute, laid down in Ramsay v. Marsh, 2 McCord's Law (S. C.) 252, 13 Am. Dec. 717, to wit, 'Where the feoffees to a use were directed to receive the profits and pay them over to the person intended to be benefited,' expresses a preference for the rule laid down in Ramsay v. Marsh, in the following quotation from Lord Hardwicke: 'Where particular things are to be done by the trustees, it is necessary that the estate should remain in them, so long, at least, as those particular purposes require it.' So that it would seem that the authority upon which Judge Evans relies lends support to the view which we have adopted, and has the sanction of the great name of Chancellor Harper. * * * But, even if that case [Jenney v. Laurens] should be regarded as an apparent exception to the rule above stated, we do not think it sufficient to overthrow the numerous cases in which it has been recognized and followed."

While the decision in Ayer v. Ritter was made subsequent to 1868, the language quoted from the opinion is of value in aiding us to ascertain the extent to which the language used by Judge Evans in Jenney v. Laurens, was regarded by Judge McIver as correctly expressing the rule or test applied by the court of South Carolina.

In McCaw v. Galbraith, 7 Rich. (S. C.) 74 (1853), the legal title was devised to the trustee to hold for the use of the testator's brother, an alien, until he should become naturalized, and then to execute to him a conveyance of the land; the rents and profits to go to the brother from the death of the testator. The alien was not entitled to take the legal title. The court, after noting the fact that more indulgence is extended to wills than to deeds, in ascertaining the intention, states the controlling principle by which the instrument will be construed:

"Where he simply gives to one in trust for another, or to one in trust to permit another to take the profits, or otherwise uses technical terms, whose sense is well fixed, his words will, without explanation given by himself in the instrument, be understood in their technical sense; but where, by a plain expression, or a necessary implication arising from the duties which he imposes upon the trustee, he shows he intends a legal estate to abide in the trustee, his intention will be respected. * * * The will contains a plain expression of the testator's intention to give to Robert G. McCaw a fee simple in trust; and to give it in such way that the use should not be executed by the statute 27 Henry VIII, c. 10. Not only is there a declaration that the legal estate shall be vested in the trustee, but there is the requirement of an act to be done by him, *the conveyance of the estate in fee* [italics ours], which necessarily presupposes the fee to be in him."

The fact that in that case the court was construing a will does not affect the value to be given the language used in the inquiry which we are now pursuing. It is conceded that the foregoing are the only decisions of the South Carolina Court, rendered prior to 1868, bearing upon the question. The decisions in Bristow v. McCall, 16 S. C. 545, Huckabee v. Newton, 23 S. C. 291, and Bowen v. Humphreys, 24 S. C. 452, subsequent to that date, are cited by Judge McIver in Ayer v. Ritter, supra, as being in harmony with the "older cases." He cites Wieters v. Timmons, 25 S. C. 488, 1 S. E. 1, in which it was held that the trust was executed, the court saying of the trustee:

"He was *not required to convey* [italics ours] such share to the issue, nor to divide the same amongst them, and, there being nothing for him to do, there was no reason why the legal title should remain in him, and hence, by the operation of the statute of uses, it passed" to the cestui que trust. Howard v. Henderson, 18 S. C. 184.

In Huckabee v. Newton, supra (1885), citing and quoting from Bristow v. McCall and McCaw v. Galbraith, it is said:

"In the case before the court there is the requirement of a similar act to be done by the trustee after the death of Lucy, the life tenant. He is *required to convey land to her children* [italics ours], * * * or the children of such as may be dead."

The judge cites Jenney v. Laurens, and, by way of distinguishing it from the instant case, says:

"Here the remainders were contingent, and it was necessary that the legal title should remain in the trustee until the contingency should happen, which was to determine who should take, which being determined, the trustee was directed to convey."

The extent to which the Supreme Court of South Carolina has adhered to the rule that the duty imposed upon the trustee to hold and *convey the legal title* will prevent the operation of the statute is illustrated in Ayer v. Ritter, supra. There Lewis M. Ayer devised to his executors, his Campfield plantation, together with articles of personal property, in trust to apply the income to the support of his son, Zaccheus, and his family, during his natural life, and at his death to convey to William H. Ayer "the said plantation in fee." The action was brought, at law, by William H. Ayer, after the death of the life tenant, for recovery of possession of a part of Campfield. It did not appear that defendant Ritter had any title. He moved for judgment of nonsuit because plaintiff failed to show any conveyance from the executors —trustees—for the land. Plaintiff was nonsuited and appealed. McIver, Justice, as we have seen, reviewed the authorities and discussed the case of Jenney v. Laurens, concluding:

"The trust here was to convey and deliver to the plaintiff the plantation and personal property designed for his benefit, and to perform those duties thus required of them it was necessary that the legal estate should remain in them. Indeed, to say nothing of the case of McCaw v. Galbraith, supra, or of the remark made by Glover, J., in Harley v. Platts [6 Rich. (S. C.) 310], it seems to us that the case of Huckabee v. Newton, supra, is directly in point, and is absolutely conclusive of this case. We do not see how the fact that the remainders in that case were originally contingent, while here the remainder was a vested remainder, can affect the question. Upon the death of the life tenant in that case the remainders were no longer contingent, and there was nothing for the trustee to do but make the conveyance to those who then became entitled, just as here, upon the death of the life tenant, there was nothing for the trustees to do but 'to convey and deliver' to the plaintiff the property to which he then became entitled. It seems to us, therefore, that in any view of the case, while there is much force in the argument of appellant's counsel, the authorities require us to hold that the statute did not execute the use, and the legal title still remains in the trustees."

The case of Uzzell v. Horn, 71 S. C. 426 (1905), 51 S. E. 253, is cited by appellant as approving and following Jenney v. Laurens. In that case plaintiffs sued in an action at law for possession of a tract of land, claiming under a deed in which the land was conveyed to Robert Peel, Sr., to hold for the use and benefit of Robert Peel, Jr., during his life—he was to have the right to take possession and use the land as his own. After his death the trustee was to hold for the use and benefit of his wife, Martha W. Peel for and during the term of her

life and after her death, to hold for any child or children which Robert Peel, Jr., "may have living at the time of his death," to be delivered up to such child or children, and if more than one to be equally divided among them, share and share alike, to hold to them and their heirs forever. In the event the said Robert Peel, Jr., died leaving no child or children, nor the issue of such living at the time of his death, "then and in that event, the said Robert Peel, Sr. (after the death of said Martha W. Peel), shall convey the said tract of land to the brother and sisters of the said Robert Peel, Jr., to be divided equally between them, to have and to hold to their heirs and assigns, free and clear from any trusts," etc. Robert Peel, Jr., died without leaving a child, or the issue thereof. Plaintiffs, children and grandchildren of Robert Peel, Sr., after the death of Martha Peel, brought the action at law against defendant Martha Horn, a daughter of Martha Peel, by her first husband. It appears that Robert Peel, Sr., the trustee, died prior to the bringing of the suit, leaving two sons, Robert Peel, Jr., and William Peel, who survived his brother and was a party plaintiff. Defendants moved for judgment of nonsuit, "on the ground that the plaintiffs had not received a title from the trustee named in the deed of trust." The motion was refused by the circuit judge, who, upon the entire evidence, directed a verdict for plaintiffs. It would seem that the ruling of the court was clearly correct, for that the legal title which vested in John Peel, Sr., trustee, descended to his only son living at the time of his death, William Peel, who was one of the plaintiffs. He was entitled to recover the possession upon his legal title, without regard to the question whether his coplaintiffs, who with himself were entitled to the beneficial interest, could maintain the action. With all deference to the learned Justices of the Supreme Court, it would seem that this fact was sufficient to sustain the ruling of the circuit judge and is substantially so stated in the opinion. The Chief Justice, in the opinion, says:

"This deed shows that the trustee had no services marked out to be performed to the plaintiffs. It looks to us, therefore, that these parties were vested with the title, the uses having been executed by the statute, and the estate vested in the grantes"—citing Jenney v. Laurens, supra, Howard v. Henderson, 18 S. C. 189, and Reeves v. Tappan, 21 S. C. 1.

He also cites Wieters v. Timmons, 25 S. C. 488, 1 S. E. 1, which is distinguished from the other cases by Justice McIver in Ayer v. Ritter, supra. It is quite difficult to reconcile the language quoted from the opinion of the Chief Justice with the language of Judge McIver in Ayer v. Ritter. It is equally difficult to reconcile it with what is said and decided in Steele v. Smith, supra. Neither Jenney v. Laurens nor Uzzell v. Horn are cited in the opinion in Steele v. Smith. Mr. Perry places South Carolina in the class of states in which it is held that the duty imposed upon the trustee to convey the legal title makes the trust executory, citing Garner v. Garner, 1 Desaus. (S. C.) 43 (1795), and Porter v. Doby, supra. 2 Trusts, 370.

In regard to the next proposition, upon which the conclusion in Steele v. Smith is reached, the Chief Justice says:

"Our cases show that the statute may execute the use in either the life tenant for life, or the remainderman in remainder, according as it may be

determined whether the trustee has any active duty to perform with respect to either, rendering it necessary that the life estate or the fee should remain in the trustee. Howard v. Henderson, 18 S. C. 184; Young v. McNeill, 78 S. C. 150, 59 S. E. 986; Breeden v. Moore, 82 S. C. 539, 64 S. E. 604. The trustee having no duty to perform with respect to the life tenant in this case, immediately on the execution of the deed the equitable estate of the life tenant becomes legal by the 'potential magic' of the statute; but, it being necessary for the trustee to retain the legal fee in remainder during the life time of the life tenant to carry out the purpose of the trust, the estate in remainder, not being executed, remained executory and equitable."

It appears to be settled law in South Carolina that:

"When estates are conveyed to trustees for the benefit of parties taking different interests, the statute may execute the use in one and not in the other." Mr. Chief Justice Gary, in Young v. McNeill, supra.

The learned Chief Justice cited Howard v. Henderson, supra, which he says "fully sustains the proposition," and Faber v. Police, 10 S. C. 376, from which he makes liberal quotation, concluding:

"When C. H. Faber devised the land to trustees for the benefit of his son for life, and after his death to his issue living at that time, he thereby created two equitable estates—one for life and the other in contingent remainder. When the statute executed the use in John Lewis Faber, the life tenant, it could not clothe him with the legal title to a larger estate than was conferred upon him by the will."

[2] In Breeden v. Moore, supra, Mr. Justice Woods quotes from the decision in Howard v. Henderson, supra. In that case the devise was to a trustee for the benefit of W. S. H. for life, remainder at his death to Geo. V. H. for life, and at her death to the children, then living, of said W. S. H. and Geo. V. H. "It was held that the statute executed the use as to the life estate." Judge Woods, after quoting the language of the court, in that case, says:

"The same principle was applied conversely in Williman v. Holmes, 4 Rich. Eq. (S. C.) 475, and Wieters v. Timmons, 25 S. C. 488, 1 S. E. * * * These adjudications rest on the rule, of universal application, that a trustee will not be held to take any larger estate than is necessary to enable him to perform the duty imposed by the instrument creating the trust"—citing Ayer v. Ritter, supra; Young v. McNeill, supra.

Our attention is not directed to any decision of the South Carolina court to the contrary, either before or since 1868. We see no reason to doubt that the law of South Carolina is as declared by those decisions. Reading the deed from this viewpoint, the estate would vest in John G. Steele for life, remainder to Joseph A. Steele, in trust to hold and convey to such person as the said John G. Steele may by will appoint, and in default of such appointment to convey to the heirs of said John G. Steele, in fee. The conclusion reached by the court upon this condition of the title is thus stated:

"Hence the rule in Shelley's Case could not apply when the deed was delivered because of the difference in the quality of the two estates."

It is, we think, settled as a rule of universal application that, while the rule in Shelley's Case applies to equitable as well as to legal estates, it does so only when both the life estate and the remainder are of the same quality.

"The legal effect of the union of the estates, as declared by that rule, does not occur where the life estate is of an equitable character and the remainder is a legal estate, or vice versa. Both estates must be of the same character." Green v. Green, 23 Wall. 486, 23 L. Ed. 75.

This case affords an interesting illustration of the application of the principle. There a conveyance was made to trustees for the sole and separate use of C., a feme covert, for her life, and to hold and convey the premises to such persons as the life tenant might, by her last will and testament, direct, and, upon failure of the life tenant to appoint by will, to her heirs at law. The trustee and the life tenant joined in a deed of trust in fee to secure the payment of a note. The question presented for decision was whether the life tenant could appoint the fee otherwise than by will, and whether, under the rule in Shelley's Case, she was invested with the fee, which passed by her deed. The court, by Mr. Justice Hunt, held that the estate which vested in her for life was equitable, whereas the estate limited over to her heirs, in default of an execution of the power of appointment by will, to which mode she was restricted, was legal, and therefore the two estates did not coalesce and vest the fee in her under the rule in Shelley's Case. Of course, the converse of the proposition is true; hence, we find it is held:

"If the estate given to a person be a legal estate for life, with a limitation of an equitable estate to his heirs, they will not incorporate into an estate of inheritance in the first taker." Crosby v. Davis, 2 Clark (Pa.) 408; Venables v. Morris, 7 Term Rep. 342.

[3, 4] An examination of a large number of decided cases shows that, in very many of them, when the rule in Shelley's Case was not permitted to operate, the life estate was by reason of the character of the trusts declared equitable, and the remainder legal. This result would probably have followed in Steele v. Smith, except for the holding that, by reason of the duty imposed upon the trustee to convey to the appointee, or, in default of appointment, to the heirs, of John G. Steele, the trust, quoad the remaindermen, was executory, and herein the law of South Carolina, as declared by the Supreme Court, differs from that of some other jurisdictions. If, as held in Steele v. Smith, the statute of uses operates to execute the use, and thereby vests the legal title in John G. Steele for life, and the duty imposed upon the trustee to hold and convey the property to the appointee by will of John G. Steele, or in default of such appointment, to convey to his heirs in fee, is an executory trust as to the fee, the conclusion reached in that case is logical and in accordance with well settled legal principles. If this was an action at law for the recovery of possession, the plaintiffs would encounter the same difficulty which prevented a recovery in Ayer v. Ritter, supra, unless, under the authority of Uzzell v. Horn, supra, the legal title, which remained outstanding in Joseph A. Steele, descended to his son, John G. Steele, and from him to the plaintiff, John Atkinson Steele, the eldest son of John G. Steele, who is a party to this record. However this may be, the proceeding for partition, when removed into the federal court, was properly trans-

ferred to the equity calendar. To meet this suggestion, the Chief Justice, in Steele v. Smith, says:

"If we consider whether the rule should apply on the death of the life tenant without exercising the power of appointment, and should hold that the statute then executed the use in those who then answered the description of the heirs at law of John G. Steele, it would only follow that such heirs then became vested with the fee in remainder as a legal estate which had not previously coalesced with * * * an extinct estate."

In conclusion he says that:

"In this way the intention of the grantor is not defeated by the rule, but those answering the description of the heirs of John G. Steele, at his death, take, not by inheritance from the ancestor, but as purchasers under the grant of John Steele, Sr., in accordance with the manifest intention of the grantor."

The court was impressed with the conviction that it was the intention of John Steele, Sr., to make a settlement of his property through the medium of a trustee, by giving the land to the trustee to hold for the life of the son, with a restricted power of appointment, vesting in the trustee the legal title to be conveyed by him to the appointee, and upon failure thereof to convey to the heirs of the son—using the word "heirs" as descriptio personarum. The language used in the deed, indicates that the draftsman was a lawyer who understood that the trust created was executory, or at least so held by the court in South Carolina. That courts of equity, having sole cognizance of the interpretation and administration of executory trusts, have regard to, and effectuate, the intention of the maker of the instrument, is well settled. Mr. Justice Hunt in Green v. Green, supra, says:

"There is a distinction between a trust in equity and a mere legal estate, and that in the latter class the words must be taken as they stand according to their legal determination, while a different rule prevailed in regard to trusts. * * * Trusts are the mere creatures of confidence between party and party, totally distinct in almost every quality from those legal estates which are the subjects of tenure, * * * and therefore not the object of those laws which are founded in the nature of tenure. They are rights arising solely out of the intent of the party who created them, and therefore such intent should be the only guide in the execution of them."

The first inquiry here is whether the decision in Steele v. Smith is a declaration of a rule of property, recognized and in force in South Carolina, when John G. Steele conveyed the land to Pagan. In view of the vigor with which that decision is attacked, we have extended our investigation somewhat into other jurisdictions. The question has been very fully discussed in the notes to Lord Glenorchy v. Bosville, 1 L. C. Eq. 1 (3d Am. Ed. 1). The author of the American note says:

"The distinction between executed and executory trusts here has gone to the extent of arresting the application of the rule in Shelley's Case in regard to executory trusts, and causing the person answering the description of issue, heirs of the body, or heirs to take as purchasers according to the language of the will as it stands. For this purpose, a trust will, in the American courts, be considered as executory, whenever a conveyance is to be made by the trustees, or in case of personal property whenever a delivery is to be made

by the trustees at successive periods of time to the persons respectively entitled under the will or articles."

We are not inadvertent to the fact that the learned editor of the note is referring to executory trusts created by wills or articles of settlement. It is, we think, quite clear that the deed executed by John Steele to Joseph A. Steele was in the nature of a settlement of the property. We are not able to perceive why his intention should not be effectuated, if he has manifested it in the manner recognized by the courts, as it would have been if he had done so by will. It appears that the question received very careful consideration by the court of Georgia. It is said that:

"The principles and distinctions have been accurately defined and established, after great discussion by that court."

In Edmondson v. Dyson, 2 Ga. (2 Kelly) 307, it appears that Mrs. R. devised her estate to D. in trust for the sole and exclusive use of her husband during his life, and directed that at his death the trustee should convey the property to such persons as her husband should be willing to appoint, and if he should die intestate then the trustee should convey the property to the heir or heirs at law of the husband absolutely. The husband died intestate and the question was whether the child of the husband took as purchaser under the will, or whether the whole estate vested in the husband, and his child took as his heir, in the regular course of the law. The case was admitted to depend entirely upon the question whether the trust was executory or executed. The Supreme Court held that the trust was executory on the ground that a conveyance was to be made by the trustee. In the discussion, Mr. Justice Nisbet declared the rule in Shelley's Case to be an established principle of law in Georgia but that it applies to legal estates and executed trusts and does not apply to executory trusts when the testator plainly implies an intention that it shall not apply. He says:

"It is argued with great force that if the limitations are perfect, if the character of the estates is ascertained, the trust is executed; that the something left to be done has no reference to any mere act of conveyancing which might be necessary to effectuate limitations which the testator has fully declared, but the trust is executory only where the limitations themselves are not defined, where the estates are not ascertained, and in cases where the testator only leaves loose statements, or notes of his intention, requiring careful and responsible deeds, or other instruments, to be by the trustee executed, which in themselves create and define estates, or which require a decree of chancery to mould the estates according to such loose memoranda; that it is immaterial whether the limitations are legal or equitable; that is whether the estate * * * may be asserted at law, or a decree in chancery be necessary to its perfect enjoyment, if the limitations are complete, and there is no doubt about the quantity or quality of the estate. I do not deny, but upon principle it is hard to escape from, the conclusiveness of this reasoning. It is difficult to see any reason why an estate to A. in trust to B. for life with remainder to the heirs of B. is an executed trust, and an estate to A. in trust to B. for life with remainder in fee *to be conveyed to the heirs of B.* is an executory trust. In both cases the intention of the testator is the same; the estates limited are the same. The only difference is found in the fact that * * * the testator is his own conveyancer, and the heirs take directly, and in the second he makes his trustee his conveyancer, and the heirs take

through his deed. The thing to be done in the last case, to wit, convey, neither restricts nor enlarges the estate to the heirs. And yet the authorities, as we shall see, make this very act of *conveyancing*, the test, or one of the principal tests, of an executory trust."

The learned judge concludes his very exhaustive examination of the authorities, saying:

"I have not found, in the laborious investigation which I have been compelled to give this subject, a single case where a conveyance was required to be made, however merely formal it might appear to be, which has been determined to be an executed trust."

In discussing the questions presented in that case, and involved in this appeal, he says:

"The questions * * * involve the application or not to that instrument [the will of Mrs. Rakestraw] of the celebrated rule of property, known to the profession as the rule in Shelley's Case, and the intricate and greatly vexed inquiry: What is an executory in contradistinction to an executed trust? These inquiries are among, if not the most, abstruse, complicated, and least understood of all that belong to a science abounding in subtle distinctions. The most brilliant genius, the most profound learning, and the most patient and continuous labour, have been for centuries applied to their elucidation, with no very decidedly satisfactory result."

He reached the conclusion, concurred in by all of the judges, that the husband took only a life estate, and his daughter, who was his heir at law, took as a purchaser in remainder. The opinion is both interesting and enlightening. We have not quoted the language used by Judge Nisbet for the purpose of expressing either concurrence with, or dissent from, the conclusion reached, nor for the purpose of invoking it in aid of the conclusion reached by the Supreme Court of South Carolina. We do not doubt that the case of Steele v. Smith received the careful and anxious consideration of that court. This is no less our duty than our conviction.

[5] If it be conceded that no case exactly on all fours with Steele v. Smith was decided by the South Carolina Supreme Court prior to 1868, which are authoritative declarations of the law of the state, it becomes our duty to ascertain to what extent we should, "for the sake of comity and to avoid confusion, lean to an agreement with the state court," assuming that the "question is balanced with doubt." This "question" is, not what the law of this case has been declared in other American states, or elsewhere, but what is the law of the state of South Carolina. In Kuhn v. Fairmount Coal Co., supra, the court did not intend to declare any new rule or principle for the guidance of the federal courts, but to formulate and restate the rule theretofore announced, and followed, with respect to the manner in which these courts should deal with questions of local, or state, law in the exercise of their co-ordinate jurisdiction, based upon diversity of citizenship. The language of the court, in several cases, illustrates the extent to which the principle has been applied. In Hinde v. Valtiers' Lessees, 5 Pet. 398, 8 L. Ed. 168, it is said:

"There is no principle better established, or more uniformly adhered to in this court, than that the Circuit Courts, in deciding on titles to real property in the different states, are bound to decide precisely as the state courts ought to do."

So in Olcott v. Bynum, 17 Wall. 44, 21 L. Ed. 570, the question was as to the admissibility in evidence of an unregistered deed, under the North Carolina statute and the adjudications of the Supreme Court of that state. Mr. Justice Swayne said:

"It is to be considered solely in the light of the statutes and adjudications in North Carolina. This court must hold and administer the law upon the subject as if it were sitting as a local court of that state." Slaughter v. Glenn, 98 U. S. 242, 25 L. Ed. 122.

As indicating the authoritative force given to the decision of a case under somewhat similar conditions, Mr. Justice Brewer, in Halsted v. Buster, 140 U. S. 273, 11 Sup. Ct. 782, 35 L. Ed. 484, after stating the question, says:

"This question must be answered in the negative. It might be sufficient to refer to the case of Bryan v. Willard, 21 W. Va. 65. In that case the precise question was before the Supreme Court of Appeals of that state, and decided against those claiming under the Martin grant. * * * The cases are therefore identical. The same points were made and the same questions presented, with one exception, to be hereafter noticed; and as the title to real estate, and the construction of deeds and statutes in respect thereto, is a matter of local law, this court, while exercising an independent jurisdiction, follows as a rule the decision of the highest court of the state."

In a well-considered and amply sustained opinion in Southern Railway Co. v. N. C. Corp. Com. (C. C.) 99 Fed. 165, Judge Simonton reversed his decree, based upon the construction given by him of a North Carolina statute, because, pending the cause in the Circuit Court, and after filing his decree, the Supreme Court of the state placed a different construction upon the statute. In re Floyd & Hayes (E. D. S. C.) 225 Fed. 262, affirmed by Circuit Court of Appeals at this term, 232 Fed. 119, — C. C. A. —.

As said by the court in Jackson v. Chew, 12 Wheat. 167, 3 L. Ed. 583:

"This court adopts the state decisions, because they settle the law applicable to the case; and the reasons assigned for this course apply as well to rules of construction growing out of the common law, as the statute law of the state, when applied to the title of lands. And such a course is indispensable, in order to preserve uniformity; otherwise, the peculiar constitution of the judicial tribunals of the states and of the United States, would be productive of the greatest mischief and confusion."

The reasons upon which this well-settled principle is based are strongly stated, and the confusion which would result from a failure to enforce it pointed out by Judge Dayton in Kuhn v. Fairmount Coal Co. (C. C.) 152 Fed. 1013.

[6, 7] Whether the decision of the Supreme Court of South Carolina in Steele v. Smith was the declaration of a rule of property, based upon decisions of that court prior to 1868, and therefore an authoritative declaration of the law of the state at that time, or whether, upon the examination of the decided cases, both before and since 1868, the question is "balanced with doubt," we are constrained "to an agreement with the state court," unless there be some other questions, not considered or settled by the decision of the state court, which should control our decision here. It is strongly urged that such questions are

presented. It is conceded that in South Carolina, upon the death of a trustee, the legal title, subject to the trusts imposed upon the ancestor, vests in his eldest son; that the statute abolishing the law of primogeniture does not apply to estates held in trust. Breeden v. Moore, supra. Therefore, upon the death of Joseph A. Steele, the legal title to the land conveyed to Joseph A. Steele, trustee, descended to and vested in his son, John G. Steele. Appellant contends that this resulted in a merger of the legal and equitable estates in John G. Steele, thereby vesting in him the absolute legal estate in fee discharged of the trust. This position is based upon the doctrine that:

"Where a greater and a less legal estate, held in the same right, meet in the same person, without any intermediate estate, a merger necessarily takes place. The lesser estate ceases to exist, being merged in the greater, which alone remains. * * * Wherever, in like manner, a legal and coextensive equitable estate meet in the same person, in either instance, the equitable estate is merged at law, for the law regards the legal estate as the superior." Pomeroy, Eq. 787.

Chancellor Kent says:

"If the estates are held in different legal rights, there will be no merger, provided one of the estates be an accession to the other, merely by the act of law, as by marriage, by descent, by executorship or intestacy. * * * At law, the doctrine of merger will operate, even though one of the estates be held in trust and the other beneficially, by the same person, or on the same or different trusts. But a court of equity will interpose and support the interests of the cestui que trust, and not suffer the trust to merge in the legal estate, if the justice of the case require it." 4 Kent, 101.

In an able and exhaustive discussion of the subject, containing a careful review of the decisions of the Supreme Court of South Carolina, upon the subject of merger of estates, Mr. Justice Woods, in McCreary v. Coggeshall, 74 S. C. 42, 53 S. E. 978, 7 L. R. A. (N. S.) 433, 7 Ann. Cas. 693, says:

"We think it clear the later cases in this state establish the proposition, which as we have seen is in accord with the doctrine universally recognized in other jurisdictions, that in equity at least merger will not take place if opposed to the intention of the parties, affirmatively proved or to be implied from the fact that merger would be opposed to the interest of the person in whom the different estates or interests become united."

Judge Woods, in answer to the contention that, in enforcing the doctrine of merger, courts of law took no account of the intention of the parties, that this was only done by courts of equity, says:

"We conclude there is not controlling authority that the intention is not to be regarded in an issue of law, or as to legal estates, but on the contrary the tendency of modern authority is to regard the intention controlling at law as well as in equity. There is certainly no reason to be found for any distinction."

The equitable doctrine has superseded the legal. 20 Am. & Eng. Enc. 591.

"Where the purpose for which the trust was created required the legal estate to remain distinct, equity will require the carrying into effect of this purpose and prevent merger." 39 Cyc. 246.

Mr. Hill, after defining the doctrine of merger of estates, at law, says:

"In such cases, however, equity will interpose, and will preserve the equitable interests from destruction, either by decreeing possession to the cestui que trust, during the period of the estate so merged, or by decreeing a conveyance to revive the legal estate." Hill, Trustees, § 252.

Mr. Perry says:

"If A. should convey lands to B. in trust for C. and her heirs, and C. should be the heir of B., upon the death of B. the legal title would descend to C., and thus both the legal and equitable title would meet in C.; but if C. was a married woman, and it was plainly the intention of the grantor or settlor, to be gathered from the whole instrument, that the trust should not cease, but continue an active trust, the court would not allow the equitable estate to merge in the legal, but a new trustee would be appointed to take the legal title." Perry on Trusts, § 347; Donalds v. Plum, 8 Conn. 447.

In Thorm v. Newman, 3 Swans, 603 (36 Eng. Rep. Reprint, 991), Lord Nottingham, in reply to the contention that, upon the facts before him, there was a merger, said:

"Whatever the law may be, it ought to be no merger in equity."

In Hunt v. Hunt, 14 Pick. (31 Mass.) 374, 384, 25 Am. Dec. 400, Shaw, Chief Justice, said:

"In order to effect a merger at law, the right previously existing in an individual, and the right subsequently acquired, in order to coalesce and merge, must be precisely coextensive, must be acquired and held in the same right, and there must be no right outstanding in a third person, to intervene between the right held and the right acquired. If any of these requisites are wanting, the two rights do not merge, but both may well stand together."

In Donalds v. Plum, supra, the court, citing Phillips v. Brydges, 3 Ves. Jr. 126, said:

"The legal and equitable estates must be coextensive, be commensurate, or there must be the same estate in law as in equity. A court of equity will always prevent a merger to preserve any beneficial interest of the parties, to promote the purposes of justice, or effect the intention of the donor. Such equitable estates are to be held perfectly distinct and separate from the legal."

A careful examination of the opinion in Wills v. Cooper, 25 N. J. Law, 137, relied upon by appellant, does not disclose any divergence from the current of authority in regard to the doctrine of merger and its application. The learned judge quotes with approval the language found in Hill on Trustees, 252. He says:

"Here the legal estate cast upon R. by descent was undoubtedly broad enough to cover his equitable interest; and * * * his equitable beneficial interest and the absolute legal estate which he took by the descent clear of the trust were precisely coextensive and commensurate"

—clearly recognizing the essential requisites to a merger of estates. No rights of third parties, either legal or equitable, intervened.

In Mangum v. Piester, 16 S. C. 317, both estates were legal; hence the lesser merged into the larger, when vested in the same person. In Lipscomb v. Goode, 57 S. C. 182, 35 S. E. 493, the court would not

permit a merger because to do so would destroy the rights of a third party. Here Joseph A. Steele held the legal title in trust to convey to such person as, according to the terms of the deed, upon the death of John G. Steele, were entitled to call for its conveyance. The legal title, with this executory trust impressed upon it, vested in John G. Steele, by operation of law. It is said, however, that he could not hold as trustee for himself, or execute the trust. It is the peculiar office of a court of equity to prevent the failure of an executory trust, effectuate the intention of the person who created it, and preserve the rights of the cestui que trust. When it is ascertained that a valid trust has been created, the court enforces it according to the intention of the maker, and, if for any reason the trustee named cannot execute it, or if no trustee be named, appoints a trustee, and so molds its decree that the rights of the beneficial owners are preserved. The maxim of equity that "a trust shall never fail for want of trustee" is elementary. In this case, as upon the death of John G. Steele, without having exercised the power of appointment, the plaintiffs are entitled, under the terms of the deed, to both the legal and equitable title, we see no reason why, as was held by the Supreme Court in Steele v. Smith, the intention of John Steele should not be effectuated by treating them as the owners in fee of the one-half undivided interest in the land. If there was no merger of the legal and equitable title by reason of the descent of the legal title upon John G. Steele, the legal and equitable estates remained separate and distinct, and upon his death the legal title, in the same plight, descended to his eldest son. If the trust is not executed in the plaintiffs, upon the death of John G. Steele, it vested in his son, John A. Steele, who is a party to this record and represents the legal title. With the other appellees, every person who, under any possible aspect, can have any interest in or title, either legal or equitable, to the land, are in the record, and will be bound by the decree.

[8] Appellant insists that, when John G. Steele executed a deed to Pagan, sufficient in form, and with warranty, for a valuable consideration, to convey the fee, he extinguished the power to appoint the estate by will— "that he was estopped from thereafter exercising, by will, the power of appointment." If it be conceded that this contention is sound, we do not perceive how it affects the rights of appellees. It may be that if, after executing the deed to Pagan, he had executed a will appointing the estate, the contingent remainder would have been destroyed, and, further that his appointee may have been decreed to hold the legal title in trust for Pagan. These questions, however interesting, are entirely academic here, because there are no facts to make them of practical interest. Counsel frankly concede that the deed to Pagan was not a valid execution of the power—it could have no other legal effect than to vest in Pagan the life estate of John G. Steele. In the case which the record presents, so far as the rights of the appellees are concerned, John G. Steele simply failed to exercise the power of appointment. In that respect it is on all fours with Edmondson v. Dyson, supra. The opinion of Judge Nisbet, in dealing with this aspect of the case, is interesting. Referring to the fail-

ure of the husband of Mrs. R. to exercise the power to appoint the fee by will, he says:

"He died intestate, and of course without having exercised the power. The power, therefore, falls to the ground, or rather it is as though it had never been, or as a void power. He had the ability, during life, to defeat the remainder to his heirs at law, by appointing the fee to convey to others. Not having done so, the property takes just that direction which the testatrix, anticipating such a contingency, willed it to take. By the provisions then of the will itself, upon the death of G. L. R., intestate, the power of appointment becomes a nullity, for she further directs the trustee, upon his death intestate, to convey the property absolutely to his heirs at law. * * * We therefore abstract it, for the future, wholly from the will, except in so far as the clause in relation to it may be used as an indicium of intention."

The learned and resourceful counsel for appellant draws the conclusion that, by conveying the fee to Pagan, John G. Steele extinguished the power—that is, as he puts it, estopped himself from exercising it—and therefore the case "must be considered just as though the power of appointment had never existed, and being considered in this light it must be held that the deed conveyed a fee simple." Without pausing to examine the validity of the proposition that the execution of the deed to Pagan extinguished the power, we are unable to adopt the conclusion reached by counsel assuming the premise to be correct. We do not think that, by attempting to execute the power in an unauthorized manner, he could destroy the rights of the remaindermen, or bring about any other result than a failure to exercise it would do.

Without further extending the discussion, leaning to an agreement with the decisions of the Supreme Court of South Carolina, as declaring the law of the state, in respect to the character of the trust created by the deed, and the construction given to it, we conclude that, when the deed of John Steele was delivered, an executory trust was created and imposed upon the legal title, that the trustee was required to hold the legal title in fee for the purpose of effectuating the trusts declared, and that, upon the death of John G. Steele intestate, appellants, his widow and children, being his heirs, were entitled to a conveyance of the fee. The other questions argued in this court were not discussed or specifically decided, because so far as appears they were not raised by counsel in Steele v. Smith. We therefore pro hac vice treated them as open for our consideration. An examination of the authorities cited in the briefs brings us to the conclusion that there was no merger of the legal and equitable estates in John G. Steele upon the death of his father, Joseph A. Steele, and that the execution of the deed to Pagan did not affect the rights of the appellees. While we have, at probably greater length than was necessary, discussed the several phases of the case presented upon the argument, we are of the opinion that the controlling factor is found in the character of the trust created by the deed executed by John Steele to Joseph A. Steele. When it is found, by adopting the South Carolina decisions, that it was executory, it follows that a court of equity will, in its interpretation, seek to effectuate the intention of the maker of the deed. Mr. Adams says that a court of equity in enforcing an executory trust will

give to the language used its legal meaning, unless an intention to the contrary is found in the instrument, and that:

"The intention so to modify them may be collected from slighter indications than would be sufficient, if an executed one, e. g. * * * from an express limitation to the first taker for life followed by a remainder to the heirs of his body." Ad. Eq. 42.

The editor of the third Am. edition cites Garner v. Garner, 1 Desaus. (S. C.) 444. See, also, Patrick v. Morehead, 85 N C. 62, 39 Am. Rep. 684.

[9-13] It appears, from the cross-bill filed by appellant, that the original tract, one-half of which was conveyed in trust, has been divided and subdivided, and that certain conveyances have been made between those holding fractional parts, under some of whom appellant claims. Eliminating a number of complications not relevant to this controversy, it appears that Wilson and Smith and Watson became the owners of an undivided interest in 99 acres of the original tract. They made partition of this portion of the land between themselves, by executing deeds of exchange, and by this arrangement that part known as "tract A," 27 acres, was conveyed to Smith and Wilson, and the other tracts to Watson. The 27 acres, by successive conveyances, came to appellant and is the subject-matter of this controversy. It is conceded by appellees that appellant owns one-half undivided interest in the 27 acres, and they seek to have partition. Of course the partition made between Smith and Wilson and Watson does not affect the rights of appellees; but it is claimed that, in making the partition, appellants are entitled to certain equities, which will be enforced by the court. They are set up in the cross-bill. It is true that, although one tenant in common executes a deed to a stranger to the title, describing and purporting to convey the entire tract by metes and bounds, the deed is effectual to convey only his undivided interest. This does not, in any degree, disturb the rights of the other tenant. This may be regarded as elementary, and is not controverted here. If, however, by reason of the fact that the grantee, in the bona fide belief that he has, by his deed, acquired a good and valid title to the entire tract of land conveyed, places improvements upon it, the court, in its decree directing partition, while preserving the rights of the cotenant, will direct the partition to be so made as to conserve the equities of all parties, both by providing for compensation for the betterments, and, if practicable, and without prejudicing the rights of the other cotenants, directing the allotment of the part upon which improvements have been made to the tenant who made them.

In this case it is difficult to see how the equity invoked can be administered. The parties to this record do not own in common any other land than that described in the bill. To bring into the decree the questions involved in the cross-bill would necessitate making other parties and involve collateral questions which are foreign to those properly cognizable in this cause. The decree protects the interests of appellants in regard to the betterments. With the findings of the special master, upon which the decree is made, we do not find any just cause of complaint, in respect to the method directed of making partition.

The appellees' right to have partition is not barred by the statute of limitations. The refusal to permit an amendment to the cross-bill was a matter of discretion in the District Court, nor do we perceive any necessity for the cross-bill. The rights of the parties are protected by the decree in the original bill Upon a careful consideration of the record, we do not find any error.

The decree is affirmed.

PRITCHARD, Circuit Judge (concurring). I am of opinion that the question whether a rule of property in South Carolina decisive of this case was established prior to 1868 is balanced in doubt; therefore in pursuance of the principle announced by the Supreme Court of the United States in the case of Kuhn v. Fairmount Coal Company, 215 U. S. 349, 30 Sup. Ct. 140, 54 L. Ed. 228, I concur in following the decision of the Supreme Court of South Carolina in the case of Steele v. Smith, 84 S. C. 464, 66 S. E. 200, 29 L. R. A. (N. S.) 939.

HOWLAND v. CORN et al.

EMPIRE TRUST CO. v. IMPROVED PROPERTY HOLDING CO. OF NEW YORK et al.

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

Nos. 71, 72.

1. CONSPIRACY ⇐22—JUDGMENT—PLEADING—SURPLUSAGE—ALLEGATIONS AS TO CONSPIRACY.

An averment that acts were done in pursuance of a conspiracy does not change the nature of a civil action, or add anything to its legal force and effect; and if the conspiracy is not made out, the allegation may be disregarded as surplusage, and damages recovered against such of the defendants as are shown to be guilty of the tort without such agreement.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 24; Dec. Dig. ⇐22.]

2. CONSPIRACY ⇐24—CRIMINAL PROSECUTIONS—ELEMENTS OF OFFENSE.

In a criminal prosecution for conspiracy, the unlawful combination and confederacy, rather than the overt acts done in pursuance of it, constitute the essential element of the offense.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 33, 34; Dec. Dig. ⇐24.

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

3. APPEAL AND ERROR ⇐1029—HARMLESS ERROR—THEORY OF CASE.

In an action by the receiver of a corporation against its directors for an accounting and damages, on the theory that they conspired to sell property to the corporation, which they owned and in which they had an interest, at an excessive price, it was immaterial, if true, that the trial judge misconceived the nature of the action, and erroneously took the position that proof of the alleged conspiracy was necessary, where the court not only found that there was no conspiracy, but also found that there was no fraud, and no intent to inflict a wrong, or to get an undue or

illegal profit, as its conclusions expressly negatived the facts upon which complainant would have had to rely to sustain a judgment in his favor under a correct understanding of the true nature of the action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4035, 4036; Dec. Dig. ⊂⊃1029.]

4. CORPORATIONS ⊂⊃317(6)—LIABILITY OF DIRECTORS—PERSONS ENTITLED TO ENFORCE LIABILITY.

The general creditors of a corporation have as much right as stockholders or mortgage bondholders to be protected against the fraud and negligence of the directors, and have a right through a receiver to compel the directors to make good any loss resulting from the corporation's purchase of valueless parcels of real estate, if occasioned by the fraud or negligence of the directors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1413, 1414; Dec. Dig. ⊂⊃317(6).]

5. CORPORATIONS ⊂⊃316(1)—DIRECTORS—PERSONAL TRANSACTIONS WITH CORPORATION.

While, strictly speaking, the directors of a corporation are not trustees, they are the agents of the corporation, and because of this fiduciary relationship the dealings of a director in his own right with the corporation are regarded with great jealousy and subjected to close scrutiny.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1401, 1402, 1405, 1406, 1409; Dec. Dig. ⊂⊃316(1).]

6. CORPORATIONS ⊂⊃314(1)—DIRECTORS—PERSONAL TRANSACTIONS WITH CORPORATION.

The position of directors of a corporation which had only five directors was one of great trust, and their character as agents did not permit them to exercise their powers against the interests of the corporation, its stockholders, or creditors, and they were bound to exercise good faith, and not to permit their official conduct to be swayed by their private interest, and they could not derive any individual advantage at the expense of the corporation and to the injury of its interests.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1393–1395; Dec. Dig. ⊂⊃314(1).]

7. CORPORATIONS ⊂⊃316(1)—DIRECTORS—PERSONAL TRANSACTIONS WITH CORPORATION.

A director is not disabled from selling his own property to his corporation, provided there are enough directors present who have no personal interest in the property, and the sale is open, fair, and honest.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1401, 1402, 1405, 1406, 1409; Dec. Dig. ⊂⊃316(1).]

8. CORPORATIONS ⊂⊃316(1)—DIRECTORS—PERSONAL TRANSACTIONS WITH CORPORATION.

If a director's sale of his own property to his corporation is not open, fair, and honest, the transaction can be set aside, and the director called upon to make good any loss inflicted upon the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1401, 1402, 1405, 1406, 1409; Dec. Dig. ⊂⊃316(1).]

9. CORPORATIONS ⊂⊃320(11)—DIRECTORS—ACTIONS FOR FRAUD OR NEGLIGENCE —SUFFICIENCY OF EVIDENCE.

In an action against directors of a corporation for an accounting and damages, evidence *held* insufficient to show that the price at which real estate owned by one of them and other real estate in which others of them had a beneficial interest was sold to the corporation was grossly excessive, or that they acted fraudulently or negligently, notwithstanding a large difference between the income which the sellers were obtaining

from such property and the interest on bonds of the corporation delivered in payment for the property.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1437; Dec. Dig. ⟸320(11).]

10. CORPORATIONS ⟸316(1)—DIRECTORS—PERSONAL TRANSACTIONS WITH CORPORATION.

Directors of a corporation, when dealing with themselves, must be scrupulous to see that they do not involve the corporation in a transaction unfair or not advantageous to it, and are bound to look out for the interests of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1401, 1402, 1405, 1406, 1409; Dec. Dig. ⟸316(1).]

11. CORPORATIONS ⟸320(11)—DIRECTORS—DEALINGS WITH CORPORATION—BURDEN OF PROOF.

The burden is on directors of a corporation, dealing with themselves, to show that the transaction was perfectly fair to the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1437; Dec. Dig. ⟸320(11).]

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

Suits by Silas W. Howland, as receiver of the Improved Property Holding Company of New York, against Henry Corn and others, and by the Empire Trust Company, as trustee under a mortgage of the Improved Property Holding Company of New York, against the Improved Property Holding Company of New York and others. From a decree dismissing the bill of complaint in the first suit, the complainant appeals; and from a decree for the complainant in the second suit the defendants the Improved Property Holding Company of New York and Silas W. Howland, receiver, appeal. Affirmed.

The first cause is a suit brought by a receiver against the directors of the corporation of which he has been appointed receiver, to establish a personal liability on the part of the defendants for reasons which are hereinafter more fully stated. The second cause is a suit for the foreclosure of a mortgage in which the same receiver appeared and answered, setting up the invalidity of certain bonds issued under the mortgage in foreclosure. In the first suit the receiver alleges as a portion of his cause of action the same facts asserted to show invalidity of the bonds in the second and which are relied upon to establish a personal liability of the defendants in the first suit. The two actions were tried together in the court below and were disposed of in a single opinion.

Separate decrees were entered—in the first suit, on January 11, 1915; in the second suit, on August 6, 1914; and on February 4, 1915, a supplemental decree was filed. The trial court dismissed the bill of complaint in the first suit, having found that the directors, the defendants, had been honest in their dealings with the corporation. In the second suit the mortgage made by the Improved Property Holding Company to the Empire Trust Company as trustee, dated May 24, 1909, was adjudged valid, coupon bonds to the face value of $1,000,000 were adjudged duly issued, and $223,000 face value of these bonds were adjudged duly redeemed by payment in cash, and $777,000 face value of the bonds were adjudged outstanding, legal, and unpaid obligations of the company secured by the mortgage. And the prayers contained in the answer of the receiver were denied. An appeal has been taken in each suit. The two cases were argued together in this court.

The Improved Property Holding Company is a corporation organized and existing under the laws of the state of New York. It was organized to acquire and hold improved business properties in the borough of Manhattan.

The complainant in the first suit was appointed by the District Court for the Southern District the receiver of the Improved Property Holding Company, and of all the property and assets of that company not covered by its mortgages dated June 1, 1906, and May 24, 1909. The General Realty & Mortgage Company is a corporation organized and existing under the laws of the state of New York, having its principal office in the city of New York. The defendants in the first suit, with the exception of the General Realty & Mortgage Company, constituted the board of directors of the Improved Property Holding Company; Corn being president of the company, Ball and Dowling vice-presidents, and O'Donohue treasurer and secretary.

At all the times mentioned in the complaint in the first suit, Ball and O'Donohue are alleged to have been officers and directors of the General Realty & Mortgage Company and are said to have controlled its affairs, holding a majority of the stock. Out of 10,000 shares of the stock Ball, it is alleged, held 4,800 shares, O'Donohue more than 1,000 shares, and O'Donohue's wife, brother, and brother's wife owned in the aggregate 3,000 shares. It is alleged that prior to May 24, 1909, Corn, Ball, O'Donohue and the General Realty & Mortgage Company, through its officers and directors, entered into a combination and conspiracy to cause the Improved Property Holding Company to issue and deliver its negotiable 6 per cent. coupon bonds, secured by a mortgage on its property, in the aggregate principal amount of $1,000,000, without receiving fair or adequate consideration therefor; to obtain for themselves $555,000 face value of said bonds, without giving any fair or adequate consideration therefor, and upon terms grossly inequitable, burdensome and unconscionable as to said Improved Property Holding Company and greatly to the advantage of said Corn, Ball, and O'Donohue, and said General Realty & Mortgage Company; to obtain for themselves large sums as interest on said bonds; to transfer from said General Realty & Mortgage Company and said Corn to the Improved Property Holding Company certain unprofitable and rapidly deteriorating parcels of real property, known as No. 476 Broadway and No. 395 Broadway, respectively, in the borough of Manhattan, city of New York, and to shift from the General Realty & Mortgage Company and said Corn to the Improved Property Holding Company the burdens and obligations incident to the operation and ownership of said properties; and to obtain for themselves large sums of money through the ownership of the bonds to be issued, both by selling or otherwise disposing of some of the bonds, and by causing many of the bonds to be redeemed at a premium and otherwise. Pursuant to the combination and conspiracy and with such purpose and intent as aforesaid, the said Corn, Ball, and O'Donohue, and the General Realty & Mortgage Company through its officers and directors, are said to have devised and consummated the wrongful and illegal scheme and schemes hereinafter set forth.

It is alleged that pursuant to this illegal conspiracy the defendants caused a meeting to be held of the directors of the Improved Property Holding Company to authorize the execution of a mortgage dated May 24, 1909, by the Improved Property Holding Company to the Empire Trust Company as trustee, covering all the property then owned by said Improved Property Holding Company, and also to authorize the issue, ostensibly for the purpose of securing capital for the transaction of the business of the Improved Property Holding Company and also for other lawful purposes of its incorporation, of $1,000,000 face value of 6 per cent. coupon bonds of the Improved Property Holding Company, secured by said mortgage, and that they further and in like manner and with such purpose and intent as aforesaid caused the board of directors of the Improved Property Holding Company to authorize and direct the purchase by the Improved Property Holding Company from the General Realty & Mortgage Company and from Henry Corn, respectively, of the premises known as No. 395 Broadway and No. 476 Broadway, respectively, both situated in the borough of Manhattan, city of New York, for $555,000 face value of said bonds, $450,000 face value of said bonds to be issued to the General Realty & Mortgage Company for premises No. 395 Broadway, subject to a mortgage to secure the principal sum of $750,000 and interest, and $105,000 face value of said bonds to be issued to Henry Corn for premises known as No. 476 Broadway, subject to mortgage to secure principal sums ag-

gregating $545,000 and interest. It is alleged that defendants Dowling and Barlow were negligent and remiss in the discharge of their duty as directors of the Improved Property Holding Company and that they failed to exercise the degree of care which an ordinarily prudent and diligent man would have exercised under like circumstances in voting for the purchase of premises 395 and 476 Broadway.

The various acts set forth in the complaint are alleged to have been wrongful and illegal, and it is averred were all parts of and constituted a wrongful and illegal conspiracy and scheme on the part of the defendants Corn, Ball, O'Donohue, and the General Realty & Mortgage Company to derive benefit and profit for themselves at the expense, regardless of the rights and interests, and in violation of the rights and interests, of said Improved Property Holding Company of New York, and in violation of the trust and confidence reposed in said Corn, Ball, and O'Donohue, as officers and directors of the Improved Property Holding Company. The defendant General Realty & Mortgage Company is alleged to have participated in the conspiracy, and as the tool and dummy of the defendants Ball and O'Donohue to have had no independent object and interest, but to have been completely subservient, at all the times and with respect to all the acts mentioned, to the said Ball and O'Donohue. It is also alleged that each of the defendants became liable to account for all moneys and property received by him or it by reason of the unlawful acts complained of, and that all of the defendants became jointly and severally accountable and liable to pay to the complainant as receiver of the Improved Property Holding Company full compensation for all loss and damages incurred by the Improved Property Holding Company and its creditors, by reason of the wrongful and illegal acts charged.

The complainant asks that it be adjudged that none of the $555,000 face value of the bonds, and none of the interest coupons thereto appertaining, issued for the acquisition of the premises No. 395 Broadway and No. 476 Broadway, are valid or enforceable obligations of the Improved Property Holding Company, or entitled to any part of the security of the lien of its mortgage dated May 24, 1909, except such of said bonds and coupons as have come into the hands of purchasers for a valuable consideration without notice. The complainant also asks that the defendants be compelled to account before a master and that each of them be decreed to pay to complainant all moneys paid to them by the Improved Property Holding Company as interest upon any of said $555,000 face value of the bonds alleged to have been wrongfully and illegally issued, and of all moneys paid to them for the redemption of any of the bonds, and of all moneys and property received by them, or any of them, in return for the transfer, hypothecation or other disposition by them, or any of them, of any of the bonds. Damages and an injunction are also asked.

The defendants deny various material allegations of the complaint and ask a decree establishing the validity of the bonds, $555,000 face value, issued by the Improved Property Holding Company to Corn and the General Realty & Mortgage Company.

William M. Chadbourne, of New York City (Henry L. Stimson, William M. Chadbourne, and Minturn De S. Verdi, all of New York City, of counsel), for appellant receiver.

Rosenthal & Heermance, of New York City (Clayton J. Heermance, of New York City, of counsel), for appellee Corn.

Guy Van Amringe, of New York City (George E. Hargrave, of New York City, of counsel), for appellee Barlow.

Lyttleton Fox, of New York City, for appellees Ball and others.

Roger Foster, of New York City, for appellee Dowling.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The receiver of an insolvent corporation sues to recover for the injury he

claims the defendants inflicted upon the Improved Property Holding Company of New York, hereinafter called the company, by their fraudulent and negligent conduct while acting as directors thereof. This is the first of the two suits and will be the first considered. The second suit is substantially between the same parties and substantially raises the same issues, so that the conclusion reached in the first suit will enable us readily to dispose of the questions involved in the second.

In the first suit the bill was dismissed because the court below did not believe that any conspiracy to defraud the company had been entered into by those of the defendants who were alleged to have conspired to bring about the unlawful result, and also because the court did not believe that defendants Dowling and Barlow (who were not charged with conspiracy or fraud) had not been guilty of a failure to exercise that reasonable degree of care which as directors of the company they were bound to give in the discharge of their duties.

The counsel for appellant argued in this court that the court below had misapprehended the nature of the suit and mistakenly assumed that conspiracy meant the same in civil suits as in the criminal law, and that this misconception of the District Judge as to the nature of the action pervaded his whole opinion. This error, it was said, went to the very root of the decision, and it was claimed that the court did not recognize the fact that the suit was based, not upon a conspiracy, but upon the action of the directors in selling to the company, upon terms unfair to it, properties in which they were personally interested. It is true the court below said:

"It cannot be too strongly insisted that this bill as against these defendants counts only upon a conspiracy."

It was also said:

"Taking the whole bill, it is impossible to say that its prayers can prevail against the defendants other than Dowling and Barlow, unless a conspiracy be shown."

[1, 2] There can be no question, we take it, but that an averment that acts were done in pursuance of a conspiracy does not change the nature of the civil action or add anything to its legal force and effect. In a criminal prosecution for conspiracy the unlawful combination and confederacy constitute the essential element of the offense rather than the overt acts done in pursuance of it. But that doctrine does not apply to civil suits for actionable torts. Green v. Davies, 182 N. Y. 499, 503, 75 N. E. 536, 3 Ann. Cas. 310. In the civil action, if the conspiracy is not made out, the allegation may be disregarded as surplusage. Perry v. Hayes, 215 Mass. 296, 102 N. E. 318. The rule is correctly stated in 8 Cyc. 647:

"If a plaintiff fail in the proof of a conspiracy or concerted design, he may yet recover damages against such of the defendants as are shown to be guilty of the tort without such agreement. The charge of conspiracy, where unsupported by evidence, will be considered mere surplusage, not necessary to be proved to support the action."

[3] If the court below misconceived the action, the opinion rendered distinctly makes it evident that, if it had apprehended the true nature

of the action, the decision would have been exactly the same as that which it in fact rendered; for the conclusions which the court reached expressly negatived the facts upon which the complainant would have had to rely to sustain a judgment in his favor under a correct understanding of the true nature of the action. The court below not only found that there was no conspiracy, but it found that there was no fraud, no intent to inflict a wrong, or to get an undue or an illegal profit. The court was convinced that the defendants honestly believed that the properties involved were worth the values which justified them in the action taken. The court also found that they exercised as directors the degree of care and caution which the law required. In view of these respective findings it is altogether beside the case to claim that the District Judge fell into an error which affected the judgment to the appellant's prejudice.

This brings us to a more particular consideration of the facts as we find them upon the record. The company over which the receiver was appointed is a hopelessly insolvent concern. It was organized in 1906 to acquire and hold improved business properties in the borough of Manhattan in the city of New York and to collect the rents therefrom. The defendants, Corn, Ball, Dowling, O'Donohue, and Barlow constituted its board of directors. Corn was made president. The company, immediately upon its organization, acquired from Corn nine leaseholds of office and loft buildings. These on June 1, 1906, it mortgaged to the Colonial Trust Company as trustee to secure an issue of $1,000,000. This mortgage is known as the "A" mortgage. All of these bonds were issued between June 1, 1906, and January 1, 1908. The amount of these bonds still outstanding is stated to be $637,000, the remainder of the issue having been redeemed. The company subsequently acquired four additional leaseholds. The thirteen leaseholds thus held were carried on the books of the company on May 1, 1909, at a total valuation of $3,582,232.55, subject to underlying mortgages aggregating $1,080,000 and to the "A" bonds, of which $910,000 were then outstanding. The directors believed that there was a considerable equity in the "A" leaseholds over the "A" mortgage. The "A" leaseholds, acquired from Corn, were prosperous and were operated by him under a contract with the Holding Company whereby he agreed to turn over to the latter a net sum therefrom of $250,000.

On May 26, 1909, the directors held a board meeting and adopted two resolutions. The first related to the purchase of the property known as 395 Broadway, in the borough of Manhattan and it reads as follows:

"Resolved, that this company purchase the premises No. 395 Broadway from General Realty & Mortgage Company, subject to an existing mortgage of $350,000 and interest for $450,000, payable in its proposed new issue of bonds, and that in addition thereto it sell to General Realty & Mortgage Company $300,000, par value, of said issue of bonds, at 80 per cent. of the face value of which $250,000 par value shall be purchased as soon as the interim certificates therefor are ready for delivery, and the balance on or before August 1, 1909."

The second related to the purchase of the property known as 476 Broadway, also in the borough of Manhattan, and it reads as follows:

"Resolved, that this company purchase the premises known as No. 474–476 Broadway, from Henry Corn, subject to $545,000 of mortgage and interest thereon for the sum of $105,000 payable in said bonds, and that Henry Corn be offered the option of purchasing $100,000 additional of said bonds at 80 per cent. of the face value, within one year, unless the company require the money sooner, in which case it may require Henry Corn to exercise the option on 30 days' notice."

On these two resolutions these suits are based. At the meeting at which the above resolutions were adopted it was also voted to authorize the execution of a mortgage dated May 24, 1909, and known as the "B" mortgage. This mortgage was given to secure the payment of bonds to the amount of $1,000,000, dated June 1, 1909, and payable June 1, 1924, and bearing interest at the rate of 6 per cent. The mortgage ran to the Empire Trust Company as trustee. And at the same meeting the board authorized the sale to the General Realty & Mortgage Company of $300,000 face value of "B" bonds at 80.

The theory of the bill of complaint is that the defendants Corn, Ball, and O'Donohue and the General Realty & Mortgage Company entered into a combination and conspiracy to defraud the company and to unload on the latter certain real estate alleged to have been unprofitable and rapidly deteriorating property; that the General Realty & Mortgage Company owned No. 395 Broadway, and that Ball and O'Donohue owned the majority of the stock of the company and controlled its affairs; that No. 395 Broadway produced in 1909 a net income of only $11,757.47, with no allowance for depreciation; that in exchanging it for $450,000 face value of "B" bonds the General Realty & Mortgage Company (which was Ball and O'Donohue) obtained an annual interest charge of 6 per cent. on that amount, or $27,000; that the defendant Corn owned No. 476 Broadway, and that it was producing a net income of about $2,326.68 a year; that in exchanging it for $105,000 of the bonds bearing 6 per cent. interest Corn obtained $6,300 a year. The bill charges that the loss suffered by the company by the taking over of these two properties is in excess of $300,000. At the time these properties were purchased the board of directors consisted of five persons, and Corn, Ball, and O'Donohue were three of the five and voted for the resolutions, and in doing so sold their own property to the company at grossly excessive prices, to their own great private advantage and with disastrous results to the corporation.

The theory of the complaint as respects the other two defendants, Dowling and Barlow, is materially different. They also were present at the meeting of the board of directors when these two properties were purchased by the company and they voted in favor of that action. It is not, however, claimed that either of the two was guilty of any fraud, or was engaged in or cognizant of any alleged conspiracy, or that their personal interests were adverse to or in conflict with those of the corporation of which they were directors, or that they were attempting to derive an individual benefit at the expense of their corporation. The charge against them is that they were negligent in the discharge of their duties as directors, that they voted to take over those properties without ascertaining the assessed value of the properties for the purpose of taxation, and that they failed to obtain an in-

dependent appraisal of each of them, and also failed to ascertain the net income of each for the period preceding the date of the resolution for their purchase.

[4] The acts of which the receiver complains have never been complained of by any of the stockholders of the insolvent company; neither have any of the bondholders complained, although the wrongs, if wrongs they were, were committed in May, 1909. The only complaint ever made is that made by the receiver representing the general creditors. The general creditors, however, have as much right as the stockholders or the bondholders to be protected against the fraud and negligence of the directors, and they have a right through the receiver to compel the directors to make good any loss which resulted from the purchase by the company of valueless parcels of real estate, if it appears that the loss was occasioned either by the fraud or the negligence of the defendants.

[5] In Koehler v. Black River Falls Iron Co., 2 Black, 715, 721, 17 L. Ed. 339 (1862), the Supreme Court of the United States laid down the principle that the directors of a corporation are trustees for the stockholders, and that if they secure to themselves advantages which are not common to all the stockholders they are guilty of a breach of trust which the courts of equity will remedy. While strictly speaking the directors are not trustees, not being clothed with legal title to the property which is vested in the corporation, they are the agents of the corporation, and because of that fiduciary relationship the dealings of a director in his own right with the corporation are regarded with great jealousy and subjected to close scrutiny. In Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 590, 23 L. Ed. 328 (1875), the Supreme Court, speaking through Mr. Justice Miller and referring to the necessity in all such cases of candor and fair dealing, says:

"If he should be a sole director, or one of a smaller number vested with certain powers, this obligation would be still stronger, and his acts subject to more severe scrutiny, and their validity determined by more rigid principles of morality and freedom from motives of selfishness."

[6] In the case at bar, with a board of directors limited to five, the position which the defendants held was one of great trust. They were clothed with power to manage the affairs of the corporation for the benefit of its stockholders and creditors. Their character as agents did not permit them to exercise their powers as directors against the interests of the corporation, its stockholders, or its creditors. In common with all directors, the defendants were bound to exercise good faith, and not to permit their official conduct to be swayed by their private interest. They could not derive any individual advantage at the expense of the corporation and to the injury of its interests.

[7, 8] The defendant Corn was the owner of No. 476 Broadway, and sold it to the Holding Company, although he was one of its directors. The General Realty Company was the owner of No. 395 Broadway, and sold it to the Holding Company, although two of the directors of the latter, defendants Ball and O'Donohue, were large stockholders in the General Realty Company. O'Donohue was a di-

rector of the latter company, and he and his family owned a little less than a half of its capital stock at the time of this sale; and Ball testified that he owned nearly half of the stock of the same company. Ball and O'Donohue were selling a property which they in part beneficially owned, and Corn was selling a property which he legally owned, to a corporation of which they were directors. Whether they had the right to do what they did depends on the circumstances of the case. A director is not disabled from selling his own property to his corporation, provided there are enough directors present who have no personal interest in the property and the sale is open, fair, and honest. See Broughton v. Jones, 120 Mich. 462, 79 N. W. 691. If it is not open, fair, and honest, the transaction can be set aside, and a director can be called upon to make good a loss inflicted upon the corporation by his breach of trust. There was in the case at bar, however, no concealment as to the real ownership of either of these properties. And we have not found any fraudulent conduct on the part of Corn, Ball, or O'Donohue, in respect to the sale. Ball testified that the result of the transaction, the sale of these properties to the company, was a very serious loss to himself; that his individual loss was in excess of $100,000. O'Donohue testified that the transaction had been a very heavy loss to him; and Corn testified that the transaction cost him about $600,000.

[9] We think upon the record that the complainant has failed to establish the fact which he alleged that the defendants sold their properties to the company at what could be regarded at the time as grossly excessive prices. Upon this question it is necessary to refer to the testimony of the experts, although we do not deem it necessary to consider their testimony at any great length. There were six of these witnesses, and one of them, Coleman, testified that he had bought and sold for his own account more real estate in the city of New York than any other private individual that he knew of, and mortgage loans running up into hundreds of millions of dollars had been made on his appraisals. He had been for years general appraiser for the Mutual and Equitable Life Insurance Companies, as well as real estate examiner for the state superintendent of insurance, and appraiser at large for the city of New York. It is quite unlikely that the opinion of any one else as to the value of the properties sold to the company could be more valuable, or that he would express upon the witness stand anything but his mature, deliberate, and honest opinion. This witness testified that on May 16, 1909, the date these properties were taken over by the company, he valued No. 395 Broadway as worth $1,113,000, and No. 476 Broadway at from $600,000 to $610,000. The valuation which the defendants had put upon the properties at the time of the transfer were for No. 395 Broadway $1,110,000, and for No. 476 Broadway $629,000. Another of the experts had placed an estimate of $1,200,000 upon one of the properties, and $650,000 upon the other. Another estimated one at $1,138,745, and the other at $636,625. It is true that the experts for the complainant place a much lower estimate upon the properties; but we see no reason why their opinions should be preferred over the opinions of the experts called by the defendants, and who had had a

wider experience, and whose fairness and impartiality we see no reason to suspect.

In this connection the fact is not to be overlooked that the Equitable Life Insurance Company had loaned on No. 395 Broadway the sum of $750,000, and had in 1906 renewed the loan for five years at 4 per cent. The Mutual Life Insurance Company had loaned $420,000 on No. 476 Broadway. These companies were as a matter of law permitted to loan up to and not exceeding two-thirds of the values of the properties upon which they loaned. If we assume that these mortgages were as large as the lenders could legally make them, the properties must, in the opinion of the insurance companies, have been worth at least $1,125,000 and $630,000 at the time the loans were made. The panic of 1907 led to a fall in the value of real estate, and these companies might not have loaned in 1909 the same amount on these properties they had loaned a few years before. But whether they would or not is not disclosed by the record.

In this connection it is observed that in 1902 when the General Realty & Mortgage Company acquired No. 395 Broadway, it paid for it $1,200,000, by taking it subject to a mortgage of $850,000, paying $250,000 in cash, and trading in the equity of the property No. 598 Broadway at a valuation of $100,000.

The complainant's counsel has laid great stress in the argument in this court upon the fact that according to the figures produced by the defendant's accountant the net income from No. 395 Broadway for the year ending January 31, 1909, after paying interest on the mortgage on the property, was only $11,757.47, and for the six years from January 31, 1903, to January 31, 1909, the average yearly income was $15,959.75. The average yearly income during the same period, computed from the tables of the accountant called by the complainant, was $13,145.75. The total rent roll for the year 1909 from that property was $84,330. The gross annual rentals from No. 476 Broadway were between $45,000 and $46,000 in 1909, and complainant asserts that the yearly net income was $2,326.68. The argument then is that there must have been fraud in this transaction because the company gave its bonds in exchange for No. 395 Broadway, the interest charge on the bonds being $27,000 per annum, while the net income the property returned was less than $12,000 for the year 1909; and that the company in like manner gave its bonds for No. 476 Broadway, obligating itself to pay an interest charge of $6,300 per annum, while the net income the property returned was something less than $2,400. We concede the force of the argument, although we do not accept it as conclusive. The testimony of the experts shows that it is not conclusive, and that the relation between the income of these properties and the interest on the bonds given in exchange for them is not decisive of the question of the real value of the properties, or of the good faith of the parties to the transaction.

The sale by Corn of No. 476 Broadway was not the only sale made by him to the company. Indeed, that company had been organized to take over his holdings. The nine leaseholds already mentioned, and which the "A" mortgages covered, originally belonged to Corn and were sold

by him to the company. He originally owned all the stock of the company, although subsequently dividing some portion of it among the other directors and bond purchasers. There is no allegation that there was anything irregular or fraudulent in the conduct of Corn as to the sale of the "A" leaseholds. It appears that shortly after the incorporation of the company in 1906 there was an issue of what is known as the "A" bonds, amounting to $1,000,000, to which reference has already been made. In 1909 funds were needed to pay off $100,000 of these bonds, which matured on June 1st of that year, and money was also needed in the construction of the buildings being erected on certain properties of the company. This bond issue was authorized to provide the necessary funds, and it was agreed to take over No. 395 and No. 476 Broadway, as the fee of these properties could be obtained and Mr. O'Donohue was not willing to go ahead and invest in bonds secured only by leaseholds. Mr. O'Donohue was not then in the company, but had expressed a willingness to go in if some fee properties were acquired; and upon its being agreed that such properties should be acquired he became a director and took a large issue of the bonds. On becoming a director he voted with the other directors for the issue of the "B" bonds and the purchase of the fee properties complained of in this suit. As he had agreed to take a large amount of the bonds, he became a director, so that he could look after his interests and "see how things were going to go." The fee properties then purchased were the only fee properties the company possessed.

At the time these transactions occurred Corn was known as about the most successful real estate operator in New York City. At the same time Dowling had the reputation of being one of the best informed real estate men in the city. Ball had a similar reputation. Dowling testified that:

> Ball did the largest business in loft buildings, in big deals, of any man in New York City; "he did more, sold more, and represented more purchasers than any other man" he knew, and he considered him "the best posted real estate broker in New York City on Broadway and the loft district."

He also testified that Ball was a man of the highest personal habits and character. He testified that:

> He thought "Corn was the best man on that class of property, of loft buildings, in the dry goods district; he built more of them, and had sold more of them, and had rented more of them, and knew more about renting conditions, than any other man in New York City. I went in and put my money in this company on the strength of his ability to rent those properties, as well as his ability to build them and handle them."

He stated that he had known O'Donohue for a great many years and that his reputation was first class.

Corn's testimony as to his own opinion concerning those transactions was as follows:

> "Q. Was there any doubt in your mind, at the time of the transfer of 395 and 476 Broadway, that the amount at which the company took these properties in was a fair valuation for the properties? A. No, sir. Q. Did you have any reason to believe that there was anything the matter with these properties, or the neighborhood in which they were located? A. Absolutely not. Q. Did you have any notice of any so-called exodus or migration? A.

Never. To the contrary, we had a lease made in 1909, which your books will show expired in the beginning of 1910, for that store in the basement, which was then leased for $9,000, and a new lease was made at an advance of $1,000 a year; $10,000. Q. Where was that? A. 474–476 Broadway. Q. When was that made? A. 1909, to take effect in 1910, and thereafter for five years. Q. Was that after the transfer of the properties to the company? A. Yes, sir. Q. At the time of the transfer of the properties to the company, was the building fully occupied? A. Absolutely complete; full tenancy. Q. Have you ever had vacancies there? A. Never had a vacancy there. Q. Can you tell us about what the net return was from the rents in that building? A. I think they were, as near as I can remember, somewhere between $45,000 gross and $46,000 per annum. Q. What were the net returns? A. About $7,000 to $8,000 a year; somewhere in between $7,000 and $8,000 a year net."

He was also asked:

"Q. At the time that you made this transfer to the company, Mr. Corn, did you consider that you were defrauding the company? A. It cost me about $600,000. Q. Is your answer 'No'? A. No. Q. At the time of this transfer did you conspire with any one to take any benefit from the Improved Property Holding Company? A. No, sir. Q. At the time of this transfer, Mr. Corn, did you have any intention of defrauding the Improved Property Holding Company, or any one? A. No."

Corn was asked whether he thought the building at No. 395 Broadway was a proper improvement for the neighborhood and answered in the affirmative:

"I think," he said, "that it is the finest structure to-day on Broadway, from Fourteenth street south to this building."

And at that time Corn bought some 1,500 or 1,600 additional shares of the stock of the company, paying $65,000 in cash for them, which brought his holdings of the stock of the company to nearly 9,000 shares. His faith in the "B" bond issue is shown by the fact that he exchanged at that time $100,000 "A" bonds for "B" bonds, although the "A" bonds were selling in the open market for 108, and at the time of this trial he still held every one of his bonds.

Barlow testified that he relied in part on what Corn, Dowling, and Ball told him. He relied particularly upon the judgment of Dowling, believing him to be a disinterested party. Barlow had personal knowledge of the construction of the building at No. 395 Broadway and after he knew that the purchase of that property was contemplated he made a special visit to the building to acquaint himself more fully as to its character. He made a like inspection of the property at No. 476 Broadway. His testimony shows that he believed at the time he voted for the resolutions of purchase that the buildings would within a reasonable time earn enough rentals to carry the charges; and it appears that before voting for the purchase he inquired as to the rentals that were being paid at that time. The idea was in his mind, as it was in the mind of the others, that No. 395 Broadway could be used as an office building, and that, so used, it would produce higher rentals than it was then bringing in. He thought it could be converted into an office building and that this would greatly raise the square foot rental.

Dowling has very extensive real estate holdings in the borough of Manhattan and has acted in numerous proceedings as an appraiser. He was familiar with No. 395 Broadway before it was proposed to

purchase it. He testified that he thought it one of the best-looking and best-built store and loft buildings he had ever seen, and believed it at the time to be worth somewhere from $1,125,000 to $1,150,000. He was thoroughly familiar with the property at No. 476 Broadway and thought it worth all the company paid for it.

Ball was interested in the company from its inception. He testified he believed the valuations at which No. 395 and No. 476 Broadway were taken over were very fair valuations, and that at the several meetings of the board that were held to consider the purchase of the properties the value to be placed upon them had been the subject of discussion, and that at the time of the purchase he knew of the appraisement of $1,155,000 placed by Coleman on No. 395 Broadway. He was asked if he ever had any idea of defrauding anybody, and replied he had not. As he was a director in both the company and the General Realty & Mortgage Company, he felt that he had special responsibilities resting on him. He testified that he had not expected at that time that there was going to be any dropping off of values on lower Broadway in the neighborhood of these properties.

O'Donohue testified that he believed the price of $1,110,000 for which No. 395 Broadway was to be taken over by the company was a fair valuation, and that he had taken steps at the time to inform himself respecting the matter, and that he had gone to Coleman, regarded by him as the best-qualified real estate expert in New York, and asked him to appraise the property personally for him, and that he was to a very large extent influenced by his appraisement of it at $1,155,000. He also testified, as respects No. 476 Broadway, he was influenced by the opinion entertained by Corn and Dowling as to its value. He thought the taking over of these properties was as fair and honest an arrangement as could be made, and that he had no idea that by entering into it he would be taking advantage of any of the stockholders.

The testimony also shows that the defendants believed the price at which the bonds were taken over was a very good price for the company. They were taken over at 80, and the company had been trying to sell them for that in the market, but without success.

We have read the voluminous record with care, and we are unable to discover that these defendants have acted fraudulently or negligently. Throughout they appear to us to have acted in these various transactions in good faith and with honest intentions. The fact that they were mistaken in some of their judgments and that losses resulted to the company from such mistaken judgment, does not, under the circumstances disclosed in the record, entitle the trustee to maintain this suit.

[10, 11] The rule is of course well established that directors of a corporation, when dealing with themselves, must be scrupulous to see that they do not involve the corporation in a transaction which is unfair or disadvantageous to it. They are certainly bound to look out for the interests of the corporation, and the burden is on them to show that the transaction was perfectly fair. In this case we think these defendants have sustained the burden which the law imposes upon them. In what they did they were not seeking to secure to themselves as in-

dividuals undue advantages at the expense of this company. If they had sought such private advantages, it would be the duty of this court to see that they made good the injury which they had caused.

This brings us to a consideration of the second suit. That was brought by the Empire Trust Company, as trustee under the mortgage made by the company (Improved Property Holding Company) on May 24, 1909, to which reference has already been made in this opinion. The receiver of the company, the mortgagor, appeared and answered, setting up the invalidity of certain of the bonds issued under the mortgage. The receiver relies upon the same facts to show the invalidity of the bonds that he relied upon in the first suit to show the personal liability on the part of the defendants in that suit. For reasons already stated, and which caused the receiver's failure to recover from the defendants in the first suit, his attempt to establish in the second suit the invalidity of certain of the bonds must also fail.

The decrees in both cases are affirmed.

UNITED THACKER COAL CO. v. RED JACKET, JR., COAL CO. et al.*

(Circuit Court of Appeals, Fourth Circuit. March 4, 1916.)

No. 1403.

1. BOUNDARIES ⟸1—DISPUTED BOUNDARIES—LOCATION—CONFLICTING CALLS.
It is the duty of the court in case of conflicting calls to reconcile them, if possible, to establish the true location of the lands in controversy; and where the lands were granted by the state as containing a specified number of acres, the intention of the state to convey such acreage should be considered.
[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 1; Dec. Dig. ⟸1.]

2. BOUNDARIES ⟸3(3)—MONUMENTS—COURSES AND DISTANCES.
A call for a monument will control a call for courses and distances.
[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 6–19; Dec. Dig. ⟸3(3).]

3. BOUNDARIES ⟸37(2)—DISPUTED BOUNDARIES—ACTIONS—EVIDENCE.
In a disputed boundary case, evidence *held* insufficient to show that a call for a survey of land belonging to a third person was a call for a monument, which would control the courses and distances and give defendants lands afterwards patented to complainant.
[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 186–189; Dec. Dig. ⟸37(2).]

4. BOUNDARIES ⟸9—DISPUTED BOUNDARIES—ACREAGE.
Where the calls for grants of land were confused, the acreage is an important factor.
[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 77–89; Dec. Dig. ⟸9.]

5. DEEDS ⟸90—PUBLIC LANDS ⟸186—CONSTRUCTION—GRANTS.
While a grant in case of individuals will be construed against the grantor, the rule is otherwise as regards a grant by the state.
[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 234–237, 247, 248; Dec. Dig. ⟸90; Public Lands, Cent. Dig. § 599; Dec. Dig. ⟸186.]

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6. BOUNDARIES ⟸47(1)—DISPUTED BOUNDARIES—WARNING OF DISPUTE.
That defendants, before plaintiffs purchased the lands in controversy, warned them that they claimed an overlap on such lands, will not defeat complainants' rights, or entitle defendants to their construction of the conveyances, the boundaries being in dispute.
[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 227; Dec. Dig. ⟸47(1).]

Appeal from the District Court of the United States for the Southern District of West Virginia, at Charleston; Benjamin F. Keller, Judge.

Bill by the United Thacker Coal Company, a corporation, against the Red Jacket, Jr., Coal Company, a corporation, and others. From decree for defendants, complainant appeals. Reversed and remanded, with directions.

This is an appeal from a decree of the District Court of the United States for the Southern District of West Virginia, entered on the 6th day of February, 1915, in a suit in equity in which the United Thacker Coal Company, a corporation, was complainant, and the Red Jacket, Jr., Coal Company, a corporation, and Richard Torpin, George Wharton Pepper, and Richard H. Harte were defendants. The appellant will hereinafter be referred to as complainant, and the appellees as defendants, such being the respective positions occupied by the parties in the court below.

The complainant, being in the actual possession of the tract of land which it claims, filed its bill to quiet its title against the claims of the trustees and their lessee, the Red Jacket, Jr., Coal Company, to any part of the tract. The bill avers that it is seised in fee simple and in the actual possession of the land in question. It states the grant of the same to the plaintiff by the state of West Virginia; avers that the trustees are claiming to own in fee simple a large part of said tract, containing by estimation about 250 acres; states that the claim of the trustees is derived under the grant of 440⅔ acres to J. D. Sargeant, and that they claim said tract interlocks with said 382½-acre tract; sets out the said mining lease of January 1, 1909, from the trustees to the Red Jacket, Jr., Coal Company, and avers said lessee claims the right under said lease to enter upon and mine the coal in said interlock; states that the trustees caused to be made what they claim to be a survey of said 440⅔-acre tract in such manner as to embrace about 250 acres of said 382½-acre tract, and caused to be marked the lines of such purported survey by painting trees along the same; avers that there is in fact no interlock between said 440⅔ acres and said 382½-acre tract; avers that the claims made by the defendants of the existence of said interlock, their survey of such an interlock by painting the trees on the ground, and their claim of title by the execution of said mining lease have cast a cloud upon the title of the plaintiff; and avers that said land is valuable alone for its coal and timber. The prayer of the bill is that the plaintiff be decreed to have title to its said tract of 382½ acres and be quieted in the possession thereof.

The trustees and the Red Jacket, Jr., Coal Company united in the answer filed to the bill. In paragraph 5 of the answer a motion is made to dismiss the bill for want of jurisdiction, and in paragraph 6 an alternative motion was made to transfer the cause to the law side of the court, if the motion to dismiss should be overruled. The defendants filed their joint and several answer, wherein they admitted the pendency of the suit of the state of West Virginia against the unknown heirs of John Green et al., the decree of sale therein on the 23d day of February, 1912, the sale thereunder and the purchase of the land in question by the complainant, the confirmation thereof by decree of April 20, 1912, and the conveyance pursuant thereto by S. B. Robertson, commissioner, to the complainant, but denied that the state of West Virginia had any authority, power, or jurisdiction to sell said land so claimed by the complainant, because she had at a former date and in a like proceed-

ing parted with all her right, title, and interest therein to one J. D. Sargeant, from and through whom the trustee defendants had acquired title thereto, and were still the owners thereof.

The owner alleged that on the 3d day of July, 1888, in a certain proceeding then pending in the circuit court of Logan county (of which Mingo county was then a part), having for its object the sale of certain lands for the benefit of the school fund, a decree was entered directing the commissioner of school lands to sell a tract of 440⅔ acres of land situate on Mate and Pigeon creeks; that, pursuant to said decree of sale, one L. D. Chambers, then the commissioner of school lands for Logan county, on the 2d of October, 1888, sold said land, and J. D. Sargeant became the purchaser thereof; that afterwards—that is to say, on the 3d day of October, 1888—a decree was entered in said cause confirming the sale so made to J. D. Sargeant, and directing the commissioner of school lands to execute to Sargeant a deed therefor by metes and bounds, conveying all the right, title, and interest of the state in and to said tract of land; that subsequently, and pursuant to said decree of confirmation, the said L. D. Chambers, commissioner of school lands as aforesaid, did, on the 5th day of October, 1888, grant said land by metes and bounds unto the said J. D. Sargeant by deed regularly executed, delivered, and recorded, and that the said Sargeant subsequently conveyed said land to Richard Torpin et al., trustees, which said trustees, by subsequent conveyances, transferred to the present trustees, who are now vested with the title to said land and are the owners thereof; and that they were the owners of said land at the time of the decree of sale entered on the 23d day of February, 1912, in the suit of the state of West Virginia against the unknown heirs of John Green et al., as well as on the 20th day of April, 1912, when the decree of confirmation was entered in said suit, and also upon the 2d day of May, 1912, when S. B. Robertson, commissioner of school lands, conveyed said 382½-acre tract unto the plaintiff.

The owner further alleged that the complainant, the United Thacker Coal Company, which purchased under the decree of February 23, 1912, its agent and attorney, Edward C. Lyon, the special commissioner making the sale, and the commissioner of school lands, S. B. Robertson, who conveyed the same unto the complainant, one and all knew that the state of West Virginia had theretofore sold said land, and that the same, or so much thereof as conflicted or interlocked with the land now claimed by the complainant, had been regularly conveyed by L. D. Chambers, commissioner of school lands of the county of Logan, unto the said Sargeant, and that the title so vested in him had been transferred to the trustee defendants in this cause, and notice of said prior sale and the present ownership of the land in question was given by the trustee defendants to the said court commissioner, the commissioner of school lands, the United Thacker Coal Company, and its agents, on the day of sale under the decree of February 23, 1912, and before said sale was made, and that the United Thacker Coal Company purchased said land with full knowledge of the claim and ownership of the defendant trustees.

The defendants further answered that they had entered upon said lands and caused the same to be surveyed, and had leased the same to their codefendant, the Red Jacket, Jr., Coal Company, and that they had leased the same to said company in conjunction with another and adjoining tract of land, upon which the Red Jacket, Jr., Coal Company had already entered and was mining coal, and that said Red Jacket, Jr., Coal Company, by virtue of said lease, has the right to mine and remove all the coal from the land in controversy.

A general replication was entered, and evidence, both oral and documentary, was introduced. The regularity of the proceedings by the state in both cases leading to the school land commissioner's deed, in the one case to the complainant, and in the other to the defendants, was admitted, and the location of the tract of land claimed by the defendants and described in the deed of October 5, 1888, from Chambers, school land commissioner, to J. D. Sargeant, became the sole issue.

The court below located the land of the defendants embraced in the Sargeant deed as contended for by the defendants, and entered a decree declaring

that the complainant had no title to or interest in any portion of the 440⅔-acre tract of land claimed by the trustee defendants, except a small portion thereof where the line of the Chambers deed crosses the Pat Hatfield tract, claimed by plaintiff under another and undisputed title, which portion was excepted in the decree by metes and bounds.

While, among other things, it is stated in the motion to transfer the case to the law side of the court that the bill does not show the plaintiff to be in possession of the land in controversy, yet there is no denial in the answer to the allegation in the bill that the complainant is in the actual possession of the 382½-acre tract.

Malcolm Jackson, of Charleston, W. Va., and C. W. Campbell, of Huntington, W. Va. (Edward C. Lyon, of New York City, Brown, Jackson & Knight, of Charleston, W. Va., and Campbell, Brown & Davis, of Huntington, W. Va., on the brief), for appellant.

John H. Holt, of Huntington, W. Va. (E. L. Greever, of Tazewell, Va., Maurice G. Belknap, of Philadelphia, Pa., Greever, Gillespie & Divine, of Welch, W. Va., and Holt, Duncan & Holt, of Huntington, W. Va., on the brief), for appellees.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

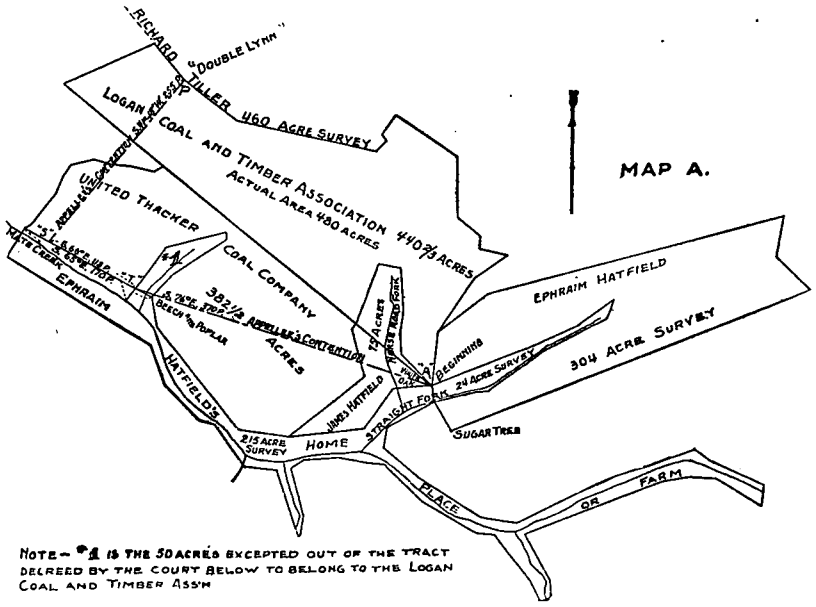
PRITCHARD, Circuit Judge (after stating the facts as above). At the trial the complainant introduced the original survey and plat of the 440⅔-acre tract, which are referred to and made a part of the grant of this tract from Chambers, commissioner, to J. D. Sargeant. This survey commenced at the white oak corner of the Preston Smith survey, and thence runs with three lines of that survey; then runs eight independent lines until it reaches the Richard Tiller survey; thence with that survey until it calls for "a stake on the line of a survey made for Ephraim Hatfield"; thence runs with one line of the Hatfield survey south 65° west 118 poles to a sugar tree; thence south 89° east 396 poles to the beginning. One of the Tiller corners called for is a "double lynn," being the corner from which the next call is "north 40° west 55 poles to a stake on a line of survey made for Ephraim Hatfield." By stipulation it was agreed that there was no controversy as to the location of the beginning corner, and none as to the location of the line for the beginning corner to around the double lynn corner.

Therefore the controversy as to the location of this tract begins at the double lynn corner. It was shown by the defendants that no survey made for Ephraim Hatfield could be reached by running from the double lynn on the bearing of north 40° west. This testimony is not controverted by the complainant. The defendants, therefore, insisted that the call "north 40° west 55 poles" should be rejected as a mistake; that the quadrant should be changed and the call made to read south 40° west, and the distance extended until it reached the Ephraim Hatfield survey of 215 acres. To adopt this contention would increase the distance from 55 poles to about 255 poles.

It is also insisted that the call to run with the Ephraim Hatfield survey "south 65° west 118 poles to a sugar tree" should be likewise treated as a mistake, and that after reaching the Ephraim Hatfield survey of 215 acres the line should run with this survey south 65° east 118 poles to a point, and thence to the beginning corner. It was shown

that there were a number of Ephraim Hatfield surveys in the vicinity of this tract, and also that the Ephraim Hatfield 304-acre survey had a line 65° west to a sugar tree. The complainant insisted that the Ephraim Hatfield 215-acre tract was not a monument call for any survey of this tract, and that there was nothing to change the calls and distances so as to reach and run with the Hatfield survey; that the line from the double lynn should continue to run with the Tiller survey "north 40° west 55 poles" as called for; that the next line should be south 65° west 118 poles as called for, and thence to the beginning corner. If this contention be correct it would locate the closing line of the 440⅔-acre survey in exact accordance with its location as shown in the grant to the plaintiff of the 381⅔-acre tract.

Maps were used by both parties at the trial which show the location of the Ephraim Hatfield 215-acre, 20-acre, 24-acre, and 304-acre surveys; also the Smith 103-acre survey and such lines of the Richard Tiller survey as relate to this controversy. The following map will show the contentions of the respective parties:



This map shows the 440⅔ acres in controversy, the 382½ acres south of and adjoining the 440⅔ acres, and the Ephraim Hatfield 215-acre, Ephraim Hatfield 24, and Ephraim Hatfield 304-acre surveys. The contention of the complainant is indicated by the solid lines around the 440⅔-acre tract. The contention of the defendants as to the location of this tract is indicated by the broken line, commencing at the "double lynn," at the northwest corner of the map, thence by two lines to the beginning. The first fifteen lines from the beginning corner above Horse Road fork to the double lynn corner are not in dispute.

While it appears that more than one survey was made for Ephraim

Hatfield in that community, and also that the calls in the deed from Chambers, commissioner, to Sargeant, do not specify the date of the deed of the Hatfield tract to which reference is made, nor the number of acres contained therein, nevertheless it is insisted by defendant that the testimony offered in their behalf affords a satisfactory explanation as to these points and tends strongly to fix the Ephraim Hatfield 215-acre home place as being the tract which is referred to in the deed from Chambers, commissioner, to Sargeant.

The defendants further insist that they have shown by the register of the land office of Virginia that prior to the separation of the state of West Virginia from Virginia only seven tracts had been granted to Ephraim Hatfield by the state of Virginia, to wit: 84 acres on Beech creek; 45 acres on Camp fork of Mate creek; 215 acres on Beech creek; 24 acres on Straight fork of Mate creek; 125 acres on waters of Mate creek; 215 acres on Mate creek; 70 acres on water of Mate creek. It was also shown by the witness Mannakee, a civil and mining engineer, that the 84 acres on Beech creek "was approximately three miles from the double lynn"; that the 45 acres on Camp fork of Mate creek "lies across the latter creek, from and to the south of the land in controversy"; that Murphy's branch, called for in the Ephraim Hatfield patent for 70 acres, "is in a southwesterly direction from the land in controversy, and about two miles distant"; that Meadow branch, referred to in the 125-acre patent to Ephraim Hatfield, "is southeast of the land in controversy and across Mate creek." This, according to defendants' contention, leaves only the 20 (not shown on the foregoing map), 24, and 215 acre tracts, which, by stipulation, were properly located on defendants' trial map, and from which it appears that the location of the 20 and 24 acre tracts is such that neither of them could be treated as the Hatfield survey mentioned in the Chambers deed, and therefore defendants insist that there is but one survey left, to wit, the 215–acre tract.

It is further insisted on behalf of defendants that the foregoing are the only surveys made for Hatfield prior to the separation of West Virginia from Virginia, except a 304-acre tract, which was never carried into grant; that the testimony of James French Strother covered all surveys and deeds made to Ephraim Hatfield for lands in the county of Logan, West Virginia, prior to the deed of Chambers, commissioner, to Sargeant; that his testimony shows surveys to Ephraim Hatfield for four other tracts, one being for 304 acres, which by stipulation between counsel is properly located on defendants' trial map, and it is insisted that the lands in controversy could not be located by adopting this tract as the monument called for; that one tract by Chambers, commissioner, to Ephraim Hatfield, containing 114 acres situate on Beech creek, which, according to the evidence of witness Mannakee, is not even a tributary of Mate creek, and is three miles distant from the double lynn, and two other tracts, one conveyed by Floyd Hatfield to Ephraim Hatfield, containing 50 acres, and one by Ephraim Hatfield, son of Wall Hatfield, containing 25 acres, are situated on Double Camp branch, which, according to the testimony of Mannakee, is across Mate creek and south of the lands in controversy; and that, therefore,

these tracts could not be employed for the purpose of locating the line in dispute.

It is therefore contended by the defendants that the Ephraim Hatfield 215-acre tract is the only one that can be properly located as the tract called for in the deed from Chambers, commissioner, to Sargeant; that this is the only survey made for Ephraim Hatfield to which the line from the double lynn could be run, so as to use all the calls in the Chambers deed and close the survey; that to run the Chambers deed as plaintiff contends no Ephraim Hatfield survey could be reached, and no running with any line thereof for 118 poles, as required by the next to the last call in the Chambers deed, is done, while, on the other hand, when the survey is made as contended by the defendants, changing the quadrant from the double lynn, the Hatfield survey is reached, and the next call thereafter of 118 poles along one of its lines is met and the line is closed, so as to meet the calls contained in the Sargeant deed.

It is admitted that by adhering strictly to the calls of its deed it would be impossible to locate the defendants' tract. That the surveyor was mistaken as to the course and distance of the lines that were obviously made by projection is shown by an examination of the plat as well as the map made by him at the time the land was conveyed by the state. Many of the calls, if taken literally, could not be employed so as to locate with anything like certainty the 440⅔-acre tract. This is due, no doubt, to a misconception of the surveyor as to the location of the adjacent tracts. These calls, if literally followed, could never be run so as to connect with the beginning corner.

[1-3] It is well settled that in a case like the one at bar it is the duty of the court, if possible, to reconcile any conflicting calls, so as to establish the true location of the lands in controversy. In view of the facts and circumstances of this case we deem it important to ascertain the intention of the grantor at the time these respective tracts were conveyed. The determination of this point will aid us materially in reaching a correct conclusion as to the true location of the same.

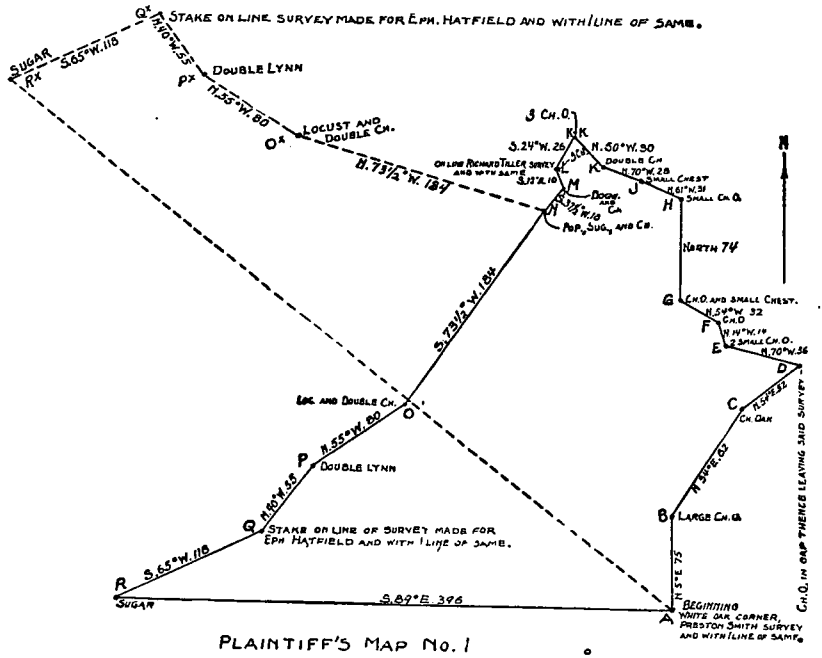
It appears that it was the purpose of the grantor to convey to the defendants and those under whom it claims a tract containing 440⅔-acres, and that it was also its purpose to convey to the complainant and those under whom it claims 382½ acres. It further appears that the state received pay for the number of acres contained in the respective grants. Under these circumstances, it becomes highly important in determining the true location of the lines in dispute to construe the calls of these deeds so as to conform, if possible, to the respective contracts for the sale of the same, and thus effectuate the purpose the grantor had in mind at the time.

It is fair to assume that the surveyor had copies of the respective Hatfield surveys at the time the survey of this tract was prepared. No evidence was offered as to what transpired at the time this survey was made, nor was there any evidence offered to show that the party who made the same ran the lines from the double lynn corner so as to reach the Ephraim Hatfield 215-acre survey. The testimony of the surveyor, chain carriers, or other parties present, would have

aided the court below very much in determining this question, but for some reason these parties were not called to testify, and there is nothing in the record to show why this evidence was not offered.

It also appears from the evidence of the surveyors and engineers who surveyed these tracts that no marks had ever been made on the double lynn as the corner of the 440⅔-acre survey to indicate that a line ran from that corner so as to connect with the Ephraim Hatfield 215-acre tract, and it further appears that after diligent search no evidence could be found of any line leading from the double lynn to the Hatfield survey in question, nor was there any evidence offered for the purpose of showing that a sugar tree had ever stood upon or along the Hatfield 215-acre survey. By an examination of the plat of the 440⅔-acre survey it is apparent that a mistake was made in platting the calls. For instance, the two calls "north 55° west 80 poles to a double lynn," and "north 40° west 55 poles to a stake in the line of a survey made for Ephraim Hatfield," should have been platted northwest instead of southwest.

The following is a map showing the original plat:



This plat shows the connection of the two southwest lines. Thus it appears that if the surveyor had correctly platted the calls of his survey the closing line would have been altogether different. It also appears that the surveyor made other mistakes in copying the Tiller survey, one of which is "north 73½° west 84 to a double chestnut and locust." This was copied in running the line of the 440⅔-acre tract so as to read south 73½° west 180 poles to the double chestnut and

locust," and shows as a southwest line. It is but natural that these mistakes should have misled the surveyor as to where he was, when by protraction he was on the Tiller line north 40° west 55 poles from the double lynn corner, and caused him to believe that he could connect with the south 65° west line of the Ephraim Hatfield 304-acre survey.

As we have stated, the location of this tract depends upon the location of a single line of the call of the survey. Upon the testimony as introduced in the court below it is contended by defendants that (a) "the Hatfield survey, being identified and its lines established, becomes a monument, to which course and distance must yield;" that (b) "in order to reach a monument or the line of another survey called for, the quadrant may not only be changed, but such is the practice in surveying."

In support of these propositions the defendants insist that it is shown by a preponderance of the evidence that the 215-acre Ephraim Hatfield tract was the one the surveyor had in mind at the time he wrote the call contained in the deed from Chambers, commissioner, to Sargeant, and, this tract being identified as the monument called for in the deed, the action of the court below in holding that the quadrant should be changed at the double lynn so as to reach the 215-acre Ephraim Hatfield tract was correct. It is well settled that, "in determining the boundaries of lands, ascertained objects, natural landmarks, and reputed boundaries control mere course and distance." Indeed, this is conceded to be the rule by counsel for the complainant.

However, counsel for complainant insist (a) that, if located as defendants contend, the land in controversy would not lie "on the ridge between Mate creek and Pigeon creek," as described by the surveyor who made the survey upon which the Sargeant deed is based, and (b) that there is no sugar tree corner in the Ephraim Hatfield survey of 215 acres, and that no line in that survey has a bearing of "south 65° west 118 poles to a sugar tree," and that in consequence no such line in that survey can be followed for a distance of 118 poles and bring the surveyor to a sugar tree therein, but that there is such a line in the Ephraim Hatfield survey of 304 acres, and, therefore, it must have been the survey intended; (c) that the true construction of the deed from Chambers commissioner to Sargeant is that the call running from the double lynn "north 40° west 55 poles" continues to run with the Tiller survey, because a few calls back the survey was made to run "with the same," and no indication prior to the call of the double lynn had been given that there was to be any departure therefrom.

From what we have said it will be seen that the one question to be determined is as to whether the 215-acre Hatfield tract is the boundary line or monument called for in the deed to Sargeant. If the evidence offered in the court below established this fact, then that court was justified in entering a decree in accordance with defendants' contention. However, to warrant a finding upon this point in favor of the defendants it must appear by a preponderance of the evidence that the 215-acre tract was the monument called for in the deed in question. In view of the fact that the surveyor failed to give the number of

acres, as well as the date of conveyance, when considered together with the fact that the "call" specified as being in the line with this tract was not found, and the further fact that the call did not terminate at the sugar tree, the adoption of this tract as the monument called for could only be done by conjecture. While, as we have stated, a monument, such as a line or natural object, will control course and distance, this is only true where the monument called for is capable of being definitely located.

In considering this question it should be borne in mind that the surveyor did this work by protraction, and it is admitted that he was mistaken as to many of the calls before he reached the double lynn. If, as insisted by counsel for defendants, the other tracts owned by Ephraim Hatfield are incapable of being located as the one the surveyor had in mind (which is apparently true), except as to the 304-acre tract, even this would not justify the court in adopting the line of the 215-acre tract solely because it happened to be nearer the double lynn than the other tracts. This is especially true inasmuch as this construction of the deed would necessarily result in depriving complainant of 250 acres of land which the school commissioner undertook to convey to it, and at the same time give the defendants 289 acres of land in excess of the amount which the school commissioner undertook to convey to Sargeant.

We are at a loss to know upon what theory this identification of the Ephraim Hatfield survey to which reference is made in the grant can be ignored and an entirely different survey substituted in its place for the purpose of locating this tract. In other words, if on account of the mistake of the surveyor the Tiller survey could not be connected with the Ephraim Hatfield 304-acre survey it could not be reasonably insisted that it should be run to the 215-acre Hatfield survey, with no means of identifying the same other than the fact that it happens to be situated near where the line in dispute begins. Even if it had appeared from the evidence that the surveyor made a mistake in attempting to connect the Tiller survey with the Ephraim Hatfield 304-acre survey, we know of no rule which would justify making a new survey by the adoption of a monument which could be identified as the one called for in the original survey, and this is especially true in view of the fact that there is a line in the 304-acre Hatfield tract which literally fulfills the terms of the only specific declaration as to the particular Hatfield tract which the surveyor had in mind at that time.

Whilst it is true, as contended by the defendants, that the contentions of neither of the parties can be sustained by a literal compliance with the calls of the grant from Chambers, commissioner, to Sargeant, nevertheless it is the duty of the court to adopt that theory which appears to be most reasonable, and at the same time give to each party, as near as may be, the amount of acreage purported to be conveyed in the respective grants.

[4, 5] Where, as in this instance, the calls of a deed are so vague and conflicting as to render it difficult to locate the same definitely, the acreage purported to be conveyed to the respective parties becomes an important, if not controlling, factor to be considered in determining

the true location of the lands in controversy. In the case of Field v. Columbet, 4 Sawy. (U. S. Cir. Ct.) 523, Fed. Cas. No. 4,764, Mr. Justice Field says:

"The designation of quantity, it is true, will not control the boundaries where they are clearly indicated. Yet, where there is doubt as to the true description, it may be properly considered."

Also in the case of Peebles v. Graham, 128 N. C. 227, 39 S. E. 25, the court says:

"The general rule is that the quantity of land stated to be conveyed will not be considered in determining location or boundaries. But there is a well-known exception to this rule that is as firmly established as the rule itself, and that is that, when the location or boundary is doubtful, quantity becomes important."

The Supreme Court of West Virginia, in the case of State v. Hicks, 85 S. E. 665, in referring to this question, said:

"Where the description of land by monuments, distances, or otherwise is vague and indefinite, by reason of conflicting lines, or omission of a line, or from any other cause, the statement of the acreage is an essential part of the description."

In the case of Kirkland v. Way, 3 Rich. (S. C.) 4, 45 Am. Dec. 752, the syllabus is in the following language:

Syl. 2: "Where the other terms of the description, contained in a conveyance of land, are not sufficiently certain and demonstrative, the number of acres is an essential part of the description."

The following West Virginia cases are also very much in point: Smith v. Owens, 63 W. Va. 60, 59 S. E. 762; Lovett v. West Virginia Central Gas Company, 73 W. Va. 40, 79 S. E. 1007.

In further support of complainant's contention it is insisted that in a suit like the one at bar the grant, having been made by the state, should be construed strictly against the grantee. It is the policy of the law in construing a deed as between individuals to construe the same strictly against the grantor, but in a suit like this, where the state is the grantor, the grant is to be construed strictly against the grantee. This policy is based upon the theory that the state is the trustee or guardian of the rights, emoluments, and prerogatives of the people as respects the public domain, the same being conferred upon the state by the people to be exercised and used for their benefit. Therefore, in a grant from the state, the rights and emoluments thus conferred should be safeguarded in construing the calls of the same so as to avoid the possibility of passing title to a greater number of acres than are specified in the grant, and to accomplish this it is the policy of the courts to hold the grantee strictly to the calls contained in the grant.

In the case of Shively v. Bowlby, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331, the Supreme Court, among other things, said:

"It was argued for the defendants in error that the question presented was a mere question of construction of a grant bounded by tide water, and would have been the same as it is if the grantor had been a private person. But this is not so. The rule of construction in the case of such a grant

from the sovereign is quite different from that which governs private grants. The familiar rule and its chief foundation were felicitously expressed by Sir William Scott: 'All grants of the crown are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants; and upon this just ground, that the prerogatives and rights and emoluments of the crown being conferred upon it for great purposes, and for the public use, it shall not be intended that such prerogatives, rights, and emoluments are diminished by any grant, beyond what such grant by necessary and unavoidable construction shall take away.' The Rebeckah, 1 C. Rob. 227, 230. Many judgments of this court are to the same effect. Martin v. Waddell, 16 Pet. 367, 411 [10 L. Ed. 997]; Central Transportation Co. v. Pullman's Car Co., 139 U. S. 24, 49 [11 Sup. Ct. 478, 35 L. Ed. 55]."

In the case of Charles River Bridge v. Warren Bridge et al., 11 Pet. 420, 9 L. Ed. 773, the Supreme Court also said:

"But we are not now left to determine, for the first time, the rules by which public grants are to be construed in this country. The subject has already been considered in this court, and the rule of construction, above stated, fully established. In the case of United States v. Arredondo, 6 Pet. 738 [8 L. Ed. 547], the leading cases upon this subject are collected together by the learned judge who delivered the opinion of the court, and the principle recognized that in grants by the public nothing passes by implication."

To the same effect is the case of Dubuque & Pacific Railroad Company v. Edwin C. Litchfield, 23 How. (64 U. S.) 66, 16 L. Ed. 500.

[6] It is also insisted by defendants that at the time this land was sold to complainant a notice signed by Torpin, Pepper, and Harte, trustees, by counsel, addressed to John W. Mason, Jr., special commissioner, and S. B. Robertson, commissioner of school lands of Logan county, and to all bidders and purchasers, which purported to give warning by stating that the tract of 382½ acres then about to be sold under decree was covered in whole or in part by the 440⅔-acre tract claimed by such trustees, and is the tract involved in this suit.

This notice could not in any way affect the question now before us. It certainly could have no bearing as to the true location of the tract claimed by defendants. These grants must be construed in the light of the calls contained therein, and a notice of this character could be of no value in construing the same.

When we consider the real point in this controversy, in the light of the facts and circumstances, and apply the rules of construction as announced by the courts, we are impelled to the conclusion that the court below erred in construing the calls of defendants' deed, and that the calls of the same should be construed so as to conform to the contention of the complainant as indicated on the map that is made a part of this opinion. As a result of this conclusion the acreage proposed to be conveyed to the respective parties is increased, rather than diminished, thus resulting, as we think, in no injustice to either party.

For the reasons stated, the decree of the court below is reversed, and the cause will be remanded for further proceedings in accordance with the views herein expressed.

Reversed.

RATCLIFF v. CLENDENIN.

(Circuit Court of Appeals, Eighth Circuit. February 24, 1916. On Motion for Rehearing, May 1, 1916.)

No. 4466.

(Syllabus by the Court.)

1. BANKRUPTCY ⊂=302(1)—ADMINISTRATION OF ESTATE—ACTIONS BY TRUSTEE—PLEADING.

Averments, in a suit in equity by the trustee in bankruptcy of a corporation against a stockholder to recover dividends paid to the latter, that the creditors represented by the trustee held claims incurred by the corporation when the funds of the company were paid over to the stockholder without any consideration, that the corporation was insolvent when those payments were made, and the stockholder knew it, that the insolvency was unknown to the creditors, and that other unknown sums had been misappropriated to the benefit of the stockholder in the same way, stated a complete cause of action in equity for the enforcement of the trust, the discovery of the unknown amounts, and the recovery by the trustee of both the known and the unknown sums.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 456; Dec. Dig. ⊂=302(1).]

2. CORPORATIONS ⊂=80(10)—STOCKHOLDERS—SUBSCRIPTIONS—RESCISSION OF PURCHASE.

A stockholder who is induced by fraud to purchase the stock of a corporation, and who for years, while the corporation is a going concern and is incurring debts to creditors which still remain unpaid, receives dividends or income from his purchase of the stock, is estopped, after the corporation becomes insolvent and is adjudged a bankrupt, from rescinding his purchase.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 262; Dec. Dig. ⊂=80(10).]

3. CORPORATIONS ⊂=153—STOCKHOLDERS—RECOVERY OF DIVIDENDS—SUBSEQUENT CREDITORS.

Creditors whose claims were incurred by the corporation subsequent to the payment of dividends sought to be recovered of a stockholder have no equity therein superior to the equity of the stockholder who received the payment in good faith, and they may not recover of him.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 579, 580; Dec. Dig. ⊂=153.]

4. CORPORATIONS ⊂=537—"SOLVENCY"—TEST—ABILITY TO PAY PAR VALUE OF STOCK IMMATERIAL.

The test of the "solvency" of a corporation is the sufficiency of its assets and its ability to pay its liabilities therewith, and the sufficiency of its assets and its ability to pay its stockholders the par value of their stock in addition to the payment of its debts are irrelevant to the issue of its solvency.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2150; Dec. Dig. ⊂=537.

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

5. CORPORATIONS ⊂=544(2)—TRUST FOR CREDITORS AND STOCKHOLDERS WHEN INSOLVENT—NONE WHILE SOLVENT.

A solvent corporation, like a solvent individual, holds its property free from any enforceable trust or equitable lien in favor of its creditors. It

is only when it becomes insolvent that such a trust or lien in favor, first of creditors, and second of stockholders, attaches to its property.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2162; Dec. Dig. ⊂=544(2).]

6. CORPORATIONS ⊂=425(5)—POWERS AND LIABILITIES—REPRESENTATION BY OFFICER—ACQUIESCENCE IN THE APPARENT AUTHORITY OF SINGLE OFFICER.

Where, without challenge by officers or stockholders of a corporation, an officer thereof has been permitted by the common consent of all other officers and stockholders, and by their acquiescence, to exercise, at his will, all the powers of the corporation, and to conduct all its business for years, they and the corporation are estopped from denying, to the prejudice or injury of innocent parties who have relied on the apparent authority of such an officer to act for and as the corporation, that he had the actual authority so to do.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1700; Dec. Dig. ⊂=425(5).]

7. CORPORATIONS ⊂=153—DIVIDENDS WRONGLY PAID—RIGHT OF ACTION BY TRUSTEE.

A trustee in bankruptcy cannot recover dividends or income paid by a corporation, not at all out of profits, but entirely out of capital, to a stockholder as income on his investment in the stock when the corporation was not insolvent, was a going concern when the payments were made, and the stockholder received them in good faith in the full belief that the corporation was solvent and prosperous and that he was lawfully entitled to the payments.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 579, 580; Dec. Dig. ⊂=153.]

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

Suit in equity by John W. Clendenin, trustee in bankruptcy for the Nevling Elevator Company, against J. M. Ratcliff. From a decree for complainant, defendant appeals. Reversed and remanded, with instructions to render decree of dismissal.

T. A. Noftzger, of Wichita, Kan. (George L. Hay, of Kingman, Kan., on the brief), for appellant.

Charles G. Yankey, of Wichita, Kan. (R. R. Vermilion, Earle W. Evans, J. G. Carey, R. L. Holmes, and W. E. Holmes, all of Wichita, Kan., on the brief), for appellee.

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

SANBORN, Circuit Judge. John W. Clendenin, trustee in bankruptcy of the Nevling Elevator Company, which was adjudged bankrupt on August 6, 1912, brought a suit in equity and recovered a decree for $4,500, interest thereon, and costs against J. M. Ratcliff for amounts paid to him as one of its stockholders by the Elevator Company in 1909, 1910, and 1911.

[1] The first specification of error is that the court overruled Ratcliff's demurrer to the complaint on the ground that it disclosed the fact that he had an adequate remedy at law. But the suit was brought against Nevling, the president and manager of the corporation, and also against Ratcliff. The trustee alleged that some of the creditors

who have claims against the estate of the bankrupt were continuously its creditors during the years 1909, 1910, and 1911, that the corporation was continuously indebted during those years to an amount in excess of $35,000 and was continuously impairing its capital, that the creditors were ignorant of these facts and believed it to be solvent and prosperous, while it was in truth insolvent for years prior to 1912, that Nevling and Ratcliff, who were stockholders and directors of the corporation with knowledge of its insolvency, conspired together to take the funds of the corporation and to pay them to Ratcliff without any consideration, that pursuant to that conspiracy they paid over to him out of the funds of the corporation $4,500 during the years 1909, 1910, and 1911, and that at other times they paid out of the funds of the corporation to Ratcliff additional and further sums the amounts of which were unknown to the plaintiff, and the trustee prayed that the defendants might be required to set forth what sums belonging to the corporation had been transferred to Ratcliff, and to account for and pay over these sums to the trustee. The property of an insolvent corporation constitutes a trust fund held by its officers, first for its creditors, and second for its stockholders, and the execution of a trust and the following and administering of trust funds are immemorial heads of equity jurisprudence. The allegations that the existing creditors still hold claims which were owing to them when the funds of the corporation were paid over to Ratcliff without consideration, that the corporation was insolvent when these payments were made and Ratcliff knew it, that the insolvency was unknown to the creditors, and that other unknown sums had been misappropriated to the benefit of Ratcliff in the same way, stated a complete cause of action in equity for the enforcement of the trust, the discovery of the unknown sums, and the recovery by the trustee of both the known and the unknown sums. There was no error in overruling the demurrer to this complaint. Hayden v. Thompson, 71 Fed. 60, 62, 63, 17 C. C. A. 592, 594, 595.

[2] The second specification is that the court erroneously struck out the counterclaim of the defendant Ratcliff. Ratcliff made a separate answer. He denied the alleged conspiracy, denied the averments of the complaint as to the existence and continuance of the claims of the creditors of the corporation, denied that he was ever a director or officer of the Elevator Company, denied that he knew anything about its insolvency, or the impairment of its capital, or its financial condition, prior to March, 1912, and alleged that he always supposed and believed it to be solvent and prosperous; and he alleged in his answer that this was his relation to the corporation. Nevling was its president and general manager; Ratcliff was a farmer and stockman, who knew nothing about the financial condition of this or other corporations, and who did not know how to examine their financial condition. Nevling told him that the Elevator Company was solvent and prosperous; that if he would put $25,000 into it he (Nevling) and the Elevator Company would guarantee him interest on it at 10 per cent. per annum; that in reliance upon these representations he paid into the corporation, on or about July, 1908, $25,000, and received for it certificates for 250 shares of its stock, of the par value of $100 per share; and

that he received the sums alleged in the complaint, aggregating $4,500, during the years 1909, 1910, and 1911, in payment of the interest or income on his investment in good faith, in the belief that the Elevator Company was solvent and prosperous, and that in law and equity he was entitled to receive these payments.

His counterclaim consisted of a restatement of his investment of his $25,000 in reliance upon the statements and representations of Nevling, an averment that he first learned of the insolvency of the Elevator Company in March, 1912, an offer to bring into court and surrender his certificates of stock and his interest in the capital stock of the company, and a prayer for an equitable lien on the assets of the Elevator Company for the difference between the $4,500 which he received from it and the $25,000 he paid to it. But he bought his stock in July, 1908, he first discovered the insolvency of the Elevator Company in March, 1912, that company was adjudged bankrupt on August 6, 1912, and the first appearance of his attempt to rescind his purchase of his stock in July, 1908, was in March, 1913, about 4½ years after his purchase. Meanwhile the Elevator Company had incurred many of the claims now represented by the trustee. Ratcliff's attempt to rescind his purchase of his stock, though induced by the fraud of the Elevator Company, or of its president, comes too late, and there was no error in striking his counterclaim from his answer. A stockholder who is induced by fraud to purchase the stock of a corporation, and who for years, while the corporation is a going concern and is incurring debts to creditors, which still exist, receives dividends or income from his purchase of the stock, is estopped, after the corporation becomes insolvent, has ceased to be a going concern, and is adjudged a bankrupt, from rescinding his purchase of the stock against a protest of its creditors. Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203; Webster v. Upton, 91 U. S. 65, 23 L. Ed. 384; Sanger v. Upton, 91 U. S. 56, 23 L. Ed. 220; Chubb v. Upton, 95 U. S. 665, 667, 24 L. Ed. 523; Scott v. Deweese, 181 U. S. 202, 213, 21 Sup. Ct. 585, 45 L. Ed. 822; Lantry v. Wallace, 182 U. S. 536, 548, 549, 554, 21 Sup. Ct. 878, 45 L. Ed. 1218; Rand v. Columbia National Bank, 94 Fed. 349, 351, 36 C. C. A. 292; Scott v. Latimer, 89 Fed. 843, 33 C. C. A. 1.

[3] Finally, it is specified as error that the court rendered a decree against Ratcliff for the $4,500 which he received from the Elevator Company, interest upon it, and the costs of the suit. This was a suit in equity by the trustee in bankruptcy of the Elevator Company to recover this $4,500 of Ratcliff, a stockholder, in the right of creditors of the corporation who held claims against the corporation which were incurred before that $4,500 was paid out, on the theory that this $4,500 was money of the insolvent corporation which was held by its officers in trust for its creditors when it was paid to Ratcliff, and that Ratcliff knew this fact and procured the payment of this money to him without giving any consideration therefor. Facts essential to this cause of action which the trustee pleaded were, first, that there were creditors of the Elevator Company represented by the trustee who held claims allowed against the estate of the bankrupt which were incurred by the corporation before at least some of this $4,500 was paid over to Ratcliff, for creditors having claims which

accrued after those payments have no equity in any of this $4,500 superior to the equity of Ratcliff. Hamilton v. Menominee Falls Quarry Co., 106 Wis. 352, 81 N. W. 876, 879. But the answer of Ratcliff denied that there were any claims of any creditors which accrued before all of the $4,500 was paid over to him by alleging that he had no knowledge or information sufficient to form a belief on that subject. The burden, therefore, was on the plaintiff to prove its averment of this essential fact and it made no proof thereof whatever. In the second place, the trustee averred that the Elevator Company was insolvent when this $4,500 was paid, and that this money was a fund held in trust for the creditors of the corporation; that Ratcliff knew this fact and obtained the money without any consideration. Ratcliff denied these averments in his answer, and the burden was on the plaintiff to prove them, and there is no substantial proof of any of them. On the other hand, the evidence established these facts:

The Nevling Elevator Company was a corporation owned and operated by a single man, Nevling, who was the president and manager thereof, and who conducted all its affairs without any action of any board of directors, or of any other person, except those persons whose action he directed. He continued in absolute control and management of its affairs from the inception of the transaction related in this suit in July, 1908, until the adjudication in bankruptcy in August, 1912. About July 7, 1908, he induced Ratcliff to pay into the corporation $25,000 and to take 250 shares of its stock by representing to him that the corporation was solvent and prosperous, and by either stating, as Nevling testifies, or by guaranteeing by the corporation and by Nevling, as Ratcliff testifies, that Ratcliff should receive from this investment interest at 10 per cent. per annum on his $25,000. In payment of this interest or income on Ratcliff's investment Nevling paid over to him out of the funds of the corporation the $4,500 here in issue in the following amounts: On October 13, 1909, $1,500; on January 24, 1910, $1,000; on July 3, 1911, $1,000; on July 21, 1911, $500; on August 26, 1911, $500. During the time of these payments the capital of the corporation varied from about $31,000 to $41,000 On June 30, 1907, the assets of the company were $58,675, its liabilities $38,908.73, its assets exceeded its debts $19,766.33, and its capital was impaired $11,933.67; on June 30, 1908, its assets were $47,257.99, its liabilities $33,165.87, its assets exceeded its debts $14,092.12, and its capital was impaired $21,107.88; on July 6, 1909, its assets were $48,142.63, its debts were $27,557.07, its assets exceeded its debts $20,585.56, and its capital was impaired $20,414.14; on June 30, 1910, its assets were $57,922.79, its liabilities $45,368.71, its assets exceeded its liabilities $12,554.08, and its capital was impaired $28,445.92; on June 30, 1911, its assets were $58,454.28, its liabilities were $54,362.25, its assets exceeded its liabilities $4,092.03, and its capital was impaired $36,907.97. During all the time until its adjudication in bankruptcy the corporation was a going concern. At the first annual meeting of the corporation after Ratcliff made his investment Nevling made him a director of the corporation, but Ratcliff was not present, did not know that he was made a director until late in the year 1912, and never

accepted the office, or acted as a director or other officer of the corporation. During all the time he was receiving the $4,500 he believed the Elevator Company to be solvent and that he was lawfully entitled to the payments he received. He never received any notice or knowledge to the contrary until months after the last payment to him, and he received all the payments in good faith.

[4] The result of these established facts is that, as the presumption was that the company, which was a going concern, was solvent, the plaintiff failed to prove that it was insolvent when any part of the $4,500 was paid over to Ratcliff, for the test of the insolvency of a corporation is the sufficiency of its assets and its ability to pay its debts, and the sufficiency of its assets and its ability to pay its stockholders the par value of their stock in addition to the payment of the debts of the corporation are irrelevant to the issue of insolvency. Hamilton v. Menominee Falls Quarry Co., 106 Wis. 352, 81 N. W. 876, 878; Banta v. Hubbell, 167 Mo. App. 38, 150 S. W. 1089, 1092; State of Kansas v. Myers, 54 Kan. 206, 217, 38 Pac. 296.

[5] As the plaintiff failed to prove that the Elevator Company was insolvent when the $4,500 was paid to Ratcliff, it failed to establish the fact that that sum or any part of it was ever charged with any enforceable trust or equitable lien in favor of any creditor of the corporation or in favor of the trustee in bankruptcy. A solvent corporation, like a solvent individual, holds its property free from any enforceable trust or equitable lien in favor of its creditors. It is only when it becomes insolvent that such a trust or lien in favor, first of its creditors, and second of its stockholders, attaches to its property. Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 383, 385, 14 Sup. Ct. 127, 37 L. Ed. 1113; McDonald v. Williams, 174 U. S. 397, 403, 19 Sup. Ct. 743, 43 L. Ed. 1022; Lawrence v. Greenup, 97 Fed. 906, 908, 909, 38 C. C. A. 546, 549; Great Western Min. & Mfg. Co. v. Harris, 128 Fed. 321, 331, 63 C. C. A. 51, 61; New Hampshire Sav. Bank v. Richey, 121 Fed. 956, 960, 58 C. C. A. 294, 298. So it was that the plaintiff failed to prove any of the essential elements of the cause of action he pleaded, and the record discloses no equity in his favor which entitles him to recover of the defendant.

[6] Counsel for the trustee, however, argue that there was no formal declaration of a dividend, that no other stockholder had an income like that of the defendant paid to him on his investment, that section 1741 of the General Statutes of Kansas of 1909 provides that the directors of a corporation shall "declare and make such dividends of the profits from the business of the corporation as they shall deem expedient, or as the by-laws may prescribe," that this is in legal effect to prohibit and the general law of the community forbids the payment of dividends out of capital, that the capital of the Elevator Company was impaired when the payments were made to Ratcliff, that there were no profits, and that for these reasons the payment of the $4,500 was unlawful. The answers to this contention are many and conclusive. If the contention stated a cause of action, it was a cause of action that was neither pleaded nor tried in the court below. It does not state a cause of action in favor of any creditor whom the

trustee represents, because it fails to plead that any such creditor has any claim which accrued before the $4,500 was fully paid, or that the company was insolvent when that payment was made. Hence it discloses no injury to and raises no equity in favor of any creditor superior to the evident and persuasive equity of the defendant. If any injury resulted to any one interested in the property of the corporation when the payment was made it must have been to Nevling, practically the only other stockholder, and he certainly has no equity in this $4,500 superior to that of Ratcliff, and, if he has, the trustee does not hold that equity and does not represent Nevling's right to enforce it. Nor is it material that there was not a formal declaration or resolution of dividend, because stockholders and officers of this corporation by common consent to and acquiescence in the exercise of all the powers of the corporation, and the conduct of all the business of the corporation by Nevling for four years, had estopped themselves from challenging his authority to make the agreement with Ratcliff and to pay him the $4,500 pursuant thereto, whether that payment was a payment of interest on his investment or of a dividend on his stock. Where, without challenge by officers or stockholders of a corporation, an officer thereof has been permitted by the common consent of all other officers and stockholders, and by their acquiescence, to exercise all the powers of the corporation, and to conduct all its business for years, they and the corporation are estopped from denying to the prejudice and injury of innocent parties who have relied on the apparent authority of such an officer to act for and as the corporation, that he had the actual authority so to do. Jenson v. Toltec Ranch Co., 174 Fed. 86, 89, 90, 98 C. C. A. 60, 63, 64; Galbraith v. First Nat. Bank of Alexandria, Minn., 221 Fed. 386, 391, 137 C. C. A. 194, 199.

[7] And, finally, the general principles of equity jurisprudence forbid the recovery of this $4,500 of Ratcliff, because his equity in it is superior to that of the trustee or of any of the creditors whom he represents. Ratcliff invested his $25,000 in the Elevator Company in good faith, in the justifiable belief that the corporation, which was a going concern, was solvent and prosperous, and that he should receive from it an income of 10 per cent. per annum on his investment. The corporation continued to be a going concern, apparently solvent and prosperous, until more than six months after the last of the $4,500 was paid to Ratcliff. He received the payments in good faith, without notice that they were wrongfully made, and in the full belief that whether they were interest or dividends he was lawfully entitled to them. "A court of equity can act only on the conscience of a party. If he has done nothing that taints it no demand can attach upon it so as to give any jurisdiction." Boone v. Chiles, 10 Pet. 177, 210, 9 L. Ed. 388. Ratcliff has done nothing that taints his conscience and no demand attaches upon it.

Where equities are equal the defendant prevails. Ratcliff was induced by Nevling to put $25,000 into the Elevator Company, and, in any event, can receive nothing on account of that investment but the $4,500 which has been paid to him as income. He must lose more

than $20,000. There is no proof that any creditor has any such equity. A trustee in bankruptcy cannot recover dividends or income paid by a corporation, not at all out of profits, but entirely out of capital, to a stockholder as income on his purchase of the stock, when the corporation was not insolvent and was a going concern at the time of the payments, and the stockholder received them in good faith in the full belief that the corporation was solvent and prosperous, and that he was lawfully entitled to the moneys he obtained. McDonald v. Williams, 174 U. S. 397, 398, 407, 408, 19 Sup. Ct. 743, 43 L. Ed. 1022; Lawrence v. Greenup, 97 Fed. 906, 909, 38 C. C. A. 546, 549; Great Western Min. & Mfg. Co. v. Harris, 128 Fed. 321, 332, 63 C. C. A. 51, 62.

Let the decree below be reversed, and let the case be remanded to the court below, with instructions to render a decree of dismissal of the complaint on the merits.

On Motion for Rehearing.

Counsel for the trustee, Clendenin, present a motion for a writ of certiorari to add to the transcript in this cause a record to the effect that there were creditors of the Nevling Elevator Company before and at the time that the payments were made to Ratcliff. If, however, this evidence were produced and made a part of the record in this court, the second ground for the decision, and that was the main ground, that the trustee averred that the Elevator Company was insolvent when this $4,500 was paid, and that this money was a fund held in trust for the creditors of the corporation, that Ratcliff knew this fact and obtained the money without any consideration, and that Ratcliff denied these averments, and the evidence established the fact that the company was not insolvent, and that Ratcliff did not know its condition when he received the statements, would still be fatal to the motion for a rehearing in this case.

For this reason the motion for a writ of certiorari must be denied, and because the second ground for the decision, which is stated above, is still conclusive, the motion for a rehearing is denied.

PENINSULA BANK OF WILLIAMSBURG, VA., et al. v. WOLCOTT et al.

In re RICHARDSON et al.

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

No. 1368.

1. BANKRUPTCY ⟸166(3)—DEEDS OF TRUST—VALIDITY.

Where a new note secured by a deed of trust was taken by a bank in part satisfaction of an old debt, the bank does not obtain priority by the deed of trust; it having knowledge that the debtor, who was adjudged a bankrupt in less than four months, was then in failing circumstances.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250, 251, 255, 257; Dec. Dig. ⟸166(3).]

2. BANKRUPTCY ⇐166(3)—BONA FIDE PURCHASERS—NOTICE OF INSOLVENCY OF MAKER.

Where a bank in due course of business, without notice that the makers were insolvent, took notes secured by a deed of trust, the fact that the makers were adjudged bankrupts within less than four months does not impair the security.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250, 251, 255, 257; Dec. Dig. ⇐166(3).]

3. MORTGAGES ⇐258—BONA FIDE HOLDER OF NOTES—PRIORITY.

A bona fide holder of notes secured by deed of trust takes the deed freed from defenses which might have been urged against the original mortgagee and holder of the notes; the deed being treated as the notes.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 689–691; Dec. Dig. ⇐258.]

4. BANKRUPTCY ⇐299—ACTIONS—NECESSARY PARTIES—WHO ARE.

The bankrupts, who were indebted to another firm, executed notes secured by a deed of trust. These notes were indorsed by a single member of the creditor firm, and were negotiated with two different banks, one of which banks already held a note of the bankrupts, which the creditor firm had indorsed to it. *Held*, that the court of bankruptcy had jurisdiction of a proceeding to set aside the deed of trust, though all members of the creditor firm were not parties; only that member who indorsed the second note being a party.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 448; Dec. Dig. ⇐299.]

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk, in Bankruptcy; Edmund Waddill, Jr., Judge.

In the matter of the bankruptcy of R. H. Richardson and others, partners trading as R. H. Richardson & Sons, and as individuals. Proceeding by Edward W. Wolcott and others, trustees of the bankrupt's estate, against the Peninsula Bank of Williamsburg, Va., and others, to set aside a deed of trust as a preference. The referee found the trust deed to be a preference, and from a decree upholding his finding the defendants appeal. Modified.

Frank Armistead, of Williamsburg, Va., for appellants.

Sidney J. Dudley, of Hampton, Va., and Harry K. Wolcott, of Norfolk, Va. (Wolcott, Wolcott, Lankford & Kear, of Norfolk, Va., on the brief), for appellees.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. On April 2, 1913, R. H. Richardson & Sons, were adjudged involuntary bankrupts. In the course of the proceedings an attack was made by creditors on a deed of trust in the nature of a mortgage of a tract of land executed by Richardson & Son to secure notes now held by the Bank of Williamsburg for $1,800 and by the Peninsula Bank of Williamsburg for $1,000. The referee reported the deed of trust altogether invalid as an illegal preference, and this finding was confirmed by the District Court.

Richardson & Sons were contractors and bought lumber from Bozarth Bros., lumber dealers, for which they were indebted on December

30, 1912, to the amount of $2,800. This debt was represented by an open account of $800 and a note or notes given by Richardson & Sons to Bozarth Bros. for $2,000, and indorsed by them to the Peninsula Bank. At this time Richardson & Sons had become involved by reason of the establishment in legal proceedings in a state court of a debt of $9,000 against them in favor of William H. Hayden, Jr. This adjudication however had not been so entered on December 30, 1912, as to become a judgment lien on the real estate of the members of the firm of Richardson & Sons. In this condition of its affairs, R. H. Richardson, a member of the firm, executed a deed of trust to Thos. W. Shelton, trustee, dated December 30, 1912, covering a lot in Newport News, to secure "the holder or holders" of three promissory notes of the firm for $1,500, $1,000 and $300. At the same time Richardson & Sons made the notes called for by the deed of trust, payable to their own order. The Peninsula Bank discounted the note for $1,000 with the indorsement of W. A. Bozarth, a member of the firm of Bozarth Bros.; but being short of funds it requested W. A. Bozarth to have the other notes discounted at the Bank of Williamsburg. W. A. Bozarth took the two notes for $1,500 and $300 to the Bank of Williamsburg, and, having indorsed them, received the proceeds from that bank. All the money received was applied to the payment of the note or notes of Richardson & Sons for $2,000 held by the Peninsula Bank and the account of Richardson & Sons with Bozarth Bros.

[1] W. A. Bozarth testified that he had no notice of the insolvency of Richardson & Sons. R. V. Richardson, of Richardson & Sons, testified, on the contrary, that when the new notes and the deed of trust were made both W. A. Bozarth and the Peninsula Bank knew his firm was in "failing circumstances." Under this evidence the finding of the referee, concurred in by the District Judge, that Bozarth Bros. and the Peninsula Bank had reasonable cause to believe that Richardson & Sons were insolvent when they took the security, cannot be disturbed. The Peninsula Bank having taken the new note and the security, the trust deed, in part satisfaction of its old debt, with good reason to believe that the mortgagors were insolvent, the deed of trust cannot stand in its favor against creditors of the same class.

[2, 3] The Bank of Williamsburg stands on a different footing. There is no evidence that it had any notice of the insolvency of Richardson & Sons, or that it did not take the notes for $1,500 and $300 in good faith in the usual course of business. The notes were negotiable, and the Bank of Williamsburg took and held them as bona fide indorsees. This indorsement carried with it the security of the deed of trust. The authorities at one time were in serious conflict on the question whether the indorsee of a negotiable note took the mortgage given to secure it subject to defenses which might have been set up against the original mortgagee; but it is now well settled by the great weight of authority that the indorsee of a negotiable note takes the mortgage given to secure it, if valid on its face, as he takes the note, freed from defenses which might have availed against the original mortgagee. Carpenter v. Longan, 16 Wall. 271, 21 L. Ed. 313; Kenicott v. The Supervisor, 16 Wall. 452, 21 L. Ed. 319; Sawyer v. Prickett, 19 Wall.

146, 22 L. Ed. 105; New Orleans Co. v. Montgomery, 95 U. S. 16, 24 L. Ed. 346; Chicago Railway Equipment Co. v. Merchants' Bank, 136 U. S. 268, 10 Sup. Ct. 999, 34 L. Ed. 349; Cudahy P. Co. v. State Nat. Bank, 134 Fed. 546, 67 C. C. A. 662; Nashville Trust Co. v. Smythe, 94 Tenn. 513, 29 S. W. 903, 27 L. R. A. 663, 45 Am. St. Rep. 748, and note.

It seems that the precise point has not been decided in Virginia, though the case of Carpenter v. Longan, supra, was cited as authority in Stimpson v. Bishop, 82 Va. 190. The case of Evans v. Roanoke Savings Bank, 95 Va. 294, 28 S. E. 323, has only an indirect if any bearing on the question. There it was held that a satisfaction entered on the record of a deed of trust by the payee of the note secured by it was effectual against the indorsee of the note in favor of a subsequent encumbrancer of the property without notice that the original payee had parted with the note. But this conclusion was reached on the ground that section 2498 of the Code of Virginia provided that effectual satisfaction could be so entered. In the case now before us there was no release and the statute referred to has no application.

[4] There is no force in the position that the court cannot pass on the validity of the deed of trust because Bozarth Bros. are not parties to the proceedings. The Peninsula Bank and the Bank of Williamsburg are the sole owners of the deed of trust and the notes it was intended to secure, and W. A. Bozarth is the indorser liable to the banks. Hence the banks and W. A. Bozarth are the only parties necessary to have before the court in determining the validity of the security. It is true a claim may be made to require Bozarth Bros. to refund the money received on their debt from the Bank of Williamsburg, and it may have been better to have Bozarth Bros. before the court to the end that all possible questions might be decided in one decree. But that point was not involved in the issue of the validity of the deed of trust. Should the creditors seek to have refunded the sum of $1,800 received by Bozarth Bros. from the Bank of Williamsburg, it will be time enough to bring in Bozarth Bros. as parties so that they may be heard on the claim against them.

The holding that the deed of trust is valid as a security for the notes held by the Bank of Williamsburg, makes unnecessary in this proceeding consideration of the question whether there are any other creditors in the same class with the preferred creditors who would be affected by the preference, since the property covered by the deed of trust has been sold and the proceeds $2,000 will not be more than sufficient to pay the notes held by the Bank of Williamsburg. This conclusion will exclude Wm. H. Hayden, the judgment creditor, from participation in the fund, and we shall not anticipate any issue that may arise between other parties.

The result is that the deed of trust to Thos. H. Shelton is adjudged a valid security as to the notes held by the Bank of Williamsburg, and invalid as to the note held by the Peninsula Bank against creditors of the same class; and the decree of the District Court is modified accordingly.

Modified.

KEYSTONE COAL & COKE CO. v. FEKETE et al.

(Circuit Court of Appeals, Sixth Circuit. April 6, 1916.)

Nos. 2692–2695.

1. LIMITATION OF ACTIONS ⟸122—COMMENCEMENT OF ACTION—INEFFECTIVE SERVICE.

In an action in which the period of limitation expired on December 24th a summons was issued, dated December 21st, and an attempted service was made on December 27th. On motion this service was set aside, but a motion to dismiss was denied, and defendants subsequently appeared generally, without any further summons and service. *Held* that, under Gen. Code Ohio, § 11230, providing that an action shall be deemed commenced as to each defendant at the date of the summons served on him, the action was commenced on December 21st, and was not barred, especially in view of section 11233, providing that, if plaintiff fails otherwise than upon the merits in an action commenced or attempted to be commenced in due time, he may commence a new action within a year after such failure.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 527, 538; Dec. Dig. ⟸122.

For other definitions, see Words and Phrases, First and Second Series, Commencement of Action.]

2. DEATH ⟸44—PARTIES—SUBSTITUTION.

In actions by administrators to recover for deaths occurring in another state, the petitions specified the surviving relatives, alleged that they had been injured by the deaths, and either stated expressly or showed by implication that the actions were brought for their benefit. On it appearing that under the law of the state where the deaths occurred the right of action vested in the surviving relatives, and not in the personal representatives, the court permitted a substitution of such surviving relatives as plaintiffs of record. *Held*, that this was not error, as the amendment made no change, except to substitute the real parties in interest for the plaintiff, who had supposed he was their trustee.

[Ed. Note.—For other cases, see Death, Dec. Dig. ⟸44.]

3. PLEADING ⟸430(2)—ISSUES, PROOF, AND VARIANCE—WAIVER OF OBJECTIONS.

Where, though the case was submitted to the jury and a recovery was permitted upon a theory of negligence not disclosed in the petition, defendant made no objection on the ground of variance to the evidence as it came in, or to the action of the court in submitting this theory, it waived any objection resting upon the variance.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1438–1441; Dec. Dig. ⟸430(2); Trial, Cent. Dig. §§ 219, 266.]

4. MASTER AND SERVANT ⟸285(1)—LIABILITY FOR INJURIES—EXPLOSIONS.

Employés of a mining company were killed or injured by an explosion of blasting powder, stored in a boarding house for company workmen conducted by W., while a party was in progress. Though the company claimed that W. was a lessee under a formal written lease, and that it, as lessor, had no control over the premises, and that the powder was solely in control of miners boarding in such house and kept there for their own convenience, there was evidence tending to show that the lease was a mere form, that the boarding house was for the company's benefit and completely under its control so far as it cared to exercise control, that the powder belonged to it and was kept there for its convenience, that the party was assembled with the assistance of its representative as a part of its policy of properly providing for the needs of its workmen, and

that its agent knew of the presence of the powder on the occasion in question. There was also evidence that it was negligence to maintain so large a store of powder in the place where it was kept under the circumstances. *Held*, that defendant was not entitled to an instructed verdict.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1008; Dec. Dig. ⟸285(1).]

5. TRIAL ⟸255(11)—INSTRUCTIONS—REQUEST.

While defendant was entitled to a charge making it clear to the jury that plaintiffs could not recover upon the theory upon which they did recover if the lease represented the contract between the company and W., and if the relations which it seemed to create were the ones actually existing, and while, if such charge had been requested, it would have been error to dispose of this matter with only the general statement that the jury must decide which party had the actual control and management of the premises and of the powder, the failure to give such instruction was not reversible error, in the absence of any request therefor.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 627–629; Dec. Dig. ⟸255(11).]

6. APPEAL AND ERROR ⟸216(1)—RESERVATION OF GROUNDS OF REVIEW—REQUESTING INSTRUCTIONS.

An exception to the failure to charge specifically as to some theory of recovery or defense is not sufficient upon which to predicate error, when there is no preliminary request for such instruction.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. ⟸216(1); Trial, Cent. Dig. §§ 627, 628, 630.]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; Wm. L. Day, Judge.

Four actions, by Michael Fekete, by Frank Thry, by Anna Helmlinger, and by Adam Muller, against the Keystone Coal & Coke Company. Judgments for plaintiffs, and defendant brings error. Affirmed.

The Keystone Company operated coal mines in Pennsylvania and owned the houses used by the men. One of these houses was occupied by Mr. and Mrs. Wilding; he worked in the mine, and she ran the house on her own account, as a boarding house for company workmen; a considerable quantity of blasting powder was stored in a closet off the room used for cooking and eating; Christmas eve, there was a "party" in this room; during the evening this powder blew up, killing some and injuring others; and these four suits were brought in a state court of Ohio (later removed to the court below because of diversity of citizenship) to recover for the injuries or deaths. The plaintiff in each of these cases recovered a verdict, and the Keystone Company brings error. The questions involved in the records are substantially the same in all four cases, except as hereinafter specified.

The meritorious questions involved were whether there was negligence in storing this powder in that location, whether the powder belonged to the company, and it had control of the premises, so as to make it liable for their dangerous condition, and whether there was contributory negligence. The plaintiff in error claims that, as matter of law, it was entitled to prevail on these issues, and also claims that the statute of limitations had run, and that a new plaintiff was erroneously substituted during the trial, and that there were errors in the charge to the jury.

Berkeley Pearce, of Cleveland, Ohio, W. S. Rial, of Greensburg, Pa., and James Mathers, of Cleveland, Ohio, for plaintiff in error.

C. S. Reed and Reed, Eichelberger & Nord, all of Cleveland, Ohio, for defendants in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). [1] 1. *Statute of Limitations.* The injuries happened December 24, 1910, in Pennsylvania. The Ohio statute referring to actions for death caused by wrongful act in another state, says:

"Every such action * * * shall be commenced within the time prescribed for the commencement of such action by the statute of such other state." Gen. Code Ohio, § 10770, as amended, 101 O. L. 198.

The Pennsylvania period of limitation for "such action" was one year. Hence the period expired December 24, 1911. The Ohio statutes further provide (G. C. § 11230) that:

"An action shall be deemed commenced, within the meaning of this chapter, as to each defendant, at the date of the summons which is served on him."

The summons issued on each of the three death claims in the state court was dated December 21, 1911, and, by the return of the sheriff, purported to be served on the Keystone Company December 27, 1911. Later this service was set aside, but a motion to dismiss the cause was denied. This action was taken after a special appearance by the defendant for the purposes of the motion, and we assume that it was taken because the defendant corporation had not been reached by service upon the proper representative. Still later, and without any further summons and service, defendant appeared generally in each action; and when these, after much delay, had reached the stage for answer, it relied upon the foregoing statutes of limitations.

In our judgment, each action was commenced on December 21st, and was not barred. Certainly, defendant's general appearance must have been in an action then pending; there is nothing to indicate that it ever was commenced over again after the first attempt; we see no way to avoid the conclusion that defendant entered its appearance and filed its plea in the same action which had been commenced on December 21st.

We are confirmed in this conclusion by the view that if defendant had not thus appeared in this action, but had insisted upon an entire dismissal, plaintiff would have had the right to begin a new suit at any time within one year, under the Ohio statute (G. C. § 11233), providing that, if the plaintiff fails otherwise than upon the merits in an action commenced or attempted to be commenced in due time, he may commence a new action within a year after such failure, in spite of the fact that the time originally limited therefor has expired. It is not to be supposed that defendant intended to, or that it could, defeat the purpose of this last statute by voluntarily appearing in an action imperfectly commenced, and then insisting that the action in which it appeared had never been commenced at all.

[2, 3] 2. *The Parties Plaintiff.* Each of three actions was brought by an administrator to recover for the death of his intestate. The petitions, as amended, specified the surviving relatives, and alleged that they had been injured by the deaths in the amounts of the ad damnum clauses. One of the petitions expressly stated that the action was

brought for the benefit of this survivor, and the other two are open to no other implication. The answers raised no question of the right of the administrators to maintain these actions; but after the trials had reached the point where the plaintiffs' opening argument to the jury had been made, the defendant first suggested that, by Pennsylvania law, the right of action for wrongful death vested in the surviving, dependent relative, and not in the personal representative, whereupon the court permitted, in each action, a substitution of plaintiffs, so as to make the surviving relative the plaintiff of record, and the cases proceeded to judgment in that form. This is said to have been error both because the action became a different one and because the new action was, at that date, barred by time; and to support the claim of error, defendant relies upon Railway v. Wyler, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983.

In that case, as is pointed out in Railway v. Wulf, 226 U. S. 570, 577, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134, the amendment was not merely a change in the nominal party, but presented a different theory of the right to recover and a different state of facts; and it was for these reasons that the amendment was not permitted. The amendment in the present cases made no change, except to substitute the real parties in interest for the plaintiff who had supposed he was their trustee. It is true that the case was submitted to the jury and a recovery was permitted upon a theory of negligence not disclosed in the original petition; but no more was it disclosed by the amended petition after the substitution of parties; and since defendant made no objection, on the ground of variance, to the evidence as it came in, or to the action of the court in submitting this theory, it waived any objection resting upon that variance.

So far as concerns the propriety of the amendment, we cannot distinguish these present cases from the Wulf Case. One is the converse of the other. There the beneficiary brought suit as plaintiff, and, when it was learned that the right of action there involved had vested in the personal representative, a substitution was permitted. We cannot see that it is of any importance that the beneficiary and the personal representative happened to be the same person. We find no error in the action of the court below in this respect. See, also, Seaboard Ry. v. Koennecke, 239 U. S. 352, 36 Sup. Ct. 126, 60 L. Ed. ——. We assume, as the parties do, but without deciding, that the identity of the plaintiff in such an action is fixed by the Pennsylvania, not by the Ohio, statute, and that the amendments named the proper parties.

[4] 3. *The Merits.* The court held that killed or injured persons who knew that the powder was in the closet were guilty of contributory negligence and recovery was barred. This holding was fatal to other actions, but in these four cases, it was found that such knowledge did not exist. There was evidence tending to support this finding, and so the question of contributory negligence is not here. Upon the subject of negligence or nuisance, whichever it may be called, it is clear enough—perhaps it is hardly disputed—that the proofs tended to show that it was beyond the limits of prudence to maintain so large a store of powder as some evidence indicated this was, in a place like

this closet and at a time when the adjoining room was to be occupied by a miners' Christmas eve party, involving drinking and smoking, and when some of those naturally to be expected to be present did not know the powder was there and when no warning was given for the benefit of these uninformed persons. The really vital question was whether this negligence was properly imputable to defendant, the owner and landlord of the premises or could be imputed only to the tenants or subtenants in the house or their invited guests. All the injured persons were of these classes. We see no object in detailing the evidence upon the issue. On one side, it was claimed that Mrs. Wilding and her husband were lessees under a formal written lease; that the company, as lessor, had no control over the premises and that the powder was solely in the control of the miners to whom it had been furnished from time to time; and that the miners boarding in the house kept this store of powder there for their own convenience, so that they might more easily get their daily supply. On the other hand, it was said that the written lease was a mere form; that the boarding house was for the company benefit and was completely under its control, so far as it cared to exercise control; that the powder in the closet belonged to the company, and was replenished and kept there by the company for its convenience; and that, on this particular occasion, the party had been assembled in this place with the assistance of the company's representative and as a part of its policy of properly providing for the needs of its workmen. It is not now important where the weight of the evidence was on this main issue. There was more than a scintilla of evidence in plaintiffs' favor on each link in this chain, so as to require its submission to the jury. The weakest link is with reference to the company's knowledge that this quantity of powder was in this place at this time, but there is testimony that it was shown to the company's agent just before the explosion, and he said it was all right. If this is true, a warning from him to those present would have prevented liability, if not injury. It was made clear by the charge that the jury must find for plaintiffs or for defendant, according as they found this general state of facts one way or the other, and we think defendant was not entitled to an instructed verdict. The extended discussion in the briefs as to the liability of a landlord, where a dangerous nuisance is maintained on the premises by the tenant, becomes immaterial. Each case was submitted to the jury and each verdict stands upon the theory that the ordinary relation of landlord and tenant did not exist, but that the premises were, in fact, in the possession and control of the landlord, and that the dangerous condition was maintained by it.

[5, 6] 4. *Specific Errors in the Charge.* Several complaints are made, but we think they are, with one exception, sufficiently covered by what has been said, or else that they do not require separate mention. The written lease from defendant to Mrs. Wilding, defendant regarded as important, and it was presented by defendant as superseding the earlier and rather loose arrangement under which there was more reason for saying that defendant had actual control. Though of course plaintiffs were not bound by the terms of the lease as the parties to it were, as against dispute by parol, yet if this lease in truth

represented the contract and the whole of it between the company and Mrs. Wilding, and if the relations which the lease seemed to create were the ones actually thereafter existing, plaintiffs were not entitled to recover upon the theory upon which they did recover. Defendants were entitled to a charge making this clear to the jury, and if such a charge had been requested, it would have been error to have passed the matter by as the court did, with no reference whatever to the lease or to that specific theory of defense, and with only the general statement that the jury must decide which party had the actual control and management of the premises and of the powder. Stoll v. Loving (C. C. A. 6th Cir.) 120 Fed. 805, 57 C. C. A. 173. However, no such request was made, and we have repeatedly held that a judgment will not be reversed because the court did not submit specifically some theory of recovery or defense which he was not asked to do. Erie Co. v. Schomer (C. C. A. 6th Cir.) 171 Fed. 798, 802, 96 C. C. A. 458. An exception was taken in general terms to the failure of the court to charge upon the subject of the effect of the lease, but such an exception cannot supply the place of the necessary preliminary request. An exception alone is sufficient to reach an error of commission in the charge, but it may not be as to an error of omission. In such case, it amounts only to the claim that the court should have said something further, but the court is not told what it is that he should have said—is not told even in substance. Many times such an exception will be all that the trial judge thinks necessary to inform him sufficiently, and, in his discretion, he will proceed to cover the ground omitted; but the close of the trial, when a jury is about to retire, is not the proper time to bring to the attention of the trial judge for the first time, and merely by exception, a matter, the proper disposition of which requires study and careful formulation in connection with what has been said. Only in a clear case of prejudice—if then—could we feel justified in reversing the judgment for a reason based only on such an exception; and this is not such a case. See Young v. Corrigan (C. C. A. 6th Cir.) 210 Fed. 442, and cases cited on page 443, 127 C. C. A. 174.

The judgment in each case will be affirmed.

MANEY BROS. & CO. v. CRANE CREEK IRRIGATION, LAND & POWER CO. et al.

CRANE CREEK IRR. DIST. et al. v. MANEY BROS. & CO.

(Circuit Court of Appeals, Ninth Circuit. March 6, 1916. Rehearing Denied May 8, 1916.)

No. 2644.

1. WATERS AND WATER COURSES ⇐228—IRRIGATION—EXECUTORY CONTRACT OF SALE—MORTGAGE BY VENDOR.

A corporation, owner of water rights, reservoir sites, and rights of way for ditches, which contracted to construct an irrigation system and to convey undivided interests therein to each of two public irrigation districts in exchange for their bonds at par, could not thereafter, as against

the districts, incumber such interests by a mortgage to a construction contractor having notice of the facts, securing an obligation for the payment of money, and which the districts could not discharge through the medium of payment provided for in their contracts.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. ⟸228.]

2. WATERS AND WATER COURSES ⟸228—IRRIGATION DISTRICTS—POWERS OF OFFICERS.

In such case the action of the officers of an irrigation district in attempting to recognize the validity of the mortgage was wholly ultra vires, and not binding on the district.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. ⟸228.]

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

Suit in equity by the Portland Wood Pipe Company, Maney Bros. & Co., a copartnership consisting of J. W. Maney, John Maney, Herbert G. Wells, and E. J. Wells, and others against the Crane Creek Irrigation, Land & Power Company, the Crane Creek Irrigation District, the Sunnyside Irrigation District, and others. From a decree entered on the cross-bill of Maney Bros. & Co., that company and the irrigation districts appeal. Affirmed.

Richards & Haga and McKeen F. Morrow, all of Boise, Idaho, for Maney Bros. & Co.

C. S. Varian, of Salt Lake City, Utah (E. R. Coulter, of Weiser, Idaho, of counsel), for Crane Creek Irrigation, Land & Power Co. and others.

Wilbur, Spencer & Beckett, of Portland, Or., for Portland Wood Pipe Co.

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

RUDKIN, District Judge. This is a companion case of Crane Creek Irrigation District v. Portland Wood Pipe Co., 231 Fed. 113, —— C. C. A. ——, just decided. In fact, the present appeal and cross-appeal were prosecuted from parts of the same decree. As stated in our opinion just referred to, 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 final conveyances. In consideration of these conveyances the irrigation districts agreed to deliver to the Irrigation & Power Company certain coupon bonds of the districts at their face value. The contracts with the two districts were identical in terms, except as to the interest to be conveyed and the consideration to be paid.

On the 29th day of September, 1911, Maney Bros. & Co. entered into a contract with the Irrigation & Power Company for the construction of a dam forming a part of the irrigation system, in which it was agreed, among other things, that the Irrigation & Power Company should execute its promissory note in the sum of $87,000, due November 15, 1912, with interest at the rate of 6 per cent. per annum from November 15, 1911, secured by a mortgage on all its property, rights, and franchises of a form satisfactory to the contractors, as security for the payment of the note, and any and all other sums due or to become due under the agreement, and that the note should be indorsed by the appellees, Ford, Butterfield, and McKinney. On the same date a mortgage was executed by the Irrigation & Power Company to Maney Bros. to secure the payment of the sum of $87,000 thus agreed upon. This mortgage was executed to secure a promissory note for the sum of $87,000, in lawful money of the United States, with interest at the rate of 6 per cent. per annum from November 15, 1911. Thereafter the Irrigation & Power Company entered into a further contract with the Slick Bros. Construction Company for the construction of other parts of the system, and the Portland Wood Pipe Company furnished materials to Slick Bros. to be used in such construction work. Subsequently the Portland Wood Pipe Company perfected a lien under the laws of the state of Idaho and instituted the present suit in the court below for the foreclosure thereof. In that suit Maney Bros. & Co. filed a cross-complaint praying for the foreclosure of their mortgage. The court below decreed a foreclosure as against the Crane Creek Irrigation, Land & Power Company and its property, but denied any relief as against the irrigation districts and their property. From this decree both Maney Bros. & Co. and the irrigation districts have appealed.

It was conceded at the trial that there was a balance due on the Maney Bros. & Co. mortgage in the sum of $35,989.10, with interest at 6 per cent. per annum from December 27, 1913, and the decree awarded a personal judgment in that amount against the Irrigation & Power Company and the sureties on the note, and decreed a foreclosure of the mortgage as against the property of the mortgagor. The errors assigned on appeal of Maney Bros. & Co. are based on the refusal of the court to decree a foreclosure against the property and property rights conveyed by the Irrigation & Power Company to the

two irrigation districts, or to allow an attorney's fee in excess of $1,000 on the mortgage foreclosure. There was no error in these rulings. No doubt the vendor under an executory contract of sale such as this holds the legal title as security for the payment of the purchase price, and the title so held may be conveyed, mortgaged, or devised. The right to convey or mortgage, however, is subject to the important qualification that the vendor cannot, by any subsequent act of his, restrict or impair the rights of the purchaser under the executory contract, or impose burdens upon the property which cannot be removed by the purchaser without departing from the terms of his contract of purchase. Here the irrigation districts agreed to pay for the property in irrigation district bonds at their par or face value, whereas the mortgage called for the payment of lawful money of the United States. The mortgage could not be satisfied or paid through the medium of irrigation district bonds, and this fact was well known to the parties at the time of the execution of the mortgage.

The powers of irrigation district officers are defined and limited by law, and parties dealing with them, or in relation to the property they represent, are chargeable with notice of the powers conferred and of the mode in which these powers must be exercised. Such officers may not purchase property subject to a mortgage where it is without their power to pay or discharge the mortgage lien (Voss v. Waterloo Water Co., 163 Ind. 69, 71 N. E. 208, 66 L. R. A. 95, 106 Am. St. Rep. 201, 2 Ann. Cas. 978), and property which they have contracted to purchase may not be subjected to a lien by the vendor which the irrigation district cannot satisfy or discharge through the medium of payment provided for in the contract of purchase. Here it was without the power of the irrigation districts to pay or satisfy the mortgage, at least without departing from their contract of purchase, and this fact was well known to the mortgagors. If the parties to this mortgage contemplated or intended that the mortgage should be taken up and paid by the districts as a part of the purchase price of the property, the mortgage should have been made payable in bonds either directly or in the alternative, so that this might be done. The mortgage, however, contained no such provision. It was payable only in lawful money of the United States, and it could not be discharged or satisfied by a tender of irrigation district bonds. The irrigation districts assumed no obligation to pay cash by their contract of purchase, and to permit a foreclosure of the mortgage against their property at this time for failure to redeem the mortgage in cash would work a manifest fraud against them. Such a result must have been contemplated, or should have been contemplated, when the mortgage was taken. For these reasons the court committed no error in denying a foreclosure against the property conveyed to the irrigation districts.

In this connection we have not overlooked the provision of the mortgage requiring the mortgagees to release the lien of the mortgage on the property to be conveyed to the Sunnyside Irrigation District upon the deposit as additional security with the cashier of the Boise National Bank of $75,000 par value of the legally issued bonds of the

district, the legality of which should first be approved by the Supreme Court of the state of Idaho, or the like provision for the release of the mortgage on the property to be conveyed to the Crane Creek Irrigation District by depositing $50,000 par value of the bonds of that district. But these were burdens which the parties to the mortgage could not lawfully impose on the irrigation districts.

[2] Our attention has been called to certain resolutions adopted by the district recognizing the validity of this mortgage; but such resolutions were adopted without consideration, and the attempt on the part of the district officers to subject the property of the districts to the lien of the mortgage is so manifestly ultra vires that it calls for no discussion. It is further claimed that the irrigation districts had no power to contract for the payment in bonds of an irrigation system to be thereafter constructed; but the contract has been made and executed, and it does not lie with the mortgagors in this case to challenge or question what has already been accomplished.

The action of the court below in fixing the amount of the attorney's fee was based largely on the ground that the principal services were performed in an unwarranted attempt to subject the property of the irrigation districts to the lien of the mortgage. In view of this fact, and of the further fact that the foreclosure was not contested by the mortgagor, we are unable to say that the allowance was inadequate or improper.

The claim of the irrigation districts that the property of the Irrigation & Power Company was not subject to foreclosure, because the Irrigation & Power Company was a tenant in common with the irrigation districts in a part of the property, is so utterly without merit as to require no discussion.

The rights of the Portland Wood Pipe Company were disposed of in our former opinion.

The decree is affirmed, without costs to either party.

COOPER v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 17, 1916.)

No. 82.

1. CRIMINAL LAW ⊜1159(2)—REVIEW—QUESTIONS OF FACT.

Whether accused devised a scheme to defraud, and whether it was carried out by the use of the mails, are questions of fact, the determination of which by the jury cannot be reviewed, where there was evidence to sustain it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3075; Dec. Dig. ⊜1159(2).]

2. CRIMINAL LAW ⊜1170½(1)—EVIDENCE—INCRIMINATING SELF—AGREEMENT.

The constitutional rights of accused were not infringed by his being asked if a signature shown him was genuine, where it had been agreed between counsel, in order to expedite the introduction of exhibits, that

when there was no question as to defendant's signature the paper might be received without proof of signature.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3129; Dec. Dig. ⊂⊃1170½(1).]

3. CRIMINAL LAW ⊂⊃1170½(6)—HARMLESS ERROR—MISCONDUCT OF COUNSEL.
Where counsel for the government persisted in the question after it became apparent that counsel for the defendant objected, but the court ruled that defendant did not have to admit the signature unless he wanted to, and that the government would have to prove it, and offered to instruct the jury that it was an entirely voluntary admission, there was no prejudicial error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3134; Dec. Dig. ⊂⊃1170½(6).]

4. CRIMINAL LAW ⊂⊃720(3)—TRIAL—ARGUMENT OF COUNSEL.
In the trial of one of four defendants indicted for using the mails to defraud, where one of the codefendants had testified without objection that he had pleaded guilty, the prosecuting attorney could comment on that fact.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1670, 1671; Dec. Dig. ⊂⊃720(3).]

5. CRIMINAL LAW ⊂⊃1134(1)—REVIEW—SUSPENDED SENTENCE.
Rulings by the trial court on an indictment, sentence under which was suspended, can be reviewed, notwithstanding the fact that imprisonment thereunder seems remote.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2986, 3056; Dec. Dig. ⊂⊃1134(1).]

6. CONSPIRACY ⊂⊃45—EVIDENCE—ADMISSIBILITY—CONTINUATION OF THE OFFENSE.
Under an indictment which charged a conspiracy to use the mails to defraud in the sale of bonds of a real estate company, and alleged that the acts in furtherance thereof continued to a date which was within two years of the filing of the indictment, evidence that the office of the company was kept open up to that date after a date three years before the filing of the indictment was admissible to show that the prosecution was not barred.

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

7. CRIMINAL LAW ⊂⊃390—EVIDENCE—ADMISSIBILITY—INTENT OF CODEFENDANTS.
Where two of four defendants jointly indicted for conspiracy had pleaded guilty, it was proper to refuse to permit them to testify as to their intent in doing certain acts, since their intent was not in issue, and they could only infer the intent of the defendant on trial, which inference was for the jury to draw.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 858; Dec. Dig. ⊂⊃390.]

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

William H. Cooper was convicted of using the mails in furtherance of a scheme to defraud, and he brings error. Affirmed.

This case comes here on writ of error to review judgments of conviction on two indictments under sections 215 and 37 of the United States Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1130, 1096 [Comp. St. 1913, §§ 10385, 10201]). The first indictment charges the defendant, together with Claude J. Van Slyke, James A. Robinson and Ernest Sharp, with having devised a scheme to defraud and using the mails in furtherance of such scheme. The defendants Van Slyke and Robinson pleaded guilty and a severance was granted as to the

defendant Ernest Sharp. The court suspended sentence on the indictment under section 37 and the defendant Cooper was sentenced to imprisonment for a period of three years in the penitentiary at Atlanta upon the three counts of the indictment under section 215 of the Criminal Code.

Griggs, Baldwin & Baldwin, of New York City (Martin Conboy, of New York City, and Worth E. Gaylor, of counsel), for plaintiff in error.

H. Snowden Marshall, U. S. Atty., of New York City (Charles H. Griffiths, of New York City, of counsel), for the United States.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge (after stating the facts as above). The controlling question in this controversy is whether the defendant, with others, devised a scheme to defraud Margaret N. Huckill, and other persons, by obtaining money, and property, from them by false and fraudulent statements regarding the resources and management of the New York Central Realty Company. Was it their purpose to use the money so received from said persons for their own use and benefit?

The scheme of the defendant Cooper, as charged, was that subsequent to 1905, acting with the other defendants, he issued mortgage bonds, secured by the real estate owned by the company, in sums greatly exceeding the value of the land covered by the mortgage and sold them to various parties by means of false statements as to their value, made through the mails and otherwise.

The government asserts that the bonds which the Realty Company put out and sold to the public with the representation that they were amply secured by the mortgage on the real estate were not so secured and that these representations of the defendant Cooper and of others connected with the company, express and implied, that the bonds were first class securities, were false and were made with intent to secure for his own benefit purchasers of securities the value of which was, to say the least, exceedingly doubtful.

[1] The questions whether a scheme to defraud was devised by the defendant and was carried out by the use of the mails were questions of fact with which this court is not concerned. We are to determine whether there was sufficient testimony to warrant the submission of these questions to the jury. Clearly, the court on his proof would not have been justified in ruling that there was no evidence on which the jury should pass. The questions of fact were clearly stated to them by the trial judge with a reference to the rules which were to determine their action and guide their deliberations. We have no doubt that upon the evidence adduced they were justified in reaching a verdict of guilty. If there was evidence to sustain it, this court cannot reverse the judgment.

[2] The proposition that the defendant's constitutional rights were invaded by the United States attorney's asking if a signature shown him was his, cannot be maintained. In order to save time and expedite the introduction of exhibits it was agreed between counsel that when there was no question regarding the signatures of the defend-

ant and others connected with the Realty Company being genuine, the paper in question might be received and no objection would be interposed that the signature was not proved. The question, in view of what had preceded it, was quite natural. We are convinced that the only object of the United States attorney was to save time by the admission of a fact which was a mere matter of routine.

[3] The question was, however, persisted in by the United States attorney after it became apparent that counsel for the defense objected. The situation is made sufficiently plain by a short extract from the record:

"The Court: Of course the United States attorney is presuming on the practice. I do not know of any objection prior to this time; but you don't have to admit it unless you want to and, therefore, he has to prove it.

"Mr. Conboy: My objection is, of course, to the request that we shall admit it.

"The Court: I do not see any objection to that because it seems to have been the course between you to make that request frequently, and in many cases it has been granted.

"Mr. Conboy: We except.

"The Court: However, in this case he will have to prove the signature before it is admitted. * * * I will say to the jury that there is no reason why you should admit it, if you don't want to, it is entirely a voluntary admission.

"Mr. Conboy: My objection is to being requested. * * *

"The Court: There is a question, they do not admit it, and you will have to prove it."

We cannot believe that this technical error, if it be one, produced the slightest injurious effect upon the jury. It seems to us that the contention that the defendant was prejudiced by what took place between court and counsel is too visionary to be considered.

[4] The statement by the assistant United States attorney that Robinson, a witness for the defense, had pleaded guilty would not have been proper were it not for the fact that Robinson had previously testified without objection that he had so pleaded. This being a fact in the case, we see no reversible error in referring to it. The statement was merely the iteration of a fact known to the jury and proved in the case.

The third indictment, found on February 4, 1914, is based upon section 37 of the Criminal Code, which makes it an offense for two or more persons to conspire to commit an offense against the United States. It charges the defendants, and other persons unknown, with a conspiracy to devise a scheme to defraud similar to that charged in the other indictments.

[5] The court suspended sentence under this indictment, but the defendant is entitled to have the action of the trial court reviewed, notwithstanding the fact that imprisonment thereunder seems exceedingly remote. We have examined the various objections to this indictment and those taken on the trial thereof and do not find any reversible error, either in the form of the indictment or the evidence relied on to sustain it.

[6] The indictment in question alleged that the conspiracy charged was carried on up to the 1st of March, 1912. The proof showed that

the indictment was found on February 4, 1914, and to avoid the statute of limitations it was necessary to show that the office of the Realty Company on Broadway was maintained after February 4, 1911, and prior to March 1, 1912, as charged. The court took great care to instruct the jury upon this question. As was said by the Supreme Court in United States v. Kissel, 218 U. S. 601, 31 Sup. Ct. 124, 54 L. Ed. 1168:

"The overt acts relied upon coming down to within three years of the indictment are alleged to have been done in pursuance of the conspiracy."

[7] The court correctly ruled that it was not competent for the defendants Van Slyke and Robinson to testify as to their intent in doing certain acts. They had pleaded guilty and their intent was not an issue in the case. Cooper's intent was an issue in the case, but these witnesses did not know what it was except as it could be inferred from his acts and this inference was for the jury to draw.

The trial of this action occupied nearly 4 weeks; the printed record contains 1,788 pages, the charge covers 74 pages and the jury deliberated over 10 hours.

It is rarely the case that the record of a trial of such magnitude and importance does not show that events occurred and rulings were made which, in the light of deliberate examination, might better have been omitted. In the present case, however, there are few such instances. We cannot avoid the conclusion that the defendant has had a perfectly fair and impartial trial and that no error occurred which would justify a reversal of the judgment. The issue was one of fact and the jury were fully justified in rendering a verdict of guilty.

The judgment is affirmed.

DANA v. MORGAN et al.

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

No. 178.

1. JUDGMENT ⊂=701—CONCLUSIVENESS—STOCKHOLDER'S SUIT.

A judgment of a state court, dismissing a suit, brought by a stockholder, on behalf of himself and all other stockholders similarly situated who cared to join, against the corporation and an officer, to set aside a contract for the compensation of the officer as ultra vires, and to compel a return of the moneys received by the officer, is conclusive, in the absence of fraud or collusion, against a subsequent suit by another stockholder, on behalf of himself and others, to have the same contract set aside as a fraud on the corporation, and to have the moneys received thereunder returned, where the second stockholder knew of the pendency of the first suit, but did not intervene therein, since the rights sought to be enforced were the rights of the corporation, and not directly the rights of the stockholder, and, the corporation having been a party to the first suit, its rights were thereby concluded.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1226; Dec. Dig. ⊂=701.]

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2. JUDGMENT ⟸701—CONCLUSIVENESS—STOCKHOLDER'S SUIT—ISSUES.

The fact that the objection of fraud was not raised in the first suit does not affect the conclusiveness of the judgment, since the same relief was asked, and if the plaintiff in the second suit had intervened in the first, as he had a right to do, he could have advanced any ground that might exist for holding the contract invalid.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1226; Dec. Dig. ⟸701.]

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

Suit by Charles A. Dana, in behalf of himself and other stockholders, against Edwin D. Morgan and another. From a decree dismissing the bill (219 Fed. 313), plaintiff appeals. Affirmed.

This cause comes here on an appeal from a decree of the District Court of the United States for the Southern District of New York, filed on January 14, 1915. The defendant company is a corporation organized and existing under the laws of the state of Colorado. It was formed for the purpose of raising and selling live stock and for purchasing, leasing and working gold and silver and other mines in the republic of Mexico. The company has a capital stock of $1,500,000 and the incorporators were men of means, and among them were George Bliss, Theodore K. Gibbs and Edwin D. Morgan, at one time Governor of New York and grandfather of the defendant Morgan.

The plaintiff, as the executor of Charles Dana, is the owner of about 4,000 shares of the stock of the defendant company, and is a citizen and resident of New York. The defendant Morgan is a citizen of Rhode Island. It is alleged that he represents, in himself and on behalf of his father's estate or other relatives, about 19,000 shares of the stock of the defendant company. He became president of the company, serving in that capacity without salary. In 1910 he resigned as president, and subsequent to his resignation and on December 7, 1910, entered into a contract with the company whereby it was agreed that he should act as the general agent of the company for a period of 10 years beginning with the year 1911. The contract provided the amount of compensation which Morgan was to receive for his services. But as the provision relating to that subject is complicated and lengthy it is not set forth in detail in this connection. The original contract of December 7, 1910, was modified on May 8, 1911, in respect to the compensation which Morgan was to receive for his services. But it is not necessary to state the terms as changed. Under each contract he was to receive his compensation through commissions. And it is alleged that during the years 1911 and 1912 the defendant Morgan received under the contracts more than the sum of $32,000.

The contract of December, 1910, and the subsequent contract of May, 1911, were each submitted by the directors to a stockholders' meeting, at which they were ratified and confirmed. The first contract was ratified by a vote of 81,489 shares in the affirmative as against 19,810 shares in the negative; the Morgan stock not being voted. At a subsequent meeting of the stockholders the contract of 1911 received,

along with other matters submitted for approval, a ratifying vote of 99,033 for as against 38,714 in the negative.

Parson, Clossom & McIlvaine, of New York City (Herbert Parsons, of New York City, of counsel), for appellant.

William W. Cook, of New York City, for appellee Morgan.

Boothby, Baldwin & Hardy, of New York City (Charles F. Brown, of New York City, of counsel), for appellee Corralitos Co.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). This is a stockholder's suit. The plaintiff sues on behalf of himself and all other stockholders who did not consent to the making of the contracts complained of and who are willing to contribute to the expense of the action. The complaint states that the commissions which the defendant company agreed to pay defendant Morgan under the contracts were excessive and beyond what the earnings of the company warranted and that they were more than the fair and reasonable value of his services. The bill alleges:

"The excessive compensation thereby sought to be secured to the defendant Morgan has been and will have to be paid out of moneys which of right and in the exercise of sound discretion should be distributed to the stockholders of the said corporation as dividends or used for the development of its property or in the satisfaction of the mortgage or the retirement of its preferred stock; and such sums as have been paid have been so paid and such sums as the said pretended contracts contemplate shall be paid are to be so paid in fraud of the rights of the defendant company and of its stockholders. Each of the said pretended contracts was made in bad faith, was in fraud of and was oppressive and unfair to the defendant company and the stockholders thereof and contemplates a dissipation of the profits and assets of the said corporation and the waste of its capital."

The bill also alleges that the plaintiff did not consent to the making of either of the contracts and that he has not consented to the making of any payment to the defendant Morgan under the contracts. The bill also alleges that it is impossible to get the corporation to bring the action and that it is therefore made a party defendant. A decree is sought directing repayment to the defendant company by the defendant Morgan of the excess of compensation which the defendant company has paid to him under the contracts.

This suit was commenced in November, 1913, and it appears that in November, 1912, a stockholder in the same company, James Harold Warner, commenced a suit against these same defendants in the Supreme Court of the state of New York on these same contracts. The suit was brought by Warner in the words of the complaint "on behalf of himself and all the stockholders of the Corralitos Company who did not consent to the making of either of the two contracts." The bill in that suit alleged:

"That the amount of the salary fixed by each of the said contracts is grossly disproportionate to the reasonable value of the services which defendant Edwin D. Morgan bound himself in the said contract to render; that the reasonable value of the said services is not more than $2,500 per year. On information and belief that the sum of $32,000 has been paid to defendant Ed-

win D. Morgan under the said contracts. That the plaintiff did not consent to the payment thereof or any part thereof.

"Wherefore the plaintiff demands judgment against the defendants that the said contracts be set aside and that defendant Edwin D. Morgan account for the sums of money which he has received under the said contracts and that defendant the Corralitos Company be enjoined, pending the determination of this action, from paying any more money to defendant Edwin D. Morgan under either of the said contracts and for such further and other relief as may be just, together with the costs and disbursements of this action."

The demand for judgment in the case at bar reads as follows:

"Wherefore, the plaintiff demands judgment against the defendant that the said pretended contracts be set aside and cancelled, that the defendant Morgan account for the sums of money which he has received under the said pretended contracts, that he pay back to the defendant company the difference between the sums of money so received and the fair and reasonable value of his services rendered to the defendant company during the period for which he received the said sums, and that the defendant company be enjoined pending the determination of this action, from paying any more money to the defendant Morgan under either of the said pretended contracts; and for such further and other relief as may be just, together with the costs and disbursements of this action."

In the suit in the New York court judgment was entered for the defendant and the bill was dismissed. Warner v. Morgan, 81 Misc. Rep. 685, 143 N. Y. Supp. 516. That court in its findings of fact found that the contracts were within the company's chartered powers, that there was no proof that they were fraudulent or oppressive, that the contracts were exceptionally favorable to the defendant company, and that the contract as modified by the contract of May 8, 1911, was in all respects valid. And this judgment has been affirmed by the Appellate Division. 165 App. Div. 903, 149 N. Y. Supp. 1117.

It appears that the plaintiff in the case at bar was well aware, at the time, of the pendency of the suit in the New York court; that he knew of it from the time of its commencement and could at any time have intervened therein and become a party thereto. He did not, however, see fit to do so. And it is claimed now that he is concluded by that judgment and that the question involved in this case is res adjudicata. The court below dismissed the bill on that ground.

It is evident that the plaintiff in this court seeks exactly the same result that the plaintiff in the New York suit sought. They both attempted to have the contracts under which the defendant was employed set aside. And they both alleged that the defendant has received from the company for his services under these contracts a remuneration grossly in excess of the value of his services, and they both sought to require him to account to the company for the moneys he has so received.

[1] Warner predicated his suit on the theory that the contracts were ultra vires and the plaintiff has predicated this suit upon the theory that the contracts were made in bad faith and in fraud of the company. But we are not able to see that this difference in the method by which these two plaintiffs sought to maintain their suits affects in any way the result. The cause of action was the same. The right of the plaintiff to sue is, in this case, as it was in the New York case, a right to

sue for the wrong alleged to have been done to the defendant corporation. Neither suit was brought to redress a wrong which was personal to the party who brought the suit. There is a vast difference between the right of a shareholder to sue for the redress of an injury done to the corporation, and the right to sue to redress an injury done to the shareholder individually. The judgment in the state court is conclusive not only upon the stockholders who brought the suit but upon the corporation also and upon those who had the right to intervene but did not avail themselves of it. Burland v. Earle, [1902] A. C. 83, 71 L. J. P. C. 1; Willoughby v. Chicago Junction Railways, etc., Co., 50 N. J. Eq. 656, 25 Atl. 277; Appleton v. American Malting Co., 65 N. J. Eq. 375, 54 Atl. 454; Goodbody v. Delaney, 80 N. J. Eq. 417, 83 Atl. 988; Hearst v. Putnam Mining Co., 28 Utah, 184, 77 Pac. 753, 66 L. R. A. 784, 107 Am. St. Rep. 698; Jones v. Johnson, 10 Bush (Ky.) 649; 10 Cyc. 993.

It makes no difference, in the absence of fraud or collusion, that a stockholder's suit is prosecuted by one or more, or by all, the stockholders; the suit being brought on behalf of all others of like interest joining therein. As was said in Brinckerhoff v. Bostwick, 99 N. Y. 185, 1 N. E. 663, the action is really the action of all the stockholders, as it is necessarily commenced in their behalf and for their benefit. And as in such suits the wrong to be redressed is the wrong done to the corporation and as the corporation is a necessary part to the suit, it inevitably follows that there can be but one adjudication on the rights of the corporation. And it is undoubted law that the judgment in the state court is an estoppel and a finality not only as to all matters actually litigated in the suit but also as to all matters which were not but might have been presented to the court and passed upon therein. See Landon v. Bulkley, 95 Fed. 344, 37 C. C. A. 96.

The plaintiff in support of his contention that he is not concluded refers us to Wabash Railroad Co. v. Adelbert College, 208 U. S. 38, 28 Sup. Ct. 182, 52 L. Ed. 379, which he cites as "the leading authority." But the doctrine announced in that case has no application to the facts of this case. The plaintiff in the case there relied on had not brought a stockholder's suit and had not asserted a right of the corporation. He was asserting a right which he possessed in his individual capacity. The railroad company had issued what were known as "equipment bonds," and at the time of their issuance they were unsecured. Subsequently the railroad company consolidated with certain other railroad companies and the theory of the plaintiff was that the consolidation resulted in giving to these originally unsecured obligations an equitable lien upon the property of the corporation which issued them, and that the equity of redemption of that property went into the hands of the consolidated corporation encumbered by that lien. The holders of some of these bonds brought suit against the Wabash Company and alleged that the suit was brought "on their own behalf, as well as in behalf of all those in like interest who may come in and contribute to the expenses of and join in the prosecution of this suit." No notice of the pendency of the suit was given to the other holders of the bonds other than by this allegation of the bill. The trial court

held a lien existed and the Supreme Court reversed it and denied the existence of the lien. That was in Wabash, etc., Railway v. Ham, 114 U. S. 587, 5 Sup. Ct. 1081, 29 L. Ed. 235. Thereafter another holder of similar bonds issued by the Wabash brought a similar suit and it was contended that the judgment in the former case constituted a bar to the claim for lien of all the holders of the equipment bonds, whether they were parties or privies to the first suit or not. The theory on which counsel relied was that the first suit was a representative or class suit and that the judgment bound all of the class, even if not parties or privies. But the Supreme Court held that the first suit was not a representative suit in the sense that the judgment in it bound those who were not parties to it. We do not doubt the correctness of that decision as applied to the facts of that case. But in the case at bar the plaintiff in the New York suit was asserting the right of the corporation and the corporation was a party to the suit and concluded by that judgment. So that when Dana filed the second suit to vindicate the right of the corporation he was seeking to vindicate a right which the New York court had conclusively determined as against the corporation itself, and therefore as against him, did not exist. The principle certainly cannot at this late day be successfully challenged that every member of a corporation is so far privy in interest in a suit against the corporation that he is bound by the judgment against it.

The plaintiff's difficulty is that he apparently overlooks the real nature of a stockholder's suit. The true theory of such a suit is well stated by Pomeroy in his work on Equity Jurisprudence (volume 3, § 1095). He says:

"The stockholder does not bring such a suit because his rights have been directly violated, or because the cause of action is his, or because he is entitled to the relief sought; he is permitted to sue in this manner simply in order to set in motion the judicial machinery of the court. The stockholder, either individually or as a representative of the class, may commence the suit, and may prosecute it to judgment; but in every other respect the action is the ordinary one brought by the corporation; it is maintained directly for the benefit of the corporation, and the final relief, when obtained belongs to the corporation and not to the stockholder plaintiff. The corporation is, therefore, an indispensably necessary party, not simply on the general principles of equity pleading, in order that it may be bound by the decree, but in order that the relief, when granted, may be awarded to it, as a party to the record, by the decree. This view completely answers the objections which are sometimes raised in suits of this class, that the plaintiff has no interest in the subject-matter of the controversy, nor in the relief. In fact, the plaintiff has no such direct interest; the defendant corporation alone has any direct interest; the plaintiff is permitted, notwithstanding his want of interest to maintain the action solely to prevent an otherwise complete failure of justice."

In Cook on Stockholders, § 692, the law is correctly stated as follows:

"The rule that the corporation itself is an indispensable party defendant to such suit is due to the fact that all other possible future suits by the corporation are thereby prevented, the rights of the corporation are duly ascertained and the remedy made effectual against the corporation as well as others."

In Alexander v. Donohoe, 143 N. Y. 203, 38 N. E. 263, Judge Earl speaking for the New York Court of Appeals as to a stockholder's suit said:

"Suing as a stockholder the plaintiff's right of action is a derivative one. He sues, not primarily in his own rights, but in the right of the corporation. The wrongs of which he complains are wrongs to the corporation. They were not aimed at him and did not involve his personal, individual rights. He suffers as a member of the corporation."

The plaintiff insists that the judgment of the New York court does not affect him, as he was not a party to it, a privy to it, or represented in it. The answer is that the corporation whose interest he seeks to represent in this suit was a party to that action and is concluded by it and that that concludes him.

[2] The plaintiff also insists that he has not had his day in court on the issues he presents. The complaint does not lie in his mouth to make. He knew of the pendency of the other suit and he had an opportunity to be heard in it. It was expressly for the benefit of any and all the stockholders who might come in and contribute to its expense. At any time before decree he might have been made a party if he had chosen to intervene, and having become a party he might have informed the court of anything he deemed important to bring to its attention and might have had the bill of complaint amended if the court concluded an amendment necessary. The question whether he should intervene or commence an independent suit was considered by him and he concluded that he would not participate in the New York suit. He had his opportunity and declined to avail himself of it.

In view of the conclusion which we have reached it is not necessary to consider any of the other matters submitted to the court.

Decree affirmed.

UNITED STATES v. THIBODEAUX.

(Circuit Court of Appeals, Fifth Circuit. April 15, 1916. Rehearing Denied May 20, 1916.)

No. 2795.

1. EXCEPTIONS, BILL OF ⊂=39(1)—TIME TO FILE—EXPIRATION OF TERM.
The right to a bill of exceptions expires with the adjournment of the term at which the case was tried, unless there is an order, agreement of counsel, or ruling of the court granting time within which to file bills.
[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 54, 56; Dec. Dig. ⊂=39(1).]

2. PUBLIC LANDS ⊂=60—SWAMP LANDS—EVIDENCE—SELECTION BY STATE.
In an action to recover the value of wood cut on certain land, to which defendant claimed title from the state of Louisiana, evidence *held* to show that the lands were selected by the state as swamp lands under the special grant to that state by Act March 2, 1849, c. 87, 9 Stat. 352, so as to justify a directed verdict.
[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 186, 187; Dec. Dig. ⊂=60.]

3. PUBLIC LANDS ⊂=60—ACTIONS FOR TIMBER—EVIDENCE—CHARACTER OF LANDS.
In an action to recover the value of wood cut on a tract of land which defendant claimed under a grant from the state of Louisiana, which claimed it as swamp lands selected by it under Special Act March 2, 1849,

c. 87, 9 Stat. 352, parol evidence is admissible to show that in 1850 the land was in fact swamp and overflowed lands, since, if it was such lands, the state's title was valid under Swamp Land Act Sept. 28, 1850, c. 84, 9 Stat. 519.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 186, 187; Dec. Dig. ⟸60.]

In Error to the District Court of the United States for the Western District of Louisiana; Aleck Boarman, Judge.

Action by the United States against Oneziphore Thibodeaux to recover the value of wood cut and removed from a homestead entry. Judgment for defendant on a directed verdict, and the United States brings error. Affirmed.

Geo. Whitfield Jack, U. S. Atty., and Robert A. Hunter, Asst. U. S. Atty., both of Shreveport, La.

E. B. Dubuisson, of Opelousas, La., for defendant in error.

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

PARDEE, Circuit Judge. This is a suit brought by the United States to recover the value of wood cut and removed from an alleged unperfected homestead entry in a New Orleans, La., land district. The defendants answered, generally denying plaintiff's petition, and specially denying that the United States was the owner of the land described in the petition, and averring that the said lands were swamp lands inuring to the state of Louisiana under an act of Congress entitled "An act to aid the state of Louisiana in draining the swamp lands therein," approved March 2, 1849, and set forth a title under a patent from the state of Louisiana down to the present defendants. From an adverse verdict and judgment, the United States sued out this writ of error, assigning errors relating to the admission of evidence and the charge and refusals to charge of the trial court.

We find in the case no commendable, if legal and sufficient, bill of exceptions. What purports to be and is headed "Bill of Exceptions" commences with the title of the case; the list of the officials of the court; the filing of the original petition on February 9, 1911, which is fully set out; the service of citation on the 13th day of February, 1911; the subsequent filing on the 8th day of May, 1912, of an answer fully transcribed, and indorsed with statement that at a later date by consent the trial of the cause was continued from time to time and term to term until finally it was agreed that the same should be tried at Opelousas, La., on January 27, 1915, and at said date, the parties announcing themselves "Ready," the jury was fully impaneled, whereupon the following proceedings were had, the following evidence adduced, and the following objections were made and bills of exception taken, noted, and allowed during said trial, to wit: (Thereupon follows the court proceedings, appearances, and evidence, etc., giving and containing all the proceedings and evidence, documents, and exhibits up to the rendition of the verdict and judgment on January 28, 1915, on which day the court adjourned.)

The next entry in said bill is an agreement of parties, dated May 25, 1915, in which it is agreed, among other things pertaining to the suit, that:

"Certain maps need not be copied or attached to the bill of exceptions, but shall be deemed and considered as a part of said bill of exceptions to the same extent as if formally inserted therein."

And thereupon the bill was authenticated by the court as follows:

"Examined and approved as to facts, but not as to legal sufficiency, this 26th day of May, 1915." Indorsed, "Filed May 31, 1915."

[1] The record shows that the term of court in which this case was tried was duly adjourned on the 28th day of January, 1915. Up to that date there does not appear to have been any order nor agreement of counsel nor rule of court granting time within which to file bills of exception. Without such order, agreement, or rule, the right to bill of exceptions expired with the adjournment of court. See Miller v. Morgan, 67 Fed. 82, 14 C. C. A. 312; United States v. Jones, 149 U. S. 262, 13 Sup. Ct. 840, 37 L. Ed. 726.

From subsequent printed matter in the transcript we find that to a petition filed on the 22d day of February, 1915, is attached the following order:

"The foregoing petition and agreement of counsel being considered, it is ordered that the plaintiff, the United States of America, be and is hereby granted an extension of time of 60 days to begin from the expiration of time originally allowed herein, to wit, 30 days from January 28, 1915, in which to file an assignment of errors and bills of exception in the above numbered and entitled cause. Said assignments of error and bills of exception to be filed on or before the 28th day of April, 1915. Thus done, read, and signed at Shreveport, Louisiana, the 22d day of February, 1915."

And thereafter, it appears, further extensions of time to file bills of exception were granted.

[2] If we assume from these orders extending time that the first order was granted before the term ended, then we find, passing over objections to evidence rejected and charges refused, that over the objections of the government the trial judge directed a verdict for the defendants. If this charge was correct, then the judgment should be affirmed; if not correct, then the judgment should be reversed. As stated in brief of counsel for defendants in error:

"The question to be decided is purely one of law, and is: Did the land in controversy inure to the state of Louisiana under the act of Congress of March 2, 1849 (9 Stats. 352), granting to the state the whole of the swamp and overflowed lands therein, 'which may be or are found unfit for cultivation?' Section 1 of the act provides that such lands 'shall be and the same are hereby granted' to the state of Louisiana. Section 2, that the Secretary of the Treasury, afterwards the Secretary of the Interior (Act March 3, 1849, c. 108; 9 Stat. 395) shall cause a personal examination to be made, under the direction of the Surveyor General of the state, 'by experienced and faithful deputies, of all the swamp lands therein which are subject to overflow and unfit for cultivation, and a list of the same to be made out, and certified by the deputies and Surveyor General to the Secretary of the Treasury, who shall approve the same, so far as they are not claimed or held by individuals; and on that approval, the fee simple to said lands shall vest in the said state of Louisiana, subject to the disposal of the Legislature thereof.' The evidence shows that

there was selected on behalf of, and on May 5, 1852, approved to, the State, under said act, in township 14 south, range 4 east:

The whole of section 23, containing	639.92 acres
The whole of section 24, containing	640.64 acres
The whole of section 25, containing	594.43 acres
The whole of section 26, containing	639.52 acres
The whole of section 27, containing	639.84 acres
The whole of section 28, containing	640.72 acres
The whole of section 32, containing	640.48 acres
The whole of section 33, containing	624.96 acres
The whole of section 34, containing	427.96 acres
The whole of section 35, containing	201.00 acres
The whole of section 36, containing	8.56 acres
Aggregating	5,698.03 acres

—and 'all the unsurveyed portion described as sea marsh in township 14 south, range 4 east, except section 16,' containing 18,622 acres.

"At the time when the selections were made, two official plats of the township were in existence—one approved May 1, 1848, offered by plaintiff; and one approved December 8, 1842, offered by defendant. Plaintiff contends that the selections were made from the map of 1848, and defendant that they were made from that of 1842. I submit that defendant's contention is the more reasonable, because an inspection of the two maps will show that, according to the map of 1848, only the northern fringe and a small portion of the western fringe of the township were surveyed, while according to that of 1842 only the southern portion was surveyed. Now the specific sections designated as having been selected, and their acreage, are precisely the sections shown to have been surveyed by the map of 1842, with the exact acreage assigned to them on that map. All the balance of the township, according to the map of 1842, was sea marsh. It is but a reasonable presumption, therefore, to assume that the man making the selections had before him the map of 1842, and, having specifically designated the sections appearing thereon as surveyed, with their acreage, he then selected the balance designated as sea marsh, excepting the school section, and approximated the whole of said balance at 18,622 acres. That acreage covered more than the balance of the township, because, if it be added to the aggregate acreage of the designated sections, we have an even greater total than a township contains. The selections could not have been made from the map of 1848, because not one of the specific sections selected is shown on that map, and not one of the sections shown on that map as surveyed was specifically selected."

With this view of the case we concur, and, as the defendants in error have an admitted title to the lands in question from the state of Louisiana, we find that verdict in their favor was properly directed.

[3] And it may be noticed that the directed charge may be sustained, because the case shows that in 1850 the lands in question were in fact swamp and overflowed lands. In the conglomerated bill of exceptions we find admission as follows:

"It is admitted by and between counsel for defendant that the witness, Theolin Landry, will swear that he is 74 years old, and has known the land in controversy since he was a small boy, and that it has always been of a swampy character and unfit for cultivation; that the land is, however, much higher or better drained to-day than it was formerly, and especially in the decade between 1860 and 1870, during which he assisted at a survey of a boundary line of the township; that the land has been in possession of the defendant and his authors as far back as 1860; he thinks it was 1855 or 1860 when possession was first taken of the land, and the defendant and his authors have always been in possession. The land is used for pasture—no part having been cultivated either by the defendant or his authors. Counsel for the government admits that the witness above referred to will swear to the facts

above set forth, but counsel for the government objects to the introduction of any parol testimony for the purpose of showing that the land in question was swamp and unfit for cultivation, on the ground that such testimony is inadmissible to establish defendant's contention that said land inured to the state under the swamp land grant act. And said testimony is therefore incompetent and irrelevant. (Objection overruled; to which ruling bill is reserved by counsel for the government.)"

We think this admission was admissible under the issues presented, and there is found no evidence to the contrary. If the lands were in fact swamp and overflowed lands in 1850, then the defendant's title was good. See Wright v. Roseberry, 121 U. S. 488–521, 7 Sup. Ct. 985, 30 L. Ed. 1039; Irwin v. San Francisco Savings Union, 136 U. S. 578, 10 Sup. Ct. 1064, 34 L. Ed. 540; United States v. Chicago, Milwaukee & St. Paul Ry., 218 U. S. 233, 31 Sup. Ct. 7, 54 L. Ed. 1015.

Judgment affirmed.

GENERAL FILM CO. v. SAMPLINER.

(Circuit Court of Appeals, Sixth Circuit. April 4, 1916.)

No. 2752.

1. COURTS ⊕=351—DISCOVERY ⊕=4, 6—FEDERAL COURTS—BILL OF DISCOVERY IN AID OF ACTION OR DEFENSE AT LAW.

Statutory provisions of a state, under which a party to an action at law may require the production of books or writings containing evidence in advance of trial, do not apply to procedure in the federal courts; but Rev. St. § 724 (Comp. St. 1913, § 1469), authorizes the court to require the production of such evidence "in the trial of actions at law." While this provision does not deprive a court of equity of jurisdiction to entertain a bill of discovery in aid of an action at law before trial, it is intended as a substitute for such bill, and the equitable jurisdiction will not be exercised to require a plaintiff to produce in advance evidence which is necessary to sustain his action, nor unless it appears that the party asking the discovery has good ground for asserting the fact sought to be proved by such evidence.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 924; Dec. Dig. ⊕=351; Discovery, Cent. Dig. §§ 5, 7; Dec. Dig. ⊕=4, 6.]

2. CHAMPERTY AND MAINTENANCE ⊕=4(8)—CHAMPERTY AS DEFENSE—PLEADING.

The defense of champerty need not be pleaded; but, if it appears on the trial that a contract is void as against public policy, the court is bound to so declare, and deny relief.

[Ed. Note.—For other cases, see Champerty and Maintenance, Cent. Dig. § 19; Dec. Dig. ⊕=4(8).]

3. DISCOVERY ⊕=6—"FISHING BILL."

A discovery, sought upon suspicion, surmise, or vague guesses, is called a "fishing bill," and will be dismissed.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. § 7; Dec. Dig. ⊕=6.]

Appeal from the District Court of the United States for the Northern District of Ohio; John H. Clarke, Judge.

Bill of discovery by the General Film Company against Joseph H. Sampliner. Bill dismissed, and complainant appeals. Affirmed.

Richard Inglis and Bulkley, Hauxhurst, Inglis & Saeger, all of Cleveland, Ohio (Caldwell, Masslich & Reed, of New York City, of counsel), for appellant.

J. H. Sampliner, of Cleveland, Ohio, pro se.

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

KNAPPEN, Circuit Judge. The appellee (whom we shall call plaintiff), claiming to be the assignee of the Lake Shore Film & Supply Company, brought suit at law against appellant in the court below for treble damages, alleged to have accrued to the Lake Shore Company under the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [Comp. St. 1913, §§ 8820–8830]) by reason of an alleged conspiracy to monopolize the motion-picture business of the United States and to restrict trade and commerce therein between the several states, and for other alleged unlawful and injurious acts.

The petition in the suit at law alleged that, on or about a date named, plaintiff "became the owner by assignment, of all the right, title and interest of the Lake Shore Film & Supply Company * * * in and to all its claim for damages by it sustained, by reason of the violation of" the federal act referred to, "by the various parties hereinafter specifically mentioned." Appellant answered the petition specifically denying the alleged assignment to plaintiff. Later, appellant filed its bill in equity in the same court, setting up the suit at law, including the claimed assignment to plaintiff and its denial thereof. The bill further alleged on information and belief that the Lake Shore Company had "never assigned by proper, legal and binding corporate action, any such alleged cause of action, * * *" appellant stating as the source, among others, "of its information and ground of its belief," certain testimony given in advance of the trial of the action at law by an officer and director of the Lake Shore Company at the date of the alleged assignment. It also alleged the request of appellant for an inspection of the assignment "to ascertain whether or not the same was duly made," and plaintiff's refusal to exhibit the assignment or a copy of it; also that appellant "is desirous of examining said assignment and ascertaining its validity for the purpose of substantiating its defense against said action at law * * * and further to substantiate the position of your petitioner * * * that if said alleged cause of action was in form assigned to [plaintiff] the attempt to assign the same was champertous, and also that the [plaintiff] in such case, is not the real party in interest to bring any suit on said alleged cause of action." The bill also alleged inability to ascertain and prove the facts as to the alleged assignment without an inspection of the instrument, inability to obtain inspection except by bill of discovery, and possession by plaintiff of the assignment, and prayed that plaintiff "be required to appear under oath and testify as to the form and manner of said alleged assignment, and if said alleged assignment is in writing, to permit the plaintiff [appellant] to inspect the same and take copies thereof."

Appellee made a motion to dismiss the bill, presumably under gen-

eral equity rule No. 29 (198 Fed. xxvi, 115 C. C. A. xxvi). The motion was sustained and the bill dismissed for the reasons, stated by the District Judge, that appellant had an undoubted right to compel production of the assignment at the trial, and that the proceeding in equity was clearly "a fishing expedition upon the part of the defendant in the suit at law, for the purpose of procuring inspection of the assignment to Sampliner for the purpose of using it if it serves its purpose or of not using it if it proves unfavorable." The appeal is from this decree of dismissal.

[1] The Ohio Statutes (G. C. §§ 11551 and 11552) empower the court, in an action at law, to require a party to produce books and writings which contain evidence pertinent to the issues "in cases and under circumstances where they might heretofore have been compelled to produce them by the ordinary rules of chancery," and give either party the right to demand of his adversary an inspection and copy, or permission to take a copy, of a book, paper or document in the adversary's possession containing evidence relative to the merits of the action or defense. But state statutes of this nature are held inapplicable to the procedure in federal courts, either under section 721 of the Revised Statutes (Comp. St. 1913, § 1538), which gives, with certain exceptions, to the laws of the several states the effect, in the courts of the United States, of rules of decision in trials at common law, or under the Conformity Act (section 914 [Comp. St. 1913, § 1537]), and because of section 861 of the Revised Statutes (Comp. St. 1913, § 1468), which provides that the mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, subject to certain exceptions which the instant case does not present. Ex parte Fisk, 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117; Hanks Dental Ass'n v. International, etc., Co., 194 U. S. 303, 24 Sup. Ct. 700, 48 L. Ed. 989.

Section 724 of the Revised Statutes (Comp. St. 1913, § 1469) empowers the courts of the United States "in the trial of actions at law" to require the parties "to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery." But the words *"in the trial"* have been authoritatively construed to mean *"on or at the trial,"* and so not to authorize a requirement of such production *"before the trial."* Carpenter v. Winn, 221 U. S. 533, 538, et seq., 31 Sup. Ct. 683, 55 L. Ed. 842. In the latter case it was said by Mr. Justice Lurton (221 U. S. 539, 31 Sup. Ct. 685 [55 L. Ed. 842]) that procedure for discovery in chancery of evidence material to the maintenance or defense of an action at law "is still open if it is desired to have the evidence produced before the trial. A court of equity does not lose its jurisdiction to entertain a bill for the discovery of evidence or to enjoin the trial at law until obtained, because the powers of the courts of law have been enlarged so as to make the equitable remedy unnecessary in some circumstances." While this statement was perhaps unnecessary to a decision of the question before the court, we should accept it as authoritative. It has been so

accepted by other courts;[1] and the proposition receives support from Southern Pacific R. R. Co. v. United States, 200 U. S. 341, 351, 26 Sup. Ct. 296, 50 L. Ed. 507, as well as from the authorities cited in Carpenter v. Winn. The discovery obtainable by bill in equity is, of course, by answer. 1 Bates, Fed. Eq. Proc. § 118.

The District Court thus had *jurisdiction* to entertain a bill of discovery in aid of the action at law. The question is whether appellant's bill presents a case calling for the *exercise* of such power. The discovery sought relates to two matters of defense to the action at law: (a) That plaintiff is not the real party in interest, and (b) that the assignment is champertous.

The first defense, except so far as involved in the defense of champerty, is presented by a denial of plaintiff's allegation of the assignment under which he claims. This denial puts upon plaintiff in the suit at law the burden of proving the assignment, and he cannot well make such proof without a production of the written assignment, if it exists. A defendant in a suit at law is not entitled to a discovery in equity of his adversary's evidence sustaining his action. Carpenter v. Winn, supra, 221 U. S. at page 540, 31 Sup. Ct. 683, 55 L. Ed. 842, and cases there cited. It is obvious that further information by way of discovery is unnecessary to enable appellant to properly plead this defense. Indeed, it has already so pleaded.

As to the defense of champerty: It is the rule that in order to entitle a defendant in an action at law to a discovery of evidence in his adversary's possession it must appear that defendant has good ground for asserting the fact that the evidence will so disclose, and usually he is required to give the sources of his information. "A discovery sought upon suspicion, surmise or vague guesses is called a 'fishing bill,' and will be dismissed." Carpenter v. Winn, supra, 221 U. S. at page 540, 31 Sup. Ct. 683, 55 L. Ed. 842, and cases there cited. See Childs v. Railway Co., supra, 221 Fed. at page 223, 136 C. C. A. 629. The fact that there is an available statutory remedy by way of inspection upon the trial, and that the object of the federal statute is, as stated in Carpenter v. Winn, supra (221 U. S. 537, 31 Sup. Ct. 683, 55 L. Ed. 842), "to provide a substitute for a bill of discovery in aid of a legal action," or as stated in American Lithographic Co. v. Werckmeister, 221 U. S. at page 609, 31 Sup. Ct. 676, 55 L. Ed. 873, "to provide, by motion, a substitute quoad hoc for a bill of discovery in aid of a legal action," furnishes ample reason for at least adhering to the ancient strictness affecting the remedy by bill.

[3] While the bill in this case alleges certain information to the effect that there has not been a valid and legal assignment to plaintiff, yet as respects the defense of champerty the statement is merely that petitioner desires to examine the assignment to ascertain its validity "to substantiate the position of your petitioner * * * that if such alleged cause of action was in fact assigned to said * * * Samplin-

[1] United Cigarette Mach. Co. v. Winston, etc., Co. (C. C. A. 4th Cir.) 194 Fed. 947, 957, 114 C. C. A. 583; Cheatham Electric, etc., Device v. American Automatic Switch Co. (D. C.) 198 Fed. 496; Childs v. Railway Co. (C. C. A. 8th Cir.) 221 Fed. 219, 223, 136 C. C. A. 629.

er, the attempt to assign the same was champertous." This manifestly fails to allege the existence of reasonable ground for believing that the assignment was champertous, and the proceeding was thus, as held by the district court, "a fishing bill" within the authorities, and was rightly dismissed. We are the better content with this conclusion from the fact that it is difficult to see how plaintiff can be prejudiced by such dismissal. Several pertinent suggestions present themselves:

Appellant has the absolute right under the statute to inspect the assignment upon the trial of the action at law, which, apart from the question of pleading, would ordinarily seem an adequate protection. United States v. Bitter Root Co., 200 U. S. 451, 475, 26 Sup. Ct. 318, 50 L. Ed. 550. He has also the right to oral examination of the adverse party upon the trial. Were it necessary to plead champerty, it not only may be pleaded upon belief, but it would seem almost a matter of course to permit amendment upon the trial of the action at law, under the issue framed as to the validity and effectiveness of the assignment to plaintiff, to meet a champertous situation if developed.

[2] But the defense of champerty is not usually required to be pleaded. When it appears upon the trial, even in the absence of pleading, that a contract is void as against public policy, the court is bound to hold the contract void and deny relief. Oscanyan v. Arms Co., 103 U. S. 261, 266, 26 L. Ed. 539; Lee v. Johnson, 116 U. S. 48, 52, 6 Sup. Ct. 249, 29 L. Ed. 570; Peck v. Heurich, 167 U. S. 624, 627, 629, 17 Sup. Ct. 927, 42 L. Ed. 302 et seq; Brown v. Ginn, 66 Ohio St. 316, 324, 325, 64 N. E. 123. In Peck v. Heurich, supra, the defense was the general issue (167 U. S. 625, 17 Sup. Ct. 927, 42 L. Ed. 302), but the court dismissed the proceeding when it appeared on the trial that the conveyance was champertous. In Brown v. Ginn, supra, the plea was only that the plaintiff was not the real party in interest (66 Ohio St. 317, 64 N. E. 123); but when it appeared on the trial that the assignment was champertous it was held (66 Ohio St. 325, 64 N. E. 123) that even if the legal title to the right of action rested in the assignee, "so as to constitute him the real party in interest, and thus enable him to bring the action in his own name, such action can not be maintained because against public policy." The fact that in the earlier case of Stewart v. Welsh, 41 Ohio St. 483, 502, the defense of champerty seems to have been pleaded is not significant. That case does not involve the question of the necessity of pleading.

The decree of the District Court dismissing the bill of complaint is affirmed with costs.

LEWIS et al. v. JONES et al.

In re RIVERSIDE FERTILIZER CO.

(Circuit Court of Appeals, Fifth Circuit. April 15, 1916. Rehearing Denied May 15, 1916.)

No. 2811.

1. MORTGAGES ⟸186(3)—PRIORITY—UNRECORDED MORTGAGE—NOTICE—BURDEN OF PROOF.

Under Civ. Code Ga. 1910, § 4530, providing that notice sufficient to excite attention and put a party on inquiry is notice of everything to which it is afterwards found such inquiry might have led, and that ignorance of a fact, due to negligence, is equivalent to knowledge in fixing the rights of the parties, and section 3260 providing that mortgages not recorded are postponed to all other liens, but that if the younger lien is created by contract, and the party receiving it has notice of the prior unrecorded mortgage, then the lien of the older mortgage shall be held good against him, the burden is on the holder of the senior unrecorded mortgage to show clearly actual notice of the mortgage to the former mortgagees.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 454; Dec. Dig. ⟸186(3).]

2. MORTGAGES ⟸186(5)—PRIORITY—UNRECORDED MORTGAGE—EVIDENCE—ACTUAL NOTICE.

Proof that mortgagees were informed before they took their mortgage that there was a prior mortgage against the property, but were not told that it was unrecorded, does not show such notice to the mortgagees of the existence of the senior unrecorded mortgage as gives it priority under Civ. Code Ga. 1910, § 3260, where it was understood by all the parties that the prior mortgage was to be paid off out of the money advanced to the mortgagors to clear the property of all prior liens, and before the mortgage was taken, the mortgagees' attorney made a search for all liens of record and inquired concerning outstanding accounts, but was not informed of the prior unrecorded mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 454; Dec. Dig. ⟸186(5).]

Walker, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Southern District of Georgia; William T. Newman, Judge.

In the matter of the Riverside Fertilizer Company, bankrupt. From a decree of the District Court, awarding priority to the unrecorded mortgage of George S. Jones and another, Charles B. Lewis, trustee in bankruptcy, and another, appeal. Reversed and remanded.

Clifford L. Anderson and Daniel W. Rountree, both of Atlanta, Ga., for appellants.

Orville A. Park, of Macon, Ga. (Hardeman, Jones, Park & Johnston, of Macon, Ga., on the brief), for appellees.

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

FOSTER, District Judge. In this matter it appears the real estate surrendered by the bankrupt was burdened with a valid mortgage in

favor of the Pratt Engineering & Machine Company, executed September 27, 1912, and recorded September 28, 1912, for over $170,000 in principal, interest, and costs. George S. and Bruce C. Jones also held a valid mortgage on the same property, executed on April 17, 1912, and recorded October 16, 1912, for $3,500 and interest. Notwithstanding the Pratt mortgage was registered over two weeks before the Jones mortgage, the Messrs. Jones claimed priority on the ground of actual notice to the Pratt Engineering & Machine Company, and the District Court decided in their favor. From that decree the trustee and the Pratt Engineering & Machine Company have appealed.

[1, 2] The Georgia Code contains the following provisions:

"Sec. 4530. Notice sufficient to excite attention and put a party on inquiry is notice of everything to which it is afterwards found such inquiry might have led. Ignorance of a fact, due to negligence, is equivalent to knowledge, in fixing the rights of parties."

"Sec. 3260. *Effect of Failure to Record.*—Mortgages not recorded within the time required remain valid as against the mortgagor, but are postponed to all other liens created or obtained, or purchases made prior to the actual record of the mortgage. If, however, the younger lien is created by contract, and the party receiving it has notice of the prior *unrecorded* mortgage, or the purchaser has the like notice, then the lien of the older mortgage shall be held good against them." (Italics ours.)

The burden was, of course, on the older mortgagees to clearly show actual notice to the junior mortgagees. From the evidence in the record, which is not in conflict, except as to certain conversations between the parties, it appears the bankrupt was building a plant, and, while the buildings were in course of erection, having some financial and other troubles in regard thereto, it entered into a contract with the Pratt Engineering & Machine Company to complete it. Before making the contract there was considerable negotiating between the parties, and it was thoroughly understood and agreed that the Pratt Engineering & Machine Company was to have a first lien on the property. To make certain of this, the Pratt Engineering & Machine Company, advanced $25,000 for the purpose of paying and clearing off all existing liens, or debts that might become liens, superior to its mortgage. In the beginning of negotiations Mr. Baxter Jones, a brother of the senior mortgagees and president of the Riverside Fertilizer Company, mentioned the claim of his brothers to the representative of the Pratt Engineering & Machine Company, Mr. Hurt, but stated it did not amount to anything and would be taken care of. Later on, at a conference at Atlanta, at which Mr. George S. Jones was present, he mentioned the mortgage as a claim that would have to be paid. At that time Mr. George S. Jones, who is an attorney at law, was interested in the completion of the plant, and was prepared to go to New York on behalf of the Riverside Fertilizer Company, to make other financial arrangements, if the negotiations then pending with the Pratt Engineering & Machine Company should fall through. Regarding this interview Mr. George S. Jones testifies (Record, page 38):

"We went downstairs, and he and Mr. Baxter Jones sat over at one table by themselves, Mr. Hall, Mr. Park, and I at another, while dinner was being brought in. Mr. Hurt and Mr. Baxter Jones finally came over to our table, and I inquired of Baxter how they were getting on, and so far as I

recollect this is about all that was said; Baxter said he hoped to be able to effect some kind of an agreement, but it would be necessary for him and Mr. Hall to dispose of the liens on the property. There was some talk about what liens there were on the property, and I stated to Mr. Hurt at that time, as I recollect it, at the table, that Bruce Jones and I held a mortgage on the property securing a $3,500 advance, and that that was to be taken care of among the others which had been mentioned. That, so far as I recollect, had not been mentioned up to that time; in fact, there was very little said."

There is a direct conflict between him and Mr. Hurt as to this conversation, Mr. Hurt denying that anything was said as to the Jones' claim being secured by mortgage. Mr. Park, the only disinterested witness, did not testify, and the testimony of Mr. Hall and Mr. Bruce Jones does not aid in solving the conflict. We will assume, however, that the conversation was as related by Mr. Jones; but beyond question it was understood by all parties present at this time that the Jones claim was to be paid out of the money advanced by the Pratt Engineering & Machine Company, and was not to remain as a ranking lien on the property. Before the transaction was completed the Pratt Engineering & Machine Company sent an attorney, Mr. George P. Whitman, to Macon, where the Jones mortgage would have been recorded, to search the records for all outstanding liens. He found some liens recorded, but not the Jones mortgage. He also looked over the books of the Riverside Fertilizer Company, saw the "bills payable" account, but no mention in the books of any mortgage. He discussed the recorded liens with Mr. Hall or Mr. Baxter Jones, officers of the Riverside Fertilizer Company, and nothing was said about the Jones mortgage. There is not a line of evidence to the effect that the Pratt Engineering & Machine Company was ever told the Jones mortgage was *unrecorded*. And there can be no doubt it was intended by all parties that it was to be paid out of the $25,000 loaned by the Pratt Engineering & Machine Company for the purpose of clearing off prior liens. Under all the circumstances, it is difficult to imagine what more the Pratt Engineering & Machine Company could have been expected to do. They were dealing with honorable men in a fair, open manner, and no doubt, but for some untoward happening, undisclosed by the record, the Jones mortgage would have been discharged with the Pratt money. The universal rule regarding notice is well stated by the Supreme Court of Georgia in the case of Jordan v. Pollock, 14 Ga. 157:

"Loose, suspicious, vague rumors or reports will not do; * * * but knowledge must be brought home to the party, so that mala fides marks the transaction, if he afterwards buy."

Under the facts of this case there could be no suspicion of bad faith on the part of the Pratt Engineering & Machine Company, and the knowledge brought home to them at no time amounted to notice that the Jones mortgage was an active, adverse, unrecorded claim on the property, that might be defeated by the mortgage of the property to them.

Having reached this conclusion, it is unnecessary to pass upon the other assignments of error in the record.

The decree will be reversed, and the case remanded, for such other proceedings as may be necessary and in accordance with these views.

WALKER, Circuit Judge (dissenting). I am unable to come to the conclusion announced in the foregoing opinion. Before the mortgage to the Pratt Engineering & Machine Company was made, the representatives of that company were informed of the existence of a prior mortgage of the same property to George S. and Bruce C. Jones. Under the statutory provisions which have been quoted, this information had the effect of preventing the subsequent mortgagee acquiring a lien superior to that of the prior mortgage, unless the prior mortgagees by contract waived their rights under their mortgage, or, in favor of the subsequent mortgagee, estopped themselves from asserting those rights. It does not seem to me that anything in the record supports the conclusion that they lost their priority, either by contract or by estoppel. They did not agree to relinquish any right they had, and it is not made to appear that they said, did, or omitted to do anything calculated to mislead the subsequent mortgagee into the belief that, in acquiring its mortgage, it was getting a prior lien on the mortgaged property.

LEWIS v. JONES et al.

In re RIVERSIDE FERTILIZER CO.

(Circuit Court of Appeals, Fifth Circuit. April 15, 1916.)

No. 2812.

Petition to Superintend and Revise Proceedings of the District Court of the United States for the Southern District of Georgia; William T. Newman, Judge.

In the matter of the Riverside Fertilizer Company, bankrupt. Petition of Charles B. Lewis, trustee, from allowance of claim of George S. Jones and another. Petition to revise denied.

See, also, 232 Fed. 100, —— C. C. A. ——.

Clifford L. Anderson and Daniel W. Rountree, both of Atlanta, Ga., for petitioner.

Orville A. Park, of Macon, Ga. (Hardeman, Jones, Park & Johnston, of Macon, Ga., on the brief), for respondents.

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

PER CURIAM. The case herein involved is disposed of under the appeal between the same parties, as per decision this day rendered. 232 Fed. 100, —— C. C. A. ——.

The petition to revise is denied.

WALKER, Circuit Judge, dissenting.

LILLIE v. DENNERT.

(Circuit Court of Appeals, Sixth Circuit. May 2, 1916.)

No. 2734.

1. JURY ⟸19(1)—RIGHT TO JURY TRIAL.
Under the modern practice of allowing a motion to enter satisfaction of a judgment at law, by reason of its payment or discharge, as a substitute for the writ of audita querela, the trial of controverted issues of fact arising under such motion is ordinarily to be had in the same manner as under such writ; that is, by jury trial.
[Ed. Note.—For other cases, see Jury, Cent. Dig. § 104; Dec. Dig. ⟸19(1).]

2. COURTS ⟸356—REVIEW—QUESTION REVIEWABLE—OBJECTIONS.
Where a motion to enter satisfaction of a judgment was tried to the court, but a jury was not waived, the appellate court on writ of error will not, no objection having been made, consider whether the order of the lower court was a mere award of an arbitrator, but will treat the decision as one which can be reviewed.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 937; Dec. Dig. ⟸356.]

3. APPEAL AND ERROR ⟸859—WRIT OF ERROR—MATTERS REVIEWABLE.
The right of review under writ of error is limited to questions of law, and does not extend to matters of fact; therefore, where a motion to enter satisfaction of a judgment was tried to the court, matters of fact cannot be reviewed, save in so far as the appellate court may determine whether there was any evidence which would warrant the finding.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3441–3445; Dec. Dig. ⟸859.]

4. JUDGMENT ⟸878(2)—SATISFACTION—EFFECT.
Where one of two joint tort-feasors satisfied a judgment against both, the judgment was discharged, though he induced a third person to pay the judgment for him and to make an assignment.
[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1654; Dec. Dig. ⟸878(2).]

5. JUDGMENT ⟸894—SATISFACTION—EVIDENCE.
On motion to enter satisfaction of a judgment, evidence *held* to warrant a finding that one of the two joint tort-feasors against whom it was rendered satisfied the judgment through the agency of a third person.
[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1706–1709, 1712; Dec. Dig. ⟸894.]

In Error to the District Court of the United States for the Western District of Michigan; Clarence W. Sessions, Judge.

Charles P. Lillie, the assignee of a judgment, moved for an execution against Paul Dennert, one of the defendants, who filed a petition praying the court to enter satisfaction of the judgment. Satisfaction of the judgment was ordered entered, and Charles P. Lillie brings error. Affirmed.

G. C. Brown, of Grand Rapids, Mich., for plaintiff in error.

C. J. Hall, of Grand Rapids, Mich., for defendant in error.

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

SANFORD, District Judge. This writ of error is brought to review an order entering satisfaction of a judgment obtained in the court below.

On December 17, 1913, one Charles R. Horrie, the plaintiff in an action at law brought against one Edgar P. Daggett and Paul Dennert, the defendant in error, as joint tort feasors, obtained a judgment against them jointly for $2,683 and costs. On February 9, 1915, this judgment was assigned by Horrie to Charles P. Lillie, the plaintiff in error.

This assignment having been filed in the clerk's office, Lillie moved the court for the issuance of a body execution against Dennert. This motion, being resisted, was heard by the trial judge on oral testimony taken before him, and was, after such hearing, denied. On application of Lillie an execution and a garnishment against Dennert were then issued for the admitted purpose of collecting the entire judgment out of his property. Thereupon Dennert filed a petition, in which he alleged, in substance: that his co-defendant Daggett had paid the full amount of the judgment to the plaintiff Horrie and satisfied the same; that, while this payment purported to have been made by Lillie and an assignment of the judgment had been taken by him, the money paid to Horrie was in reality the money of Daggett, the payment, as a matter of fact and law, the act of Daggett, and the action taken by Lillie a mere sham and pretense; and that Lillie had refused to discharge the judgment of record as he ought to do, and was attempting by his proceeding to compel a contribution by Dennert to Daggett a joint tort feasor, not warranted by law. And he thereupon prayed that an order be entered withdrawing the execution, discharging the garnishment and entering satisfaction of the judgment.

Lillie answered this petition, denying the foregoing allegations of fact, and alleging, in substance: that he had paid Horrie the amount of the judgment with his own money; that no part of it was received by him from or for Daggett; that he took the assignment as his own property, with all rights to enforce it given by law; that it had not been paid and was wholly unsatisfied; and that he was its individual and sole owner.

The issues raised by this petition and answer were heard and determined by the trial judge upon the oral testimony heard by him on the previous motion for body execution, a transcript of which was filed with the petition and incorporated therein by reference; upon the consideration of which, without handing down any opinion or making any finding of facts, he entered an order that the judgment was fully paid and satisfied on February 9, 1914, directing the clerk to make an entry of such satisfaction, recalling the execution and dismissing the garnishment proceedings.

Lillie by his writ of error now seeks to review this order. It has been held that such an order is a decision from which a writ of error will lie. See McCutcheon v. Allen, 96 Pa. 319, 329; also Cooley v. Gregory, 16 Wis. 303, in which an appeal was allowed. In view of the result which we reach on the merits, we assume, without deciding, that the proper remedy has been adopted.

[1] The scope of the review permissible under such writ of error is, however, in the instant case, a matter of grave doubt. Under the established modern practice allowing a motion to enter satisfaction of a judgment at law, by reason of its payment or discharge, as a substitute for the ancient writ of audita querela, the trial of controverted issues of fact arising under such motion, is ordinarily to be had in the same manner as under such writ, that is, by jury trial; to which several state courts have held the parties are entitled as a matter of right. Harding v. Hawkins, 141 Ill. 572, 584, 31 N. E. 307, 33 Am. St. Rep. 347; Bruce v. Barnes, 20 Ala. 219, 222; McCutcheon v. Allen (Pa.) supra, at page 323; Hottenstein v. Haverly, 185 Pa. 305, 308, 39 Atl. 946; Cooley v. Gregory (Wis.) supra, at page 326; and other cases therein cited. And see 2 Black on Judgments (2d Ed.), § 1014, p. 1491.

[2, 3] Sections 648 and 649 of the Revised Statutes (Comp. St. 1913, §§ 1584, 1587), however, provide that the trial of issues of fact in the Circuit Courts shall be by jury, except in certain cases not here material, unless the parties or their attorneys file with the clerk a stipulation in writing waiving a jury; in which case they may be tried and determined by the court. Neither of these sections is repealed by the Judicial Code; and they,—as well as Section 700 providing for review,—are clearly made applicable to the District Courts, as now constituted, by Section 291 of that Code. Act March 3, 1911, c. 231, 36 Stat. 1167 (Comp. St. 1913, § 1268). If, therefore, the issues of fact arising under a motion to enter satisfaction of judgment are to be considered as coming within the class of issues embraced within Sections 648 and 649 of the Revised Statutes, it would seem clear that where the parties, without filing a written stipulation waiving a jury trial, either expressly, or, as in the instant case, impliedly, submit the determination of the controverted issues to the trial judge, as, in effect, to an arbitrator, his conclusion is,—at least in the absence of a finding of facts,—not subject to review under writ of error, on a consideration either of the questions of fact or of law, or of mixed fact and law, arising on the evidence heard before him. Campbell v. Boyreau, 21 How. 223, 226, 16 L. Ed. 96; Bond v. Dustin, 112 U. S. 604, 606, 5 Sup. Ct. 296, 28 L. Ed. 835; Andes v. Slauson, 130 U. S. 435, 438, 9 Sup. Ct. 573, 32 L. Ed. 989; St. Louis v. Rutz, 138 U. S. 226, 241, 11 Sup. Ct. 337, 34 L. Ed. 941; Lupton's Sons v. Auto Club, 225 U. S. 489, 494, 32 Sup. Ct. 711, 56 L. Ed. 1177, Ann. Cas. 1914A, 699. And see Edwards v. Ladow (6th Cir.) 230 Fed. 378, — C. C. A. —. In the absence, however, of any objection interposed in this behalf by the defendant in error, we are not disposed of our own motion, to apply the rigor of this rule to the instant case, but shall assume, for present purposes, without determination, that it is not applicable, in its strict sense, to the subordinate issues of fact submitted to the determination of the trial judge upon a motion to enter satisfaction of judgment of the court; that in such matter he acts in his judicial capacity rather than merely as arbitrator, and that hence, as to the questions thus determined by him, we have authority, under a writ of error to review the evidence for the purpose of de-

termining whether any error of law has been committed. It is entirely clear, however, that as the right of review under writ of error is limited to questions of law and does not extend to matters of fact (Andes v. Slauson, supra, 130 U. S. at p. 348, 9 Sup. Ct. 573, 32 L. Ed. 989), we can not in any event review the conclusion of the trial judge in so far as it depends upon a mere consideration of the weight to be given the evidence introduced before him, and that his conclusion is to be accepted by us as final if there was any evidence upon which, as matter of law, it could properly have been reached. See, by analogy, Hathaway v. Cambridge, 134 U. S. 494, 498, 10 Sup. Ct. 608, 33 L. Ed. 1004; Runkle v. Burnham, 153 U. S. 216, 225, 14 Sup. Ct. 837, 38 L. Ed. 694; Dooley v. Pease, 180 U. S. 126, 131, 21 Sup. Ct. 329, 45 L. Ed. 457; West Virginia Railroad v. United States (4th Cir.), 134 Fed. 198, 202, 67 C. C. A. 220; and Louisville Railroad v. United states (D. C.) 216 Fed. 672, 679 (three judges), and cases therein cited.

[4, 5] The following facts are shown by the undisputed evidence:

After the rendition of the judgment in Horrie's favor and notice from his attorney that he was about to obtain an execution thereon, Daggett, under the advice of his attorney, offered to pay Horrie one-half of the judgment, if he would proceed against Dennert for the other half; and deposited in bank one-half of the amount of the judgment, taking therefor a certificate of deposit with which he intended to make the proposed payment. This proposition was declined by Horrie; his attorney stating, however, that in order to assist Daggett, he would be willing to assign the entire judgment to some third person. Thereupon Daggett's attorney advised him to get some one friendly to him to buy the judgment, but with his own money and as an actual purchase. Daggett accordingly saw Lillie, who was his friend and business associate, and asked him, as Lillie states, "to buy that judgment for him"; telling Lillie at the time that he would see that he did not lose anything by it. Lillie agreed to do this; and in order that he might obtain the money with which to make the purchase, Lillie and Daggett went together to the bank in which Daggett held his certificate of deposit, being the bank in which Daggett's company regularly did business and in which he was well known, but at which Lillie had not done business for several years or apparently ever made a previous loan. Daggett and Lillie saw the cashier of this bank and arranged for a loan to Lillie for the full amount of the judgment; Lillie giving the bank his three months' note therefor, without endorsement. After Lillie had given this note, Daggett stated that he had a certificate of deposit for one-half of the amount which he had forgotten to bring, and told the cashier that he would bring it in and deposit it as security on the note. This he did on the next day. Lillie took the money thus obtained from the bank on his note, and with it paid Horrie the full amount of the judgment; taking from him the assignment which is now in question. Subsequently on receiving from the bank notice of the maturity of the note, Lillie notified Daggett, who said he would take care of the interest; the note being accordingly renewed by Lillie and the interest paid by Daggett. This renewal

note is still unpaid and outstanding in the hands of the bank as Lillie's individual obligation alone. Lillie, however, admitted that he did not buy the judgment as an investment for his own money; that he had no personal interest in the matter and did what he did for Daggett as his friend; that he understood at the time that the judgment was to be bought in his name in order that he might collect one-half of it from Dennert, and that, as Daggett could not pay it in his own name and collect from Dennert, it was necessary to have the assignment taken in the name of a third party; and that the whole arrangement, so far as he was concerned, was made for Daggett's benefit. And he further admitted that he had never made any demand upon Daggett for payment of the judgment, but stated that if he had to pay the note, he intended to look to Daggett on his word to hold him harmless.

Daggett also admitted that, realizing that he could not himself pay the judgment and then collect the one-half from Dennert, he went to Lillie as his friend and asked him to take up the judgment for him, promising him at the time that he would see him through and see that he did not lose anything.

It is not disputed that if the judgment was in fact paid by Daggett, one of the joint tort feasors and judgment debtors, this operated as a satisfaction and discharge of the judgment. Klippel v. Shields, 90 Ind. 81, 82; Booth v. Farmers' Bank, 74 N. Y. 230, 232; Hammatt v. Wyman, 9 Mass. 138, 142; Sager v. Moy, 15 R. I. 528, 9 Atl. 847. It is earnestly insisted, however, in behalf of Lillie, that the undisputed evidence does not warrant such conclusion, but that it shows, on the contrary, that the judgment was in fact bought by Lillie with his own money and as a stranger to the judgment, although as an accommodation for Daggett; that he took an assignment thereof with the express intention of keeping the judgment alive and enforcing its collection; that under such circumstances the purchase of the judgment by him did not operate as a discharge, under the rule stated in McAleer v. Young, 40 Md. 439, and other cases on which he relies; and that, in any event, the giving of security to him by Daggett for one-half of the judgment, operated at the most, as a payment of one-half of the judgment, and did not discharge the remaining one-half, which he is now entitled, in any event, to enforce against Dennert.

After careful consideration we are, however, of the opinion that, under the undisputed evidence, there was ample room for an inference of fact that while the entire loan in the bank was ostensibly made in Lillie's name, and the note, as between himself and the bank, constituted his individual debt, yet, as between Lillie and Daggett, the entire transaction amounted, in substance and in effect, to the borrowing of the money by Lillie as the agent for Daggett, as an undisclosed principal, the entire note constituting, as between them, Daggett's obligation rather than Lillie's; that the judgment having been purchased with the proceeds of this note was, in substance and effect, bought by Daggett, acting by indirection, through the instrumentality of Lillie; in short, that Lillie acted in the entire transaction merely as a man of straw for and in behalf of Daggett, as the real actor.

If, however, the judgment was thus in fact bought by Daggett, one of the joint tort feasors and judgment debtors, this clearly operated as an entire discharge and satisfaction of the judgment, even although the purchase was ostensibly made by Lillie and the assignment taken in his name in the effort to keep the judgment alive as an obligation against Dennert. Boyer v. Bolender, 129 Pa. 324, 328, 18 Atl. 127, 15 Am. St. Rep. 723; Tompkins v. Bank, 53 Ill. 57, 59; Ten Eyck v. Craig, 62 N. Y. 410, 416; Booth v. Farmers' Bank, supra, 74 N. Y. at page 232. And see Harbeck v. Vanderbilt, 20 N. Y. 395. And as the evidence, in our opinion, warrants an inference that this was the fact, we cannot say that the conclusion of the trial judge that the judgment was paid and discharged, is supported by no evidence upon which, as matter of law, it could have been properly based. Finding, therefore, no error of law in the order entering satisfaction of the judgment, it must accordingly be affirmed, with costs.

CURTIS v. LOUISVILLE & N. R. CO.

(Circuit Court of Appeals, Sixth Circuit. May 2, 1916.)

No. 2731.

1. RAILROADS ⟸320—OPERATION—CARE—STATUTE.
Shannon's Code Tenn. §§ 1574–1576, which arbitrarily require certain precautions to be taken when any obstruction appears on the railroad tracks, and declare absolute liability in the absence of such precautions, apply only when the person or obstruction appears on the track in front of an engine or within lateral striking distance before the collision occurs, and do not apply where the person first comes within striking distance at a point which the head of the engine has already passed, or into danger at the very instant of the engine's arrival.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1014–1016, 1019; Dec. Dig. ⟸320.]

2. RAILROADS ⟸346(1)—CROSSING ACCIDENTS—ACTIONS—BURDEN OF PROOF.
In an action under Shannon's Code Tenn. §§ 1574–1576, for the death of one run down by a train, plaintiff, who contended that the railroad company did not take the required precautions has the burden of showing that his intestate was upon the tracks ahead of the engine.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1117; Dec. Dig. ⟸346(1).]

3. RAILROADS ⟸348(1)—CROSSING ACCIDENTS—EVIDENCE—SUFFICIENCY.
In an action for the death of plaintiff's intestate, who was killed at a railroad crossing, where plaintiff relied on the failure of the railroad company to take the precautions by Shannon's Code Tenn. §§ 1574–1576, evidence *held* insufficient to show that deceased was upon the tracks in front of the engine so that the statute would apply.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1138, 1140, 1141; Dec. Dig. ⟸348(1).]

4. RAILROADS ⟸327(2)—CROSSING ACCIDENTS—CONTRIBUTORY NEGLIGENCE.
Where the view was only partially obstructed and, had he looked, save in two places, one where there was a woodpile and the other where there was a cut deceased must have seen the train, which was lighted, he was, it appearing that according to schedule the train was expected about that time, guilty of contributory negligence as a matter of law in driving onto

the tracks just in front of the train, or so close to the tracks that his horse became frightened.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1044; Dec. Dig. ⊂=327(2).]

In Error to the District Court of the United States for the Eastern District of Tennessee; Edward T. Sanford, Judge.

Action by C. D. Curtis, administrator of Charles C. Curtis, deceased, against the Louisville & Nashville Railroad Company. There was a judgment for defendant, and plaintiff brings error. Affirmed.

G. W. Pickle, of Knoxville, Tenn., for plaintiff in error.

Jas. G. Johnson, of Knoxville, Tenn., for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. Charles C. Curtis was killed by a Louisville & Nashville train at a grade crossing in Eastern Tennessee, at 10 o'clock on an evening of September. This action was brought by his administrator, to recover for the death, under the Tennessee statute. There was the requisite diversity of citizenship to give jurisdiction; but on the trial the court below directed a verdict for the defendant, and the administrator brings error.

[1, 2] The Tennessee statutes (Shannon's Code, §§ 1574–1576, and subdivision 4 of section 1574) arbitrarily require certain precautions to be taken, when any "obstruction appears upon the road," and declare an absolute liability in the absence of such required precautions. It is the settled Tennessee construction of this statute that it is to be applied only when the person or other obstruction appears upon the track in front of the engine or within lateral striking distance before the collision occurs, and that it does not apply in a case where the person first comes within the striking distance at a point which the head of the engine has already passed, or at the very instant of the engine's arrival (see reviews by this court of the Tennessee cases in Railway v. Truett, 111 Fed. 876, 50 C. C. A. 442; Railroad v. Sutton, 179 Fed. 471, 103 C. C. A. 51; Railway v. Koger, 219 Fed. 702, 135 C. C. A. 374); also that, in order to make out a case under the statute, the burden is on the plaintiff to show that the obstruction did appear on the track ahead of the engine (Railway v. Hawk [C. C. A. 6] 160 Fed. 348, 353, 87 C. C. A. 300, and Tennessee cases cited).

[3] The first count of the declaration in this case was based upon this statute. There was no surviving eyewitness of the accident. Curtis was in a buggy driving a single horse, going east along the highway at about right angles to the railroad. The north-bound train reached the crossing at about the same time. The horse and buggy and Curtis were found at different spots, but all west of and within a few feet of the railroad track, and within a few feet north of the center of the highway. The only mark found on the engine indicating a collision was that the flagstaff holder, near the left-hand end of the pilot beam, was bent. The fireman, looking up after putting in coal, caught a glimpse of the horse apparently rearing away from the side of the engine. These facts as to the flagstaff and as to what the fireman saw,

coupled with the inference to be drawn from the location of the bodies, constitute the only evidence on the issue whether the horse was upon or close to the track ahead of the engine, so as to make it possible to say that the horse constituted an "obstruction upon the track" within the meaning of this statute. We are quite clear that these facts, coupled with all permissible inferences, cannot meet the burden of proof which rested upon plaintiff on this issue. Remembering that the horse was going eastwardly, these facts and inferences, separately and collectively, tend to determine the issue in the negative, viz., that the horse was not upon the track or within striking lateral distance until, at the earliest, the same instant when the front of the engine arrived at the same spot. So far as this count is concerned, the direction of verdict must be sustained.

[4] The court below found that the undisputed facts disclosed such contributory negligence as would bar any right of recovery at common law under the second count, and so found it unnecessary to decide whether there was any evidence tending to show negligence by the railroad. If this did exist, it consisted in not giving the customary signals by bell and whistle when approaching the crossing. We assume, without deciding, that the evidence tended to show a breach of duty by the railroad in this respect, and so we come to the existence of contributory negligence as the controlling question. This requires some further statement of facts. About a half mile south of the crossing, the railroad emerged from a deep cut. The railroad track at this point was 8 feet higher than at the highway crossing, and, between the two points, was straight. The view of a north-bound train, by a person going east on the highway, for 300 feet toward the crossing was wholly unobstructed for this half mile, except for two things. About 300 feet west of the crossing, there began, on the south of the highway, a slight rise or hill which reached its highest point east of the railroad. This led to a cut by both highway and railroad, and a resulting embankment on the south of the highway and west of the railroad. This bank was highest along the edge of the railroad cut and this edge was 42 feet from the nearest rail. A supposedly accurate survey shows that the bank at the edge was 4½ feet high; the extremest supposition or estimate by plaintiff's witnesses is that it was 6 feet high. From this height it ran down to nothing toward the west, and also ran down to nothing at the south, at a distance of some 300 or 400 feet. Along the top of this bank, commencing 50 to 100 feet south of the highway, was a pile of cordwood, 5 or 6 feet high, 4 or 5 feet wide, and running along the edge of the bank parallel with the track for a distance the highest estimate of which is 60 feet. There is also a suggestion in the argument that weeds were growing along the top of the bank.

The trial court considered only the situation arising after Curtis emerged from behind whatever obstruction was presented by this bank and woodpile, and finding that there was then a distance of 42 feet between the rail and Curtis, or say 25 feet between his horse's head and the overhang of the train, concluded that the opportunity to see the approaching train was so ample as to require the inference that Curtis had not exercised due care. If he had been on foot, this

result would probably not be questioned; but it is suggested that he may have lost control over a frightened horse, and so have been in a situation analogous to that disclosed by Railway v. Truett, supra. There is no testimony that the horse was likely to be frightened. Plaintiff's proof is directly to the contrary. The facts differ materially from those in the Truett Case, and it is difficult, if not impossible, to distinguish the circumstances of the present case from those of Railroad v. Freeman, 174 U. S. 381, 19 Sup. Ct. 763, 43 L. Ed. 1014, in which the Supreme Court held that the inference of contributory negligence was conclusively established. However, it is not necessary to rest that inference upon what occurred after passing the 42-foot line. Curtis lived within 100 feet of this crossing, east of the railroad; he was entirely familiar with the crossing and with the train schedule; this was a regular train, running at its usual speed, 30 to 40 miles an hour, and was practically on time. Curtis was therefore bound in unusual degree to be on the lookout for this train at this time. He was riding in an open buggy, and his eyes would be well above the highest point of the bank. The engine carried a headlight, in good condition and burning brightly, and ample to be seen by him; the train, 500 feet long, consisting of both day coaches and Pullmans, was lighted in the usual way. Both the engine headlight and the upper part of the cars would have been exposed to Curtis' view constantly over the top of the bank, and, indeed, fully exposed, except for the less than one train length which the bank extended south from the highway. There is no proof whatever that there were any weeds on the bank at this time—proof either specifically or that their presence was customary. The only proof is from plaintiff's witness, who says that he does not know whether there were any weeds at this time, but that it was customary to cut them down in August, and this was in September. Clearly, the woodpile is the only thing which could have obstructed Curtis' view, and it is impossible to figure out how this could have obscured his view of the train, except momentarily, while Curtis was moving east and the train going north. Further, a train moving at the speed of this train, even if running with the steam shut off, makes a great noise; there was nothing else, unless the rattle of the moving buggy wheels, to cover up this noise; and although the wind was blowing from the north, yet plaintiff's witnesses, situated still further north, clearly heard the roar of this particular train as it came out of the cut and came on toward the crossing. They remember this as distinctly as they remember that the whistle was not blown.

Putting together all the testimony and allowable inferences, one of three conclusions is compelled: First, that Curtis saw the train coming, and, misjudging its distance, tried to cross ahead of it, demonstrating his negligence; second, that he saw the train coming, and stopped and waited too close to the track, so that the horse was hit by the train or drawn against the train, indicating not only his lack of care, but also that the absence of whistle or bell was of no importance; or, third, that he failed during all the time of approaching the track for 300 feet, to use any care in either looking or listening for this train. We must consider this case within the rules which the Supreme Court has de-

clared in Railroad v. Houston, 95 U. S. 697, 24 L. Ed. 542, Schofield v. Railway, 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224, and in Railroad v. Freeman, supra, which are stated by Judge Hook, for the Eighth Circuit Court of Appeals, in Tomlinson v. Railroad, 134 Fed. 233, 67 C. C. A. 218, and which we have applied in (e. g.) Kallmerten v. Cowen, 111 Fed. 297, 49 C. C. A. 346, and Railroad v. Hurlburt, 221 Fed. 907, 137 C. C. A. 477.

The judgment is affirmed.

HALFPENNY et al. v. MILLER.

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

No. 1388.

1. APPEAL AND ERROR ⊜80(1)—DECISIONS APPEALABLE—FINALITY OF DETERMINATION.

In an action for a partnership settlement, a master to whom the case was referred presented a statement of the accounts, with a finding that defendants owed plaintiff $219.10. A decree was entered, confirming the report, dissolving the partnership, adjudging that plaintiff recover such sum against the defendants, ordering a receiver to sell certain partnership property, and continuing the cause for further proceedings. A subsequent decree confirmed the receiver's sale, fixed the fees of the receiver and special master, ordered the receiver to pay one half the funds in his hands to plaintiff as his share, and to pay the other half to plaintiff to be credited on his recovery against defendants, and adjudged costs in favor of plaintiff, with the right to issue execution therefor, and for the amount remaining unpaid on the decree in his favor. *Held* that, while the first decree determined the main controversy between the parties, as the partnership property was yet to be sold, the balance in the hands of the receiver ascertained and disposed of, and the liability for costs determined, and as the final balance in favor of plaintiff had not been fixed, with leave to issue execution, it was at least doubtful whether the first decree was a final decree for the purposes of appeal, and, under the principle that all doubts should be resolved in favor of retaining an appeal, a motion to dismiss an appeal from the second decree would be refused.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 494–500, 503, 505–509; Dec. Dig. ⊜80(1).]

2. APPEAL AND ERROR ⊜801(1)—MOTIONS TO DISMISS.

Motions to dismiss appeals without consideration of the merits should not be granted, except when it clearly appears that there has been a fatal failure to comply with legal requirements.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3161, 3164; Dec. Dig. ⊜801(1).]

3. PARTNERSHIP ⊜333—DISSOLUTION AND SETTLEMENT—ACCOUNTING.

Where, on a partnership settlement, the master's statement of the operating account showed, not only that defendants owed the partnership $12,503.72, but also that the partnership owed plaintiff the same amount, defendants having received such amount in excess of what they paid in, and plaintiff that much less than he paid in, the account was properly settled by charging defendants, as due plaintiff, the full amount thereof, though, had the account showed that defendants owed the partnership such amount, and that the partnership owed plaintiff nothing, the balance would have been a partnership asset, and plaintiff would have been entitled to judgment for only one-half thereof.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 792–796; Dec. Dig. ⊜333.]

Appeal from the District Court of the United States for the Southern District of West Virginia, at Charleston; Benjamin F. Keller, Judge.

Suit by A. G. Miller against John Halfpenny and another, late partners trading as Halfpenny & Hamilton. From a decree, defendants appeal. Affirmed.

W. B. Maxwell, of Elkins, W. Va. (H. M. McCaughey, of Philadelphia, Pa., and E. L. Maxwell, of Elkins, W. Va., on the brief), for appellants.

Andrew Price, of Marlinton, W. Va., for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. This action was instituted by A. G. Miller against John Halfpenny and R. C. Hamilton for the settlement of a partnership. By the terms of the partnership contract the losses and profits were to be shared, one-half by Miller, who was in charge of the operation of the lumber mills in West Virginia, and one-half by Halfpenny and Hamilton, who did business in Philadelphia and had charge of selling the lumber.

[1, 2] The District Court referred the case to a special master to report the proper settlement. That was little material dispute as to the facts, and no charge of intentional wrongdoing. The difficulty was the adjustment of a complicated account. The master presented to the court a thorough and careful statement of the accounts and his reasoning thereon; his finding being that the defendants Halfpenny and Hamilton owed the plaintiff Miller on December 31, 1910, the sum of $2,191.10. By a decree entered November 18, 1913, the report of the master was confirmed in accordance with the opinion of the court filed on the same day; the copartnership was dissolved; recovery for $2,191.10 and interest was adjudged in favor of Miller against Halfpenny and Hamilton; and the receiver was ordered to pay two small debts, and to sell a tract of land, the property of the partnership. By this decree the cause was "continued for further proceedings." On June 19, 1914, by another decree, the sale made by the receiver was confirmed; the fees of the receiver and the special master were fixed; the receiver was ordered to pay one half of the funds in his hands to Miller as his share as a member of the partnership, and the other half, the share of Halfpenny and Hamilton, to Miller to be credited on his recovery of $2,191.10 against Halfpenny and Hamilton; and costs were adjudged in favor of the plaintiff against the defendants with the right to issue execution for costs and for the amount remaining unpaid on the decree in his favor. The petition for appeal and the order allowing it were dated December 17, 1914.

At the hearing in this court a motion was made to dismiss the appeal, on the ground that the decree of November 18, 1913, was a final decree, and that therefore the appeal on December 17, 1914, was too late. The accepted definitions of a final decree are sometimes difficult to apply. In Keystone M. & I. Co. v. Martin, 132 U. S. 91, 10 Sup. Ct. 32, 33 L. Ed. 275, it was held that a decree for an in-

junction leaving an account to be afterwards taken was not final. The authorities are reviewed, and the rule reaffirmed, that for a decree to be final it—

"must terminate the litigation between the parties on the merits of the case, so that, if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered."

In Lewisburg Bank v. Sheffey, 140 U. S. 445, 11 Sup. Ct. 755, 35 L. Ed. 493, the court thus speaks of a decree which it held to be final:

"This finally determined the entire controversy litigated between the parties and nothing remained but to carry the decree into execution. The bringing of the fund into court was for the final distribution as decreed, and not to be held pending the ascertainment of the principles upon which it should be distributed."

In the case now before us it is true the decree of November 18, 1913, determined the main controversy between the parties—the method of taking the accounts and the balance on such accounting in favor of Miller. Hence, under the authorities cited, there is strong reason to say the decree was final. But the land was yet to be sold, the balance in the hands of the receiver to be ascertained and disposed of, and the liability for costs to be determined. Besides, the final balance in favor of Miller had not been fixed with leave to issue execution therefor; for the receiver had in his hands funds belonging to Halfpenny and Hamilton applicable to the balance of $2,191.10 found against them on the general accounting taken of partnership transactions. These matters were not adjudged and the rights and liabilities of the parties finally settled until the decree of June 19, 1914. It is, therefore, at least doubtful whether the decree of November 18, 1913, should be regarded the final decree for purposes of appeal. Dainese v. Kendall, 119 U. S. 53, 7 Sup. Ct. 65, 30 L. Ed. 305; Lodge v. Twell, 135 U. S. 232, 10 Sup. Ct. 745, 34 L. Ed. 153; McGourkey v. Toledo & Ohio Central R. Co., 146 U. S. 536, 13 Sup. Ct. 170, 36 L. Ed. 1079; Covington v. Covington First National Bank, 185 U. S. 270, 22 Sup. Ct. 645, 46 L. Ed. 906. Motions to dismiss appeals without consideration of the merits should not be granted, except when it clearly appears that there has been a fatal failure to comply with legal requirements. On the principle that all doubts should be resolved in favor of retaining an appeal for decision on the merits, the motion to dismiss is refused.

[3] Coming to the merits, the defendants contend that there was a fundamental error in the conclusion from the statement made by the master that Halfpenny and Hamilton owed Miller on the operating account $12,503.72; that the conclusion should have been that the balance due by Halfpenny and Hamilton was a partnership asset of which Halfpenny and Hamilton themselves were entitled to one-half; and that therefore the debit against them on this account in favor of Miller should have been only one-half, $6,251.86.

This position is founded on a misapprehension. Had the statement of the operating account showed that the defendants owed the partnership thereon $12,503.72 and that the partnership owed the

plaintiff nothing on that account, then the balance of $12,503.72 would have been a partnership asset, divisible one-half to the defendants and one-half to the plaintiff. But the statement showed not only a balance against the defendants of $12,503.72 in favor of the partnership, but a balance against the partnership in favor of the plaintiff of $12,503.72. In other words, including the share of loss chargeable to each party the defendants had received from the operating account $12,503.72 more than they had put in, and the plaintiff had received $12,503.72 less than he had put in. It follows that this account was properly settled by charging the defendants as due to the plaintiff $12,503.72.

The exceptions to the master's report relating to the charges of interest and discount are so fully and satisfactorily disposed of by the District Court that they require no further discussion. There are numerous assignments of error relating to small items of the account: without detailed discussion it is sufficient to say that the master has disposed of these items as fairly as was possible under the circumstances.

Affirmed.

UNGLES-HOGGETTE MFG. CO. v. FARMERS' HOG & CATTLE POWDER CO.

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

No. 4453.

1. TRADE-MARKS AND TRADE-NAMES ⟸3(4)—DESCRIPTIVE MARKS—"DIP"—"DRY-DIP."

The compound word "dry-dip" cannot be appropriated as a trade-mark for a powder to be sprinkled over animals to rid them of vermin, since "dip" as a noun has a well-established meaning as a liquid preparation into which objects may be dipped or immersed, as for cleansing, coloring, and the like, and in connection with animal husbandry means a liquid preparation into which infected animals may be plunged for treatment, and a "dry-dip," therefore, presumptively means a dry or powdered preparation intended to perform the same service.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 7; Dec. Dig. ⟸3(4).

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

2. TRADE-MARKS AND TRADE-NAMES ⟸8—DESCRIPTIVE MARKS—ARBITRARY SPELLING.

Nor can there be an appropriation of the word "dridip" as a trade-mark for such a powder, since that is idem sonans with the other spelling, and Act March 3, 1881, c. 138, § 2, 21 Stat. 503, providing for the registration of trade-marks, requires as a condition to registration a showing that no other person has the right to use the mark sought to be registered, either in the identical form or in any such near resemblance thereto as might be calculated to deceive, thereby indicating the disapprobation of Congress to the use of any word as a trade-mark tending to deceive or confuse the public.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 12; Dec. Dig. ⟸8.]

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3. TRADE-MARKS AND TRADE-NAMES ⟸45—REGISTRATION—EFFECT.
The registration of a trade-mark under Act March 3, 1881, c. 138, § 7, 21 Stat. 503, is only prima facie evidence of ownership, and confers no right to the use as a trade-mark of a descriptive name, which could not be appropriated as such at common law.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 53, 59; Dec. Dig. ⟸45.]

Appeal from the District Court of the United States for the District of Nebraska; Thomas C. Munger, Judge.

Suit for injunction by the Ungles-Hoggette Manufacturing Company against the Farmers' Hog & Cattle Powder Company. Decree for the defendant, and plaintiff appeals. Affirmed.

Maxwell V. Beghtol, of Lincoln, Neb. (Edmund C. Strode, of Lincoln, Neb., on the brief), for appellant.

Samuel P. Davidson, of Tecumseh, Neb., for appellee.

Before ADAMS and CARLAND, Circuit Judges, and TRIEBER, District Judge.

ADAMS, Circuit Judge. This was a bill to restrain infringement of a trade-mark consisting of the word "Dridip," which the plaintiff, Ungles-Hoggette Manufacturing Company, claims to have adopted and appropriated as a trade-mark, to indicate the origin and ownership of a certain lice and vermin destroyer manufactured by it. It alleged in its bill that the defendant, Farmers' Hog & Cattle Powder Company, infringed upon its trade-mark by using the words "Dry-Dip," or "Farmers' Dry-Dip," on packages of lice and vermin destroyer manufactured by it.

Defendant denied that plaintiff had appropriated, or by use or otherwise had acquired, the right to the exclusive use of the word "Dridip" as a trade-mark for its product, on the ground that that word, instead of indicating the origin and ownership of its product as it lawfully might, was descriptive of that product, and was not the subject of exclusive appropriation by plaintiff as a trade-mark. Defendant also denied infringement.

The District Court heard the proof and rendered a decree dismissing the bill. Plaintiff appeals.

[1] The word "dip," as a noun, has a well-understood meaning. Any liquid preparation into which objects may be dipped or immersed, as for cleansing, coloring, lacquering, and the like, may be properly described as a dip. See "dip" in Webster's International Dictionary and Funk & Wagnalls Dictionary. Such common use of the word "dip," as a noun, is conceded by plaintiff's counsel. In connection with animal husbandry this word, taken by itself, therefore, signifies some liquid preparation, consisting of a mixture of parasiticides, like sulphur, coal-tar creosote, arsenic, or similar agents, into which animals infected with lice and other vermin may be plunged for treatment.

The word "Dry-Dip," employed in connection with animal husbandry, would presumptively mean some dry or powdered preparation

intended to perform the same service. This proposition, however, is not left to presumption or speculation, as counsel specifically agreed (among other facts bearing on the case, which, in view of the conclusion reached by us, it is unnecessary to state), that "the dry dip sold by the defendant and the dridip sold by plaintiff is a dry powder, and is used by sprinkling on the animal." So it appears that the dry-dip served the same purpose and accomplished the same result as the liquid dip, with an unimportant difference—in their application. The infected animal is driven or plunged into the liquid dip, while the dry dip is sprinkled upon the infected animal. In view of these considerations, plaintiff certainly could not have appropriated the compound word "Dry-Dip" as its trade-mark. Such a word would unquestionably have been accurately descriptive of the article sold or dealt in by it.

[2] Does the fact that plaintiff misspelled the first member of its compound word, in such a way, however, that its necessary pronunciation is the same as "Dry-Dip," make the misspelled word any more available to exclusive appropriation by it? We think not. In Trinidad Asphalt Manufacturing Co. v. Standard Paint Co., 163 Fed. 977, 90 C. C. A. 195, affirmed by the Supreme Court in 220 U. S. 446, 31 Sup. Ct. 456, 55 L. Ed. 536, we had occasion to consider whether the plaintiff could secure a trade-mark in the word "Ruberoid," notwithstanding the conceded right of the public to make use of the word "rubberoid," and we there said:

"A public right in 'rubberoid' and a private monopoly of 'ruberoid' cannot coexist. They are inconsistent and trespass upon each other, and under the law of trade-mark the latter must give way. To the contention that 'ruberoid' is fanciful or arbitrary, it must be said that no one can restrict or destroy the public right by the coinage and monopoly of a word that is a near imitation of one, the use of which is open to all for the truthful description of articles of trade and commerce."

To these propositions many illustrative cases are cited to which attention is directed. In addition to the teaching of that case, which seems to us conclusive of this, attention may be called to the fact that Act March 3, 1881, c. 138, 21 Stat. 502, entitled "An act to authorize the registration of trade-marks and protect the same," requires as a condition to such registration that the applicant must make a showing that:

"No other person, firm, or corporation has the right to use the mark sought to be registered, either in the identical form *or in any such near resemblance thereto as might be calculated to deceive.*" Section 2.

While this act relates to registration only of a trade-mark, it nevertheless discloses the disapprobation of Congress to the use of any word as a trade-mark which may tend to confuse or deceive the public. The word "Dridip" may be a misspelling of the word "Dry-Dip." This, however, depends upon whether the phonetic method of spelling is practiced or not (many educated and more uneducated persons do practice it). But, however this may be, there can be no possible difference in the pronunciation of the two words. They sound alike to any listener or bystander.

The rule governing the doctrine of idem sonans is that absolute accuracy in spelling words is not required in legal documents or proceedings, whether civil or criminal. If the name, as spelled in a document, however incorrectly, conveys to the ear, when pronounced according to the commonly accepted methods, a sound practically identical with the name as correctly spelled, the name thus given is a sufficient designation of the individual referred to, and no advantage can be taken of the clerical error. See Hubner v. Reickhoff, 103 Iowa, 368, 72 N. W. 540, 64 Am. St. Rep. 191; Robson v. Thomas, 55 Mo. 581. Manifestly then, the word "Dridip" could no more be appropriated as a trade-mark than the concededly descriptive word "Dry-Dip."

[3] Some argument is made that the fact of registration of the word "Dridip" as a trade-mark conferred upon the plaintiff some additional right. This is not correct. If there be no valid common-law trademark by the appropriation and use of a word or symbol that indicates origin or ownership, as distinguished from describing the article manufactured or sold, the bare fact of registration cannot make it so. Registration is only prima facie evidence of ownership. See Act March 3, 1881, c. 138, § 7, 21 Stat. 502. If that presumption is overcome by the facts in a given case, then registration is of no avail.

Our conclusion is that the word "Dridip" is so descriptive of the article manufactured and sold by plaintiff that it cannot be the subject of a lawful trade-mark. With this conclusion, no consideration need be given to the defense of a noninfringement.

Judgment of the District Court is affirmed.

WARD v. AMERICAN AGRICULTURAL CHEMICAL CO.

In re FLOYD & HAYES' ESTATE.

(Circuit Court of Appeals, Fourth Circuit. February 29, 1916.)

No. 1397.

1. BANKRUPTCY ⟸184(2)—OWNERSHIP OF PROPERTY—CHOSES IN ACTION—RECORDING.

A contract between the seller and buyer, whereby the latter agrees to assign all accounts, notes, etc., taken for the property when resold, and to collect them in trust for the seller, is not required to be recorded by the statutes of South Carolina as interpreted by the Supreme Court of that state, and entitles the seller to the possession thereof as against the buyer's trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 276; Dec. Dig. ⟸184(2).]

2. COURTS ⟸366(1)—RULES OF DECISION—CONSTRUCTION OF STATE STATUTES.

The construction of the South Carolina recording acts as not applying to the assignment of choses in action is binding on the federal courts, though contrary to an earlier decision of the federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 956, 957, 967; Dec. Dig. ⟸366(1).]

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

In the matter of the estate of Floyd & Hayes, bankrupts. From an order allowing in part the claim of the American Agricultural Chemical Company (225 Fed. 262), R. E. Ward, trustee in bankruptcy, appeals. Affirmed.

F. L. Willcox, of Florence, S. C. (Willcox & Willcox, of Florence, S. C., on the brief), for appellant.

W. C. Moore, of Dillon, S. C. (Sellers & Moore, of Dillon, S. C., on the brief), for appellee.

Before KNAPP and WOODS, Circuit Judges, and DAYTON, District Judge.

WOODS, Circuit Judge. This appeal involves the right of the American Agricultural Chemical Company to certain notes, mortgages and open accounts claimed by it under a contract with the bankrupt firm of Floyd & Hayes. The contract dated January 14, 1914, provided that the American Agricultural Chemical Company would furnish Floyd & Hayes a quantity of fertilizer for which they gave their unconditional promise to pay at a future time. The contract contained the following stipulations:

"On May 1, next, or when called on, you agree to deliver us all cash for cash sales, and all the notes you have taken and a list of accounts that are due from purchasers of the above-named fertilizers, for the gross amount of time sales of same, these notes and accounts to be returned to you before maturity for collection, and all proceeds as collected must be applied to the payment of your obligation to us, whether the same shall have matured or not. Homestead and all other exemptions are hereby waived as to any debt arising under this contract. And it is further agreed that all fertilizers shipped to you as well as all notes, accounts, cash or other proceeds from the sale of said fertilizers, which may at any time be in your possession, or in the possession of your representative, are our property, to be held by you as our agent in trust for the payment of your obligation to us, the title thereto shall not pass until your obligation to us is paid."

Pursuant to this contract, the American Agricultural Chemical Company delivered to the bankrupts fertilizers to the value of $9,358.16. On June 20, 1914, Floyd & Hayes executed and delivered to the company an assignment of the notes, mortgages and open accounts, and turned over with the assignment the notes and mortgages and a list thereof. About September 1, 1914, the notes and mortgages were returned to Floyd & Hayes for collection and a trust receipt for them was taken. Prior to filing the petition in bankruptcy the bankrupts had collected on the accounts, notes and mortgages and turned over to the company in money and cotton $1,976.18.

Floyd & Hayes were adjudged bankrupts on January 1, 1915. The contract was not recorded, and the question is whether the company is entitled to hold the notes, mortgages and book accounts against the trustee in bankruptcy.

[1, 2] Practically the same question arose as to book accounts in Townsend v. Ashepoo Fertilizer Co., 212 Fed. 97, 128 C. C. A. 613, and this court held that, under the broad terms of the South Carolina recording statutes, record of such a paper in the nature of a mortgage of accounts was necessary to its validity against subsequent

creditors and purchasers without notice. The principle which the court thought applicable was thus stated:

"Nothing is better settled than that a creditor owns debts owing to him as property; and we are unable to see what warrant the court would have to exclude such property from the operation of a statute covering all personal property, on the ground that the property is choses in action and intangible. Secret liens may be valid in the absence of a statute condemning them. Greey v. Dockendorff, 231 U. S. 513, 34 Sup. Ct. 166, 58 L. Ed. 339. But they are under just condemnation in the business world, and we are not inclined to indulge refinements in the interpretation of the statute in order to protect those who fail to record their papers, and then when disaster comes bring them out against subsequent creditors. Besides, nothing is more plainly within the mischief at which the statute was directed than an unrecorded mortgage of a merchant's accounts, especially of the accounts of a merchant like Roof doing what is known as an advancing business. All know that the debts owing to such a merchant constitute an important asset, sometimes the chief asset, on which his credit rests, and those who credit him do so on the faith of these debts as his property."

The court was not inadvertent to the cases of Williams v. Paysinger, 15 S. C. 171, and Patterson v. Rabb, 38 S. C. 138, 17 S. E. 463, 19 L. R. A. 831, and of course recognized their binding authority. In these cases there was an assignment and delivery of a note or bond and the mortgage securing it, and it was held, in accordance with the general rule, that the recording of the assignment was not necessary to the protection of the assignee against those who dealt with the original mortgagee as if he were the owner. Booth v. Kehoe, 71 N. Y. 341; Kirkland v. Brune, 31 Grat. (Va.) 126; Tingle v. Fisher, 20 W. Va. 497; Brady v. State, 26 Md. 290; Bacon v. Bonham, 27 N. J. Eq. 209; National Bank v. Purifier Co., 84 Mich. 364, 47 N. W. 502. But it seemed to us that a transaction of that sort might well be distinguished from a written contract providing that goods sold to a merchant should remain the property of the seller and that all accounts or other evidences of indebtedness taken for the goods "shall represent the goods sold" and remain the property of the seller as security for his debt. If not distinguishable, a merchant doing an advancing business of $50,000 a year and carrying a stock of goods of $10,000 may, by an unrecorded blanket mortgage of all his book-accounts and other choses in action then in existence or thereafter made, completely deceive the business public and subsequent creditors and purchasers.

Since the decision of Townsend v. Ashepoo Fertilizer Co., supra, however, and probably in view of that decision, the Supreme Court of South Carolina has used this language in Carolina Nat. Bank v. City of Greenville, 97 S. C. 291, 81 S. E. 634:

"The first proposition argued by the appellant's attorneys is that the assignment executed by Bowe & Page on the 2d of September, 1910, in favor of the plaintiff, was null and void, on the ground that it was not recorded. Waiving the objection that this question is not properly before the court for consideration, for the reason that it was not set up as a defense, the court takes this opportunity to reaffirm the doctrine, already settled in this state, that the assignment of a chose in action, is not embraced within the provisions of the recording acts, as will appear by reference to the cases of Williams & Co. v. Paysinger, 15 S. C. 171, and Patterson v. Rabb, 38 S. C. 138, 17 S. E. 463, 19 L. R. A. 831. The case of Williams & Co. v. Paysinger, supra, was cited with approval in Singleton v. Singleton, 60 S. C. at page 235, 38 S. E. 462."

The contract assigned to which the Supreme Court of South Carolina referred was one made by Bowe & Page with the city of Greenville for street paving, and the payments for which it provided from the city of Greenville seemed to constitute the main assets of the business in which the contractors were engaged. The language of the court in this case must be regarded as laying down a construction of the South Carolina statute contrary to that adopted by this court in Townsend v. Ashepoo Fertilizer Co., supra; and the construction of the state court is controlling. We think the District Court was right in so regarding it, and holding that the recording statutes of South Carolina have no application to the reservation of title or assignment of the choses in action claimed by the appellee under its contract with Floyd & Hayes.

Affirmed.

McGRAW v. WALSH.

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

No. 1430.

1. MECHANICS' LIENS ⟹246—SUITS TO ENFORCE—EXISTENCE OF OTHER REMEDY.
Where a creditor having a mechanic's lien also held stocks and bonds as collateral security for his debt, he had a right to enforce either security or both, unless enjoined by the court.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 431; Dec. Dig. ⟹246.]

2. MECHANICS' LIENS ⟹251—SALE—ENJOINING—CONDITIONS PRECEDENT.
One seeking to enjoin a sale for the satisfaction of a mechanic's lien on the ground that the lienor held stocks and bonds as security for his debt and had not accounted therefor was bound to show a demand for the return of the securities, accompanied by payment or tender of the amount due, before he could have the enforcement of the decree of sale enjoined, as the duty was on him to pay his debt as a condition of the return of the security, and not on the lienor to produce the security before the debtor was ready to pay.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 439; Dec. Dig. ⟹251.]

3. MECHANICS' LIENS ⟹251—SALES—ENJOINING—AFFIDAVITS.
A sale under a decree establishing a mechanic's lien would not be enjoined on the ground that the lienor had misappropriated collateral security held by him, where the allegations as to the misappropriation of the securities were made upon information and belief, without stating the sources and nature of the information, especially as the moving party was a party to the suit to enforce the mechanic's lien and had ample opportunity therein to ask that the lienor be required to bring the securities into court before enforcing the lien, but made no effort to that end.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 439; Dec. Dig. ⟹251.]

4. COURTS ⟹493(2) — CONFLICTING JURISDICTION — STATE AND FEDERAL COURTS.
That a state court had in a separate proceeding ordered a sale of the same property and a different application of the proceeds was no ground for enjoining a sale under the decree of a federal court establishing a mechanic's lien, where the federal court first acquired jurisdiction of the subject-matter.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1347; Dec. Dig. ⟹493(2).]

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

Suit by J. J. Walsh, Jr., surviving partner of himself and Frank G. Walsh, deceased, doing business as J. J. Walsh & Son, against the Grafton Hotel Company. From an order denying the petition of John T. McGraw to restrain a sale in satisfaction of a mechanic's lien, the petitioner appeals. Affirmed.

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

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

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. After protracted litigation in the District Court for the Northern District of West Virginia and in this court, J. J. Walsh, Jr., established a mechanic's lien on the property of the Grafton Hotel Company known as Willard's Hotel for about $50,000 and interest, in the case of Grafton Hotel Co. v. Walsh, 228 Fed. 5, — C. C. A. —. Under an order of the District Court the property was advertised for sale for the satisfaction of the amount due on the lien. On January 16, 1916, John T. McGraw filed his petition in the District Court asking for an order restraining the sale. The petition was denied, without answer or demurrer, on the ground that it stated no facts warranting the relief asked; and the petitioner appealed. The facts alleged in the petition or admitted at the hearing may be thus summarized:

John T. McGraw was the only person interested in the corporation and the hotel property, and therefore the sole party in interest in the litigation with Walsh. In the course of that litigation it was admitted by Walsh in his testimony that he had received from McGraw bonds and stocks amounting in the aggregate at par value to the sum of $348,800 as security for any balance that might be due Walsh on his contract for building the hotel. Walsh testified that he was able and willing to return the securities whenever he received the balance due him on the contract. The court enjoined Walsh from disposing of the securities pending the litigation; and the injunction is still in force. The charge is made on information and belief that Walsh has disposed of a number of these securities as collateral for his own debts or the debts of a corporation in which he is interested. But the sources of information upon which the belief is founded are not given. There is an allegation that the securities are worth at least $200,000, and that Walsh is insolvent. On these allegations the court was asked to enjoin the sale, "until there shall be a proper accounting between the said Walsh and this petitioner as to said securities, and until at least the said Walsh shall produce within the jurisdiction of this court so much of said securities as he can produce."

[1, 2] From the petition it appears that Walsh had two securities—the mechanic's lien, and the stocks and bonds referred to in the petition. He had a right to enforce either or both, unless enjoined by the court. Nothing appears in the petition to show that he will not be

able to regain possession of the stocks and bonds for delivery to the petitioner, by using the money due to him on the judgment when he receives it. The primary duty is on the petitioner to pay his debt as a condition of the return of his collateral, and not on Walsh to produce the collateral before the petitioner is ready to pay. It seems clear, therefore, that before the petitioner can have the enforcement of the decree of sale enjoined he should show demand for the return of his securities accompanied by payment or tender of the amount due.

[3] But if there were no other reason, the petition must be denied because all the allegations of misappropriation of the securities are made upon information and belief without stating the sources and nature of the information. 1 Foster's Fed. Practice, 293; 1 High on Injunctions, 35; Lake Shore Ry. Co. v. Felton, 103 Fed. 227, 43 C. C. A. 189. No extraordinary circumstances are alleged taking the case out of the general rule; on the contrary, the circumstances are strong against relaxation of the rule. McGraw was a party to the suit to enforce the mechanic's lien, and had ample opportunity to ask that Walsh be required to bring the securities into court, before enforcing the lien; but he made no effort to that end. When he comes now and asks that this judgment obtained after long and expensive litigation be enjoined he should make satisfactory proof of the wrong alleged and of irreparable injury. A mere statement of misappropriation of the securities on information and belief without indication of the sources of the information falls far short of satisfactory proof.

[4] The fact alleged in the petition that the state court has in a separate proceeding ordered a sale of the same property and a different application of the proceeds of the sale does not affect the matter, since it is conceded that the federal court first acquired jurisdiction of the subject-matter.

It may be the duty of the District Judge upon proper showing to require Walsh to produce and surrender the collateral securing the judgment debt as a condition of receiving the proceeds of the sale in satisfaction of the amount due on the decree. Upon that point we express no opinion.

Affirmed.

In re H. B. HOLLINS & CO. In re EVERETT et al. In re FIRST NAT. BANK et al.

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

No. 126.

1. BANKRUPTCY ⊜140(3)—PROPERTY—COLLATERAL SECURITIES.

When a bankrupt has pledged to secure a loan his own securities, securities of his customers rightfully, and securities of his customers wrongfully, the customers became sureties for him as principal to the lender, and the securities must be applied to the payment of the loan as follows: First, the bankrupt's; second, the customers' securities rightfully pledged; and, third, the customers' securities wrongfully pledged.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. ⊜140(3).]

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2. BANKRUPTCY ⊂⊃140(3)—PROPERTY—COLLATERAL SECURITIES.
Where a bankrupt repledged, as he had a right to do, securities pledged by several of his customers to secure several loans to him, the indebtedness of each customer is to be charged against the securities in the proportion of each customer's whole indebtedness to the bankrupt; and if any customer loses some of his securities on some of the loans, he is entitled to an equal amount of the surplus on other loans as against general creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. ⊂⊃140(3).]

Petition to Revise and Appeal from Order of the District Court of the United States for the Southern District of New York.

In the matter of H. B. Hollins & Co., alleged bankrupts. A petition by the bankrupts, asking that Crossman & Sielcken be required to pay over part of the proceeds realized from the sale of certain securities, was denied by the District Judge, and petitioners appeal. Affirmed.

See, also, 210 Fed. 965; 230 Fed. 917.

Beekman, Menken & Griscom, of New York City (W. C. Armstrong, of New York City, of counsel), for appellants.

L. B. Smith, of New York City, for appellees.

Before COXE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. In April, 1913, Crossman & Sielcken borrowed $1,000,000 of Hollins & Co. and gave them as collateral $1,200,000 of the corporate 4¼ per cent. stock of the city of New York, agreeing that Hollins & Co. might rehypothecate the same for any larger sum they could obtain. November 13, 1913, a petition in bankruptcy was filed against Hollins & Co. and a receiver appointed. November 22, 1913, the court permitted Crossman & Sielcken to take up Hollins & Co.'s note to the Chase National Bank for $950,000 and the collateral securing it, which included among other securities $1,073,000 of their City stock and certain securities belonging to Hollins & Co. June 29, 1914, the court confirmed a composition offered by Hollins & Co. to pay their creditors in notes of the Equities Realization Corporation for the full amounts of their claims, but payable only out of the assets of the firm taken over by it.

April 21, 1915, Hollins & Co. filed a petition in the District Court sitting in bankruptcy asking that Crossman & Sielcken be required to pay over to them a part of the proceeds realized from the sale of the securities received from the Chase National Bank. The District Judge denied this petition, and upon a petition to revise his order we reversed the same without prejudice, on the ground that after confirmation of the composition the bankruptcy court had no jurisdiction as to assets not in its session. There were, however, before the confirmation of the composition, and now are, in the possession of the receiver, cash and securities turned over to him by the First National Bank and by the Equitable Trust Company after loans made by them to Hollins & Co. had been paid. Various claims for priority as to these funds were referred to a special master, and upon exceptions to his report decided by the District Court.

The collateral in the case of the First National Bank loan of $175,058.33 was Crossman & Sielcken's City stock, of the value of $57,919.84, securities belonging to other customers, and some belonging to Hollins & Co. This loan was treated by the master separately, and as a result of computing the ratio Crossman & Sielcken's total indebtedness to Hollins & Co. bore to the total value of their hypothecated securities he charged $48,140 upon their securities in this loan, leaving an equity of $9,860 on which they were entitled to share pro rata in this surplus with other claimants whose securities had also been rightfully hypothecated. The surplus which remained after this was done, and all claimants of securities satisfied, he ordered to be paid to the receiver, who would have to account therefor to the Equities Realization Corporation, which is realizing the assets of Hollins & Co. for the benefit of the general creditors who accepted its notes under the composition.

In the case of the Equitable Trust Company's loan of $50,000 secured by $30,000 of Crossman & Sielcken's City stock and certain securities belonging to Hollins & Co., there was a surplus of cash and the securities of Hollins & Co., all of which the special master awarded to Crossman & Sielcken. His two conclusions do not seem to us to be consistent. The surplus in each case should have gone to the same party, either to the receiver or to Crossman & Sielcken. Judge Hough awarded them in each case to Crossman & Sielcken, reversing the first and confirming the second order of the special master.

We are referred to but two authorities on the question of the relative standing of pledged securities belonging to the bankrupt and securities of his customers rightfully pledged, Skiff v. Stoddard, 63 Conn. 198, 26 Atl. 874, 28 Atl. 104, 21 L. R. A. 102, holds that the bankrupt's securities should share ratably with the customers', while United National Bank v. Tappan, 33 R. I. 1, 79 Atl. 946, holds that the bankrupt's securities must be first exhausted. We prefer the latter view.

[1] When a bankrupt has made a loan, and to secure the same has pledged his own securities, securities of his customers rightfully, and securities of his customers wrongfully, the customers become sureties for him as principal to the lender. The securities must in equity be applied to the payment of the loan as follows: First, the bankrupt's; second, the customers' securities rightfully pledged; third, the customers' securities wrongfully pledged.

[2] When a bankrupt, authorized to repledge securities of his customers, repledges them in several separate loans, as he has a right to do, the proportion of the customers' indebtedness to the bankrupt must be charged to these securities as between them and competing creditors, and is to be ascertained for each loan by charging the securities with their ratable proportion of the customers' whole indebtedness to the bankrupt. If, after all the customers have received the shares they are entitled to of the surplus, anything be left, it should go to the general creditors, except that, if it appear, as in this case, that a secured creditor has lost some of his securities in some of the loans, he should be credited on his indebtedness to the bankrupt with

their value in determining his share of the surplus as between himself and the general creditors.

In this case, as it appears that there is a surplus in the loan of the First National Bank and of the Equitable Trust Company in which no other secured creditor is interested, and that Crossman & Sielcken have lost City stock in some of the other loans in which the bankrupt pledged it of more value than the aggregate surplus, the District Judge was right in awarding the whole surplus to them. A true apportionment of the indebtedness of Crossman & Sielcken to Hollins & Co. shows that this surplus is the proceeds of their City stock.

The orders are affirmed.

BANK OF HATTIESBURG v. CARTER (two cases).

In re MOLLERE.

(Circuit Court of Appeals, Fifth Circuit. April 4, 1916.)

Nos. 2829, 2887.

MORTGAGES ⊂=151(1)—PRIORITY—STATUTORY LIEN OF LANDLORD.

The landlord's lien given by Code Miss. 1906, § 2851, on the movables of the tenant on the demised premises, is superior in bankruptcy to a mortgage given to secure an antecedent indebtedness.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 326; Dec. Dig. ⊂=151(1).]

Appeal from, and Petition for Revision of Proceedings of, the District Court of the United States for the Southern District of Mississippi; Henry C. Niles, Judge.

In the matter of H. P. Mollere, bankrupt. To review an order giving preference to a landlord's lien in favor of J. P. Carter, the Bank of Hattiesburg appeals and petitions to revise said order. Appeal dismissed, and petition to revise denied.

James N. Flowers and Ellis B. Cooper, both of Jackson, Miss., for petitioner and appellant.

Nathan C. Hill and Claude E. Hill, both of Hattiesburg, Miss., for respondent and appellee.

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

PARDEE, Circuit Judge. The case shows that in the bankruptcy of H. P. Mollere, pending in the District Court of the United States for the Southern District of Mississippi, the Bank of Hattiesburg proved its claim for $2,380, with interest, secured by a deed of trust covering certain movables, which proof of debt by preference was duly allowed. Thereafter J. P. Carter, as landlord of a certain building rented to the bankrupt, probated his claim of $800 on the same movables, claiming a lien thereon under the laws of the state of Mississippi. Section 2851, Code Miss. 1906.

The property in contest was duly sold by the trustee, and the proceeds, amounting to $675, not enough to pay either claimant, was held to await the disposition of the court. At the time of proving his claim said Carter filed a petition in the bankruptcy court, asserting his lien as prior to all other claims, and attacking the allowance of the claim of the Hattiesburg Bank as a valid lien on the movables in question, and praying that the deed of trust in favor of the bank should be disallowed, and the proceeds of the movables sold be adjudged liable to his lien for rentals.

No specific parties were made, but the matter was taken up by the referee as a contest for priority between Carter and the bank, and after hearing evidence the referee reported in favor of the Bank of Hattiesburg. On review before the District Court, the finding in favor of the Bank of Hattiesburg was reversed, and preference was decreed in favor of Carter. Neither before the referee nor the trial judge was the trustee made a party or considered as having any interest. In this court the trustee is ignored.

As the distribution of the funds coming into the hands of the trustee is necessarily a regular step in the proceedings, our jurisdiction to review must be found either in section 24b or section 25 of the Bankruptcy Law (Act July 1, 1898, c. 541, 30 Stat. 553). As the judgment of the bankruptcy court complained of was in no proper sense an allowance or rejection of any claim over $500, section 25 does not authorize an appeal, and our jurisdiction can only be found under section 24b, and is confined to matters of law arising on the facts as found by the lower court or otherwise indisputably shown in the record before us.

The trial judge found and adjudged as follows:

"H. P. Mollere, Bankrupt. No. 225. In Bankruptcy.

"As between the claim of the landlord for rent due by the bankrupt, as constituting a lien upon the assets situated upon the premises of higher rank than that of the creditor having a mortgage upon the same property, the referee held that the lien of the mortgagee was superior to that of the landlord, and from this holding the landlord appeals to this court. The landlord bases his claim for rent upon section 2851, Mississippi Code of 1906, providing: 'That no goods or chattels, lying or being in or upon any messuage, lands or tenements, leased or rented for life, years, at will or otherwise, shall at any time be liable to be taken by virtue of any writ of execution, or other process whatever, unless the party so taking the same shall, before the removal of the goods or chattels from such premises, pay or tender to the landlord or lessor thereof, all the unpaid rent for the said premises, whether the day of payment shall have come or not, provided it shall not amount to more than one year's rent; and the party suing out such execution or process, paying or tendering to such landlord or lessor the rent unpaid, not to exceed one year's rent, may proceed to execute his judgment or process; and the officer levying the same shall be empowered and required to levy and pay to the plaintiff as well as the money so paid for rent, as the money due under the process, and when the rent contracted for is payable, not in money, but in other things, the creditors shall pay the landlord the money value of such things.'

"The language of the statute just cited clearly defines the rights of the landlord as to his rent for one year as superior and paramount to any and every claim against the assets upon the premises. The Mississippi cases construing this section of the Code, or one identical, re-enacted and now in force, are cited by opposing counsel as establishing their respective contention, and it is argued by the mortgagee herein that the case of Marye v. Dyche,

42 Miss. 347, is decisive, in which it is held that 'this provision of the statute does not affect the tenant's conveyance by mortgage in good faith and for a valuable consideration of the property on the demised premises, or where there is a special lien thereon created by contract prior, to the levy of the attachment'; that this holding has been affirmed in the following cases: Stamps v. Gilman, 43 Miss. 456; Fitzgerald v. Fowlkes, 60 Miss. 270; Henry v. Davis, 60 Miss. 212; Newman v. Bank, 66 Miss. 323, 5 South. 753; Richardson v. McLaurin, 69 Miss. 71, 12 South. 264; that in the instant case the conveyance by the bankrupt was prior to the attachment, and the question at issue decided by Richardson v. McLaurin, supra. The landlord in turn cites these cases as supporting his contention, in that a landlord cannot be deprived of his rent without the conveyance has all the elements of good faith and a valuable consideration.

"The record in this case discloses that the indebtedness of the bankrupt was an old one, long past due and owing several months prior to the deed of trust executed to the mortgagee, making the consideration a past-due indebtedness, as no new funds or money was advanced and the consideration of that certain 'bill of sale' (not recorded) executed in August, 1913, need not be considered, because the court is of opinion that the landlord from the testimony and proof herein, is fully protected by section 2851, Miss. Code 1906, supra, and his claim fortified by the Mississippi cases cited. Further, the application of the provisions of the Bankrupt Act of 1898, as amended, to the issue arising herein, that liens must be given for present consideration, to be of effect, in the judgment of the court, would operate in favor of the landlord. Bankrupt Act 1898, sec. 67(d), as amended by Act June 25, 1910, c. 412, § 12, 36 Stat. 842 (Comp. St. 1913, § 9651).

"In view of the foregoing, the holding of the referee is an erroneous one, and a decree should enter recognizing the claim of the landlord as superior to that of the mortgagee."

On the facts found by the District Judge we concur in his ruling and find no error of law to revise.

The appeal in No. 2887 is dismissed, and the petition to revise (No. 2829) is denied.

HOOKWAY v. McKNIGHT.

In re McKNIGHT LAND CO.

(Circuit Court of Appeals, Eighth Circuit. April 17, 1916.)

No. 4567.

FRAUDULENT CONVEYANCES ⊜57(4)—WHAT CONSTITUTES.

Where a creditor of a solvent corporation agreed to take preferred stock under an express stipulation that it should be redeemed within a given time, a conveyance of lands by the corporation, which was then solvent, to redeem the stock, is not fraudulent, though the corporation thereafter through bad investments became insolvent.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 150–152, 154; Dec. Dig. ⊜57(4).]

Appeal from the District Court of the United States for the District of North Dakota; Charles F. Amidon, Judge

Suit by C. W. Hookway, as trustee of the McKnight Land Company, bankrupt, against E. V. McKnight. From a judgment for defendant, plaintiff appeals. Affirmed.

G. W. Twiford, of Minot, N. D., and Daniel B. Holt, of Fargo, N. D. (Edward Engerud and John S. Frame, both of Fargo, N. D., and R. H. Bosard, of Minot, N. D., on the brief), for appellant.

E. T. Conmy, of Fargo, N. D. (J. S. Watson and N. C. Young, both of Fargo, N. D., on the brief), for appellee.

Before ADAMS, Circuit Judge, and REED and ELLIOTT, District Judges.

ADAMS, Circuit Judge. On September 15, 1913, the McKnight Land Company, a corporation of North Dakota, was by the District Court of the United States for the District of North Dakota adjudicated a bankrupt, and C. W. Hookway was duly chosen its trustee. He brings this suit in equity against E. V. McKnight to rescind a contract of sale or transfer of land made by the bankrupt corporation to him on December 20, 1911, on the alleged ground that it was made with intent to defraud the creditors of the Land Company.

The testimony tended to show the following main facts: In 1907 the appellee and his two sons, Roy and John, organized a land corporation to deal in lands, with an authorized capital of $50,000, of which $12,000 only was then issued. E. V. McKnight, the appellee, subscribed and paid for $4,000 of the stock, and the two sons, Roy and John, subscribed each $4,000, and gave their notes to the corporation for that amount. The appellee later purchased and paid for $1,000 worth more of the stock of the company. In 1909 the appellee, being about to remove to California to reside there, sold his stock in the Land Company and some other stock owned by him, known as the "Hurd bank stock," to the corporation, for $13,125, and took the notes of the corporation in that amount for the purchase price. In June, 1910, the articles of incorporation of the Land Company were so amended as to permit the issuance of preferred stock by it and to provide for its redemption at any time after one year from its issuance.

Afterwards the appellee, being then an acknowledged and rightful creditor of the company for $8,000, balance due on account of the stock sold by him to it, and $15,000 in money loaned by him to it, and holding the note of the corporation for the aggregate amount so due him of $23,000, at the solicitation of his sons agreed to surrender his note and take preferred stock of the corporation, of the par value of $23,000, provided the corporation would agree to redeem it at par on December 1, 1911. This was assented to by the corporation, and the note was surrendered, and a corresponding amount of preferred stock issued to him. When the period fixed for redemption of the preferred stock held by appellee, namely, December 1, 1911, arrived, the corporation assigned to him certain valuable contracts for the purchase of school lands from the state of North Dakota at a valuation fairly and reasonably equivalent to the face value of the stock so acquired and held by him, and this was received by the appellee in lieu of money originally agreed to be paid. At the time the agreement to surrender his notes by the appellee was made and performed, and the preferred stock was accepted by him, the corporation was solvent and in a first-class financial condition, but afterwards, by reason of improvident ven-

tures, bad crops, and misfortunes of one kind and another, insolvency and bankruptcy ensued.

There was no evidence that there was any reasonable ground to contemplate insolvency or bankruptcy at the time the appellee and the corporation entered into the arrangement to exchange the note for the preferred stock. On this and other evidence, not substantially contradicting this, the learned trial judge dismissed the bill, saying, amongst other things:

"At the time of this preferred stock transaction, in exchange for the cash, and the equivalent of cash which the Land Company then received, that company agreed to redeem the stock by the payment of the face value thereof, with interest at 8 per cent. on December 1, 1911, if the defendant, E. V. McKnight, should so desire. At the time the company was perfectly solvent, the transaction was made in entire good faith; it was a contract which the Land Company had authority to make, and was in fact a simple loan with an agreement on the part of the Land Company to repay the loan on December 1, 1911, with interest. The lands sought to be recovered in this suit were turned out to E. V. McKnight in payment of the obligation of the Land Company created by this loan. Such payment in land was just as valid as a payment in cash would have been. I hold the payment to have been valid in all respects."

This finding of fact was presumptively correct. Moreover, after an independent consideration of the evidence and arguments of counsel, we are of opinion that the trial court was clearly right in the view it took of the case. It seems to us that the essence of the transaction between the appellee and the Land Company was that the appellee, being a bona fide creditor of the Land Company in the sum of $23,000, accepted the stock practically as collateral security for the payment of that debt at the time fixed. There was no evidence that McKnight desired the stock of the company as an investment. On the contrary, he was about leaving North Dakota, where he had resided with his boys for a long time, and to take up his residence in California, and all the testimony points to this conclusion that he desired to convert his holdings of stock in North Dakota into cash, and that he never intended to accept the stock in full discharge of his debt. He did accept it with the agreement that the face value of the stock, which was the equivalent of the debt, should be refunded to him on the 1st of December, 1911.

There is no pretense that the transaction between E. V. McKnight and the bankrupt amounted to any unlawful preference under the bankruptcy law to Mr. McKnight. The basis of the suit is that the contract was void under the statute of North Dakota concerning fraudulent conveyances. Finding no fraud to have been practiced upon the Land Company in the transaction, and that there was no intent to hinder, delay, or defraud creditors by the transaction, the decree of the District Court must be affirmed.

YANUSZAUCKAS v. MALLORY S. S. CO.

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

No. 136.

1. COURTS ⟸270—FEDERAL COURTS—JURISDICTION.
Where plaintiff is an alien, the District Court of a district other than that of defendant's residence has no jurisdiction over the action, unless the parties consent.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 810; Dec. Dig. ⟸270.]

2. APPEARANCE ⟸9(5)—SPECIAL APPEARANCE—WHAT CONSTITUTES.
Where defendant appeared specially for the purpose of moving to dismiss, and the notice of appearance so stated, defendant's appearance was special, and did not confer jurisdiction on the court.
[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 47–49; Dec. Dig. ⟸9(5).]

3. APPEARANCE ⟸10—SPECIAL APPEARANCE—TIME TO PLEAD.
Where defendant appeared specially for the purpose of moving to dismiss the summons and complaint, the fact that it thereafter applied for an order extending the time to plead generally, in case it should be held the court had jurisdiction of the action, such application did not convert the special appearance into a general one, giving the court jurisdiction.
[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 53, 54; Dec. Dig. ⟸10.]

4. COURTS ⟸274—FEDERAL COURTS—JURISDICTION—CITIZENSHIP OF CORPORATION.
A corporation must be considered as a citizen of the state wherein it was incorporated.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 814; Dec. Dig. ⟸274.]

5. COURTS ⟸276—FEDERAL COURTS—VENUE—WAIVER—"CITIZENSHIP."
"Citizenship" can be acquired only by birth and naturalization; hence an averment in the complaint that plaintiff was a citizen of the state by domicile and residence was meaningless, and where defendant moved to dismiss because the United States District Court was without jurisdiction, the allowance of an amendment setting up plaintiff's alienage did not affect defendant's rights.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 815; Dec. Dig. ⟸276.
For other definitions, see Words and Phrases, First and Second Series, Citizenship.]

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

Action by John Yanuszauckas against the Mallory Steamship Company. The complaint was ordered dismissed, and plaintiff's motion for judgment by default denied, and he brings error. Orders affirmed.

Baltrus S. Yankaus, of New York City (Frank J. Felbel, of New York City, of counsel), for plaintiff in error.

James A. Hatch, of New York City (Wharton Poor, of New York City, of counsel), for defendant in error, appearing specially.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The plaintiff is an alien and the defendant is a Maine corporation. The plaintiff sues for damages for injuries sustained by him while being employed by the defendant in unloading the steamer Brazos, owned by the defendant, while the steamer was attached to Pier 38, North River. The suit was commenced in the District Court for the Eastern District of New York.

[1] We think it clear that, unless both parties consent, the action cannot be maintained in the Eastern district for the reason that the plaintiff is an alien and the defendant is a Maine corporation.

[2] The defendant appeared specially for the sole purpose of moving to dismiss. The statement in the notice of appearance that the defendant appears "specially for the purpose of moving to dismiss the summons and complaint" prevents it from being considered as a general appearance. In Harkness v. Hyde, 98 U. S. 476, 25 L. Ed. 237, the court says:

"It is only where he (the defendant) pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived."

See also Shaw v. Spencer, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115, and Waters v. Central Trust Co., 126 Fed. 469, 62 C. C. A. 45.

[3] The defendant asserted this position at the earliest moment by moving to dismiss and appearing for that purpose only. The application for an order extending the time to plead generally in case it should be held that the suit was properly brought in the Eastern district, cannot be regarded as a waiver of the position taken in the motion to dismiss. It was only a wise precaution to enable the defendant to defend on the merits if the jurisdiction in the Eastern district should be upheld. The judge simply said, in effect, that if he found that the action was properly brought in the Eastern district he would permit the defendant to answer and defend on the merits. To assert that the defendant was compelled to accept a situation which might result in a default being taken against him while the court was considering its rights is both illogical and unfair.

[4, 5] The defendant being a Maine corporation must be regarded as a citizen of Maine and the venue must be laid there unless it consents to be sued elsewhere. It has not so consented. The original complaint contained no averment either that the plaintiff was a citizen or an alien. The averment, "that the plaintiff is a citizen of the state of New York by his domicile and residence and is a resident of the Eastern district of New York," is meaningless. Citizenship can be acquired only by birth or naturalization. The amendment permitted by the court allowing the plaintiff to allege that he was an alien did not operate as a waiver of the defendant's rights.

The orders of the District Court are affirmed.

TAYLOR et al. v. KIMMERLE.

(Circuit Court of Appeals, Sixth Circuit. May 2, 1916.)

No. 2738.

1. COMPROMISE AND SETTLEMENT ⟸19(2)—SETTING ASIDE OF COMPROMISE—RIGHT TO SET ASIDE.

Bondholders, familiar with the situation and desirous of effecting a quick reorganization, acquired from a bankrupt estate a vendor's lien, as well as bonds. Other persons interested refused to consent to a dismissal of the litigation, and the vendor's lien, as well as the bonds acquired, were denied priority. *Held* that, as the purchase was a compromise settlement and an adjustment of disputed claims, made in good faith and without fraud, the purchasing bondholders, who were familiar with the situation, are not entitled to have the order of purchase set aside and a return of the purchase price on the ground of failure of consideration.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 71–73; Dec. Dig. ⟸19(2).]

2. BANKRUPTCY ⟸260—SALES—WARRANTIES.

A court, which approved a trustee's report and authorized him to sell bonds and a vendor's lien, did not thereby so warrant the priority of such claims over other claims that it was judicial bad faith for the same court to thereafter hold other claims prior to the claims sold.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 360; Dec. Dig. ⟸260.]

Appeal from the District Court of the United States for the Western District of Michigan; Clarence W. Sessions, Judge.

Petition by William L. Taylor and another against Charles H. Kimmerle, trustee in bankruptcy, for an order requiring Kimmerle to repay the sum they had paid in purchasing assets of the bankrupt estate. From an order dismissing the petition, petitioners appeal. Affirmed.

H. F. Williams, of Chicago, Ill., for appellants.

W. F. McKnight, of Grand Rapids, Mich., for appellee.

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

DENISON, Circuit Judge. The question involved on this appeal is thus most concisely stated by appellant's counsel:

"Charles H. Kimmerle, as trustee in bankruptcy, sold to William L. Taylor and Frank M. Millikan a vendor's lien for something over $8,000, face value, and $36,000 face value, of bonds, for $6,500 in cash, and the sale was approved by the District Court. Taylor and Millikan did not buy for speculative purposes and were admittedly acting in the best of good faith. The same court shortly thereafter, in another proceeding concurrently pending, held that the vendor's lien and the bonds were void. Thereupon, and before Kimmerle had distributed the $6,500, Taylor and Millikan filed their petition in the bankruptcy cause, setting up, in substance, the fact that the vendor's lien and the bonds were void, and praying for an order on Kimmerle to repay to them $6,500, which they had previously paid to him, on the ground that they had never received any consideration for it. The court, on the admitted facts, denied the right of Taylor and Millikan to have their money repaid to them, and dismissed their petition. The matter now comes to this court on the appeal of Taylor and Millikan."

[1] This statement may be adopted, save as to the phrase "held void." The vendor's lien was denied priority over the mortgage in foreclosure, and the bonds in question were held not to have been so issued to Kimmerle as to carry a right to share in the foreclosure proceeds. Kimmerle was insisting in the foreclosure suit that these claims of his were rightful. Taylor and Millikan, as large bondholders, were adversely interested. They agreed to buy out Kimmerle's interests and claims for $6,500, expecting thereby to accomplish an adjustment of all disputes and a quick reorganization of the corporation in receivership under mortgage foreclosure. This expectation failed only because outside bondholders disapproved and compelled the litigation to go on to an adjudication.

We are satisfied that this judgment must be affirmed on the ground that the purchase was a compromise settlement and adjustment of disputed claims and was made in good faith and without fraud. The fact that it involved an assignment, instead of a surrender, of claims in litigation is of no importance. Taylor and Millikan fully understood the situation; they may have been mistaken about the legal questions involved, but it is not likely that they regarded these questions as important; they wanted to get the litigation out of the way; and the fact that there is a later judicial determination against the validity or value of the rights involved cannot justify rescinding a settlement so made. We had occasion to dispose of a case upon this principle very recently (American Co. v. Waltermire, 231 Fed. 412, —— C. C. A. ——), and we thought the principle too familiar to require citation of authorities; but for illustrative cases, see Bofinger v. Tuyes, 120 U. S. 198, 7 Sup. Ct. 529, 30 L. Ed. 649, in which it appeared that parties had made a compromise settlement under the supposition that it would terminate litigation, but other parties had unexpectedly taken an appeal, and in which it was held that the settlement would not thereby fail; and see, also, Union Bank v. Geary, 5 Pet. 99, 114 (8 L. Ed. 60), in which it was said:

"So that this question, at the time the contract was entered into, was considered by the bank at least doubtful. And to permit a subsequent judicial decision on this point in their favor, as having retrospective effect, so as to annul a settlement or agreement made by them under a different state of things, would be sanctioning a most mischievous principle."

[2] We are unable to approve appellant's theory that the court which approved the trustee's report and authorized him to make the sale thereby so warranted the legal priority of the claims sold over certain adverse claims that it was judicial bad faith for the same court afterwards in another case to decide these questions against the interests of Taylor and Millikan.

The order dismissing their petition is affirmed.

OWEN v. CLIFTON et al.

(Circuit Court of Appeals, Fifth Circuit. April 6, 1916. Rehearing Denied May 20, 1916.)

No. 2882.

CORPORATIONS ⟸560(6)—RECEIVERS—ADMINISTRATION OF ESTATE—SUIT TO SET ASIDE FRAUDULENT JUDGMENT.

A receiver for a corporation may maintain a bill in the court of his appointment, and which is administering the estate, to prevent the enforcement, to the injury of that estate, of a fraudulent judgment recovered against the corporation, and affirmed on an appeal, in which the corporation gave a supersedeas bond, although no claim against the receivership estate has yet been filed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2262; Dec. Dig. ⟸560(6).]

Maxey, District Judge, dissenting.

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

Suit in equity by W. F. Owen, receiver of New Orleans, Mobile & Chicago Railroad Company, against J. F. Clifton and others. Decree for defendants, and complainant appeals. Reversed.

J. N. Flowers and Ellis B. Cooper, both of Jackson, Miss. (Flowers, Brown, Chambers & Cooper, of Jackson, Miss., and J. C. Rich, of Mobile, Ala., on the brief), for appellant.

J. W. Cassedy, of Brookhaven, Miss., and W. J. Pack, of Laurel, Miss. (Jeff. Collins, of Laurel, Miss., on the brief), for appellees.

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

WALKER, Circuit Judge. The bill in this case was filed by the appellant, W. F. Owen, suing as the receiver of the property of the New Orleans, Mobile & Chicago Railroad Company, against J. S. Clifton and his two attorneys in a suit for personal injuries brought in a state court in Mississippi by Clifton against said company before the property of that company was placed in the hands of the receiver, in which suit a judgment was rendered against the railroad company. The bill as it was amended contained averments to the effect that the claim asserted in that suit was one wholly unfounded upon facts, and was the result of a corrupt conspiracy between Clifton and two other named persons to fabricate that claim and to support it by the perjured testimony of Clifton and his two co-conspirators, and that this conspiracy, without any fault or lack of due diligence on the part of the defendant in the suit brought by Clifton, has been so far successfully carried out that a judgment in favor of Clifton has been rendered against the railroad company, which, on an appeal by that company, which gave a supersedeas bond, was affirmed by the Supreme Court of Mississippi after the receiver of the property of that company was appointed. The bill prayed that the judgment so obtained be canceled

and set aside, or that the enforcement of it be perpetually enjoined, or for such other, further, special, or general relief as the equities of the case require. By the decree, which is appealed from, the bill as it was amended was adjudged to be insufficient in law upon its face to warrant the relief prayed for, and was dismissed.

The receiver was not a party to the suit in which the impeached judgment was rendered. He is concerned with that judgment only in so far as it may give rise to a claim against the estate which is the subject of the receivership. The averments of the bill make it apparent that the rendition of the judgment will lead to the presentation, either by the plaintiff in the judgment or by the surety on the supersedeas bond, if payment of the judgment by him shall be coerced, of a claim against the estate which the court is administering in the suit in which the receiver was appointed. That court, by its receiver, has possession of all the property of the defendant in the judgment in question, and that property is subject to administration by that court alone. In view of that fact, although when the bill was filed the claim represented by the judgment had not been formally presented to the court of equity which was administering the estate of the defendant in the judgment, that court, looking at the substance of the transaction, so far as the estate in its charge was subject to be affected by it, would be justified in treating the recovery of the judgment and anything done by the plaintiff therein to enforce it as steps in the prosecution of the claim, to the end of making it a charge upon the estate which the court was administering. The receiver was within his right and duty in defending the estate in his possession against a claim which was antagonistic to the rights or interests of the parties to the suit in which he was appointed. Bosworth v. St. Louis Terminal Railroad Association, 174 U. S. 182, 19 Sup. Ct. 625, 43 L. Ed. 941. One who is shown to have fraudulently procured a judgment in his favor cannot expect to have the aid of a court of equity to carry it into execution. In so far as the execution of the judgment is dependent upon property in the equity court's charge being subjected to the satisfaction of it, that court may inquire into the conduct of the plaintiff in procuring it. Lawrence Mfg. Co. v. Janesville Mills, 138 U. S. 552, 11 Sup. Ct. 402, 34 L. Ed. 1005; Gay v. Parpart, 106 U. S. 679, 1 Sup. Ct. 456, 27 L. Ed. 256; Lewers & Cooke, Limited, v. Atcherly, 222 U. S. 285, 32 Sup. Ct. 94, 56 L. Ed. 202.

If Clifton, the plaintiff, in the alleged fraudulently procured judgment, is permitted to enforce it against the surety on the supersedeas bond, he would reap the fruits of his fraudulent transaction and at the same time leave the claim which the judgment in his favor created to be asserted against the estate of the defendant in the judgment by one who was not a party to the fraud. The action of the receiver in submitting by his bill for the scrutiny of the court the alleged fraudulent transaction at the stage it had reached when the bill was filed was not premature, as the result was to enable the court to deal with the claim, obviously being prosecuted to the end of making it a charge upon the property which the court was administering, and, if it is found to have such a fraudulent origin that the claimant could not have the

aid of the court for its enforcement, to thwart an attempt by him to do indirectly, through the instrumentality of an application which an innocent third party might be practically coerced into making to save himself, what he could not do directly.

The conclusion is that the averments of the bill disclose a fraudulent transaction having for one of its objects the creation of an unconscionable claim against an estate which the court is administering, and that the court should inquire into that transaction, and, if it is found to be such a one as is alleged, should prevent its consummation, in so far as such consummation would be to the injury of the estate in the court's custody.

It follows that the decree dismissing the bill was erroneous, and should be reversed; and it is so ordered.

MAXEY, District Judge, dissents.

PURITAN CORDAGE MILLS v. SAMPSON CORDAGE WORKS.

(Circuit Court of Appeals, Sixth Circuit. April 14, 1916.)

No. 2796.

1. APPEAL AND ERROR ⊂=339(2)—TIME FOR APPEAL—INTERLOCUTORY DECREE.
A decree adjudging unfair competition, awarding an injunction, directing that defendant deliver up for destruction any imitative articles which he may have on hand, and ordering a reference for accounting of profits and damages, is interlocutory, not final, and an appeal not taken therefrom till more than 30 days after it was entered must be dismissed.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1884; Dec. Dig. ⊂=339(2).]

2. APPEAL AND ERROR ⊂=357(1)—APPEALABLE DECREE—BURDEN OF PROOF.
If the direction for destruction of imitative articles renders the decree final as to such articles, the burden is on appellant to show that there were such articles.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1928; Dec. Dig. ⊂=357(1).]

Appeal from the District Court of the United States for the Western District of Kentucky; Walter Evans, Judge.

Suit by the Sampson Cordage Works against the Puritan Cordage Mills. Decree for complainant, and defendant appeals. On motion to dismiss, because not taken within 30 days. Dismissed.

Helm & Helm, of Louisville, Ky., for appellant.

McDermott & Ray, of Louisville, Ky., Coale & Hayes, of Boston, Mass., and Joseph Wilby, of Cincinnati, Ohio, for appellee.

Before KNAPPEN and DENISON, Circuit Judges.

PER CURIAM. [1, 2] The decree adjudged unfair competition, awarded injunction, directed that defendant "now deliver up" for destruction any of the imitative articles "which it may have on hand," and ordered a reference for an accounting of profits and damages.

This decree must be deemed interlocutory, upon the authority of Maas v. Lonstorf (C. C. A. 6th Cir.) 166 Fed. 41, 91 C. C. A. 627. The direction for destruction is only for incidental relief, and does not, beyond recall, dispose of the main controversy, as in Thomson v. Dean, 74 U. S. (7 Wall.) 342, 19 L. Ed. 94; if this direction could distinguish from Maas v. Lonstorf, the burden would be on appellant to show that there were such articles on which the decree would thus take present final effect, and this burden is not met; and the statute permitting appeals from interlocutory orders has, as to this class of cases, removed the hardship which was the basis of the exception to the general rule that a decree is not final and appealable if a judicial accounting remains to be taken and reviewed.

Motion granted. The clerk will deliver to appellant, for use in a future appeal, all except five copies of the printed record.

UNITED STATES v. WHITED & WHELESS, Limited, et al.

(Circuit Court of Appeals, Fifth Circuit. April 15, 1916.)

No. 2796.

PUBLIC LANDS ⊂=123—DISPOSAL BY UNITED STATES—LIMITATION OF ACTIONS.

Act March 3, 1891, c. 561, § 8, 26 Stat. 1099 (Comp. St. 1913, § 5114), providing that suits to vacate and annul patents theretofore issued shall only be brought within five years from the passage of the act, and that suits to annul or vacate patents thereafter issued shall only be brought within six years after the issuance of the patent, gives to the patent, after the expiration of the term, the same effect against the United States that it would have had if it had been valid when issued, and therefore bars an action by the United States to recover from the purchasers of the patentee the value of lands alleged to have been fraudulently patented.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. ⊂=123.]

In Error to the District Court of the United States for the Western District of Louisiana; Aleck Boarman, Judge.

Action by the United States against Whited & Wheless, Limited, and others, to recover the value of lands alleged to have been fraudulently patented. Judgment for the defendants on exceptions to the petition, and the United States brings error. Affirmed.

George Whitfield Jack, U. S. Atty., and Robert A. Hunter, Asst. U. S. Atty., both of Shreveport, La., for plaintiff in error.

T. Alexander and J. D. Wilkinson, both of Shreveport, La., for defendants in error.

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

PER CURIAM. This is a suit to recover from the purchasers of the patentee the value of lands alleged to have been fraudulently patented. The defendants in error excepted to the petition on two grounds: (1) That the petition set forth no cause of action or right to recover for the matters and things set forth; and (2) that, even if

the petition did set forth a cause of action, the same was barred and prescribed by the prescription of six years. These exceptions were sustained in the lower court and judgment rendered accordingly.

The error alleged in this writ is that the court erred in sustaining the exceptions. The act of March 3, 1891 (26 Stat. 1095, c. 561), provides among other things, that:

"Suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act; and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents." 26 Stat. 1099, § 8.

The patent involved in this case was issued the 12th day of December, 1898; this suit was brought December 29, 1914. We are of opinion this statute must be taken to mean that the patent is to be held good and is to have the same effect against the United States that it would have had if it had been valid in the first place. United States v. Chandler, 209 U. S. 447, 28 Sup. Ct. 579, 52 L. Ed. 881; United States v. Winona & St. Peters R. R. Co., 165 U. S. 467, 17 Sup. Ct. 368, 41 L. Ed. 789. See United States v. Exploration Co. (C. C.) 190 Fed. 405; United States v. Smith (C. C.) 181 Fed. 545; Kansas City Lumber Co. v. Moores, 212 Fed. 153, 129 C. C. A. 1. If the patent by the lapse of six years is to have the same effect against the United States that it would have had if it had been valid in the first place, then the situation is just about the same as if there had been no fraud practiced upon the government, and as if the patent had been properly, legally, and fairly issued.

Judgment affirmed.

KNABE BROS. CO. v. AMERICAN PIANO CO.

(Circuit Court of Appeals, Sixth Circuit. April 14, 1916.)

Nos. 2673, 2674.

TRADE-MARKS AND TRADE-NAMES ⊂=73(1)—INFRINGEMENT—UNFAIR COMPETITION.

The form of notices required to be affixed by defendant to its pianos to distinguish them from those of complainant, which were older in the market, where both bore the name "Knabe" considered.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 84; Dec. Dig. ⊂=73(1).]

On petition to modify opinion. Modified and affirmed.

For former opinion, see 229 Fed. 23, —— C. C. A. ——.

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

PER CURIAM. Our opinion, filed February 11th last, provided for hearing counsel upon the precise language of the cheek-block notice upon appellant's piano. Each party has presented suggestions on that subject. Certain modifications of the opinion are also asked. We state our conclusions upon the various subjects:

(a) We think the form of the cheek-block notice, suggested in our opinion, should be used without modification. This notice may contain the guaranty and statement of inspection as in appellant's original cheek-block notice. It should be in plain type, substantially of the kind used in the printed slips presented by appellee, should be printed on paper securely glued to the cheek-block and well covered by transparent varnish. The cheek block should be secured in place by the use both of glue and a screw.

(b) The fall-board inscription should be in the words "Made by the Knabe Bros. Co., Cincinnati, O.," arranged in three lines, the upper containing the words "Made by," the lowest the words "Cincinnati, O.," and the words "The Knabe Bros. Co." between the first and the third lines. The words last named should be no more prominent than in form 1 of appellant's proposed fall-board designation, Exhibit A, and the other words should be as prominent as in that suggested form. We see no valid objection to the use of script in the name of appellant company with the lower arm of the letter "K" underlining the words "Knabe Bros.," as in Exhibit A mentioned.

(c) We adhere to the form of notice required by our opinion "to be conspicuously inserted in catalogues and advertisements, and to be framed and kept displayed upon defendant's pianos in all salesrooms in which they are offered for sale." We see no occasion for a warning notice upon concert programs in which merely the name of the piano is given, with nothing referring to the sellers, manufacturers or place of sale. In such case, appellee would not be injured by possible confusion but would quite as likely be benefited thereby. No form of appropriate and effective short notice for short advertisements has been presented; no such appropriate and effective form occurs to us, and we must, therefore, leave our opinion as it stands upon the subject of warning notice in advertisements. Manifestly, an effective warning notice upon ordinary street signs, illuminated or otherwise, is impracticable; appellant, however, should not be allowed to use such signs without such warning notice.

(d) Appellant has, in this court, prevailed to a substantial extent upon the merits, and should, therefore, recover full costs of this court, as announced in our opinion. The fact, as alleged, that appellant did not actually use the cheek-block notice before appellee's bill was filed is immaterial either to the opinion or to the subject of costs.

THE PORT JOHNSON TOWING CO. NO. 7.

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

Nos. 166, 167.

COLLISION ⇐82(2)—COLLISION WITH TOW—NEGLIGENT NAVIGATION IN FOG. A tug navigating in a fog without a tow, at a speed of about 4 miles and which, knowing that there was a tow ahead and hearing the whistle of the towing tug, proceeded without change of course or speed until she came into collision with the tow, *held* solely in fault.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 170, 172–174; Dec. Dig. ⇐82(2).]

Appeals from the District Court of the United States for the Eastern District of New York.

Suits in admiralty for collision by Edward J. Phalen and by A. J. & J. J. McCullom against the steam tug Port Johnson Towing Company No. 7; Port Johnson Towing Company, claimant. Decrees for libelants, and claimant appeals. Affirmed.

For opinion below, see 229 Fed. 267.

Park & Mattison, of New York City (Samuel Park, 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.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge. These appeals are from decrees entered by Judge Chatfield against the tug No. 7 running without a tow, and in favor of the barges McAllister and Phalen, for damages occasioned by a collision which occurred in a fog, just as the tow had come through the Buttermilk Channel, northwest of Governor's Island, December 2, 1914. The barges were part of a fleet of twelve barges which were being towed by the tug Nellie Tracy. The barges McAllister and Phalen were in the first tier of the tow. The collision occurred about 5:30 p. m.

There is some dispute over the density of the fog, but we do not think that it is very material how dense the fog was, for if it were a light fog the master of the tug No. 7 could have seen the tow and, as the tug was not encumbered in any way, should have avoided the string of boats. If, on the contrary, the fog were so dense that he could not see at all, he should have stopped or proceeded at such moderate speed that he could have avoided a collision. He was going about four miles an hour.

We have, then, a case where a tug navigating in a fog, and knowing that there is a tug and tow ahead, proceeds, without changing course or speed, until she is right on top of the tow. The Tracy was proceeding at moderate speed—not over 2½ miles an hour—and blew her whistle, which was heard on the No. 7. It seems to us that a clear case of negligence on the part of the No. 7 is established. In the Chicago and the City of Augusta, 125 Fed. 712, at page 715, 60 C. C. A. 480, at page 483, we said:

"This court has repeatedly held, following the Supreme Court, that a vessel which is primarily in fault for a collision cannot shift its consequences in part upon the other vessel without clear proof of the contributing negligence or fault of the latter. Her own negligence sufficiently accounts for the disaster."

The decrees of the District Court are affirmed with costs.

YEE SUEY v. BERKSHIRE, Supervising Inspector.

(Circuit Court of Appeals, Fifth Circuit. March 30, 1916.)

No. 2752.

ALIENS ⊜32(9, 10)—DEPORTATION OF CHINESE—PLACE OF DEPORTATION.

An order for deportation of an alien to China is not warranted, where the record does not show that he came from China, but that he entered the United States from an adjacent country; but in such case the order may be amended.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 92, 94; Dec. Dig. ⊜32(9, 10).]

Appeal from the District Court of the United States for the Western District of Texas; William B. Sheppard, Judge.

Suit by Yee Suey against F. W. Berkshire, Supervising Inspector. From the decree for deportation, Yee Suey appeals. Modified and affirmed.

U. S. Goen, of El Paso, Tex., for appellant.

R. E. Crawford, Asst. U. S. Atty., of El Paso, Tex., for appellee.

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

PER CURIAM. This cause was submitted on briefs, and in the light of the transcript and briefs we find that, excepting the fifth assignment of error, no one of them is well taken. As to the fifth, we notice counsel for the appellee confess partial error as follows:

"Appellant's fifth assignment of error raises the question as to whether or not the Secretary of Labor under the law was warranted in ordering the appellant deported to China, there being no evidence in the record that appellant ever was in China, the evidence showing that appellant came to the United States from Mexico. The contention of appellant's counsel is directly sustained by the decision of the Second Circuit in the case of United States ex rel. Moore v. Sisson, U. S. Chinese Inspector, 206 Fed. 450, 124 C. C. A. 356. In our view of the law, appellant's contention is correct. However, in the case cited, the court declined to discharge the Chinamen because they had been ordered deported to China when they should have been ordered deported to Canada, but held that the warrant of deportation should be amended, by providing that the aliens should be deported to Canada. We think that the judgment in this case should conform to the judgment in that, and your judgment should be that the order of the Secretary of Labor, deporting appellant to China, should be amended so that he would be deported to Mexico.

R. E. Crawford,
"Assistant United States Attorney,
"Attorney for Appellee."

Giving effect to this, the warrant of deportation of the Acting Secretary of Labor should be amended, by striking out the word "China," and inserting in its stead the word "Mexico," and with such amendment the decree appealed from is affirmed.

SOUTHERN RY. CO. v. WHITE.

(Circuit Court of Appeals, Sixth Circuit. May 2, 1916.)

No. 2775.

APPEAL AND ERROR ⊂=981—MOTION FOR NEW TRIAL—REVIEW.

The granting of a new trial on the ground of excessiveness of damages is a matter of discretion with the trial court, not subject to review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3876; Dec. Dig. ⊂=981.]

In Error to the District Court of the United States for the Eastern District of Tennessee; Edward T. Sanford, Judge.

Action by John White against the Southern Railway Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

L. D. Smith, of Knoxville, Tenn., for plaintiff in error.

S. E. Hodges and W. T. Kennerly, both of Knoxville, Tenn., for defendant in error.

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

EVANS, District Judge. John White, the plaintiff below, and whom we shall call the plaintiff in this opinion, was an employé in interstate commerce of the Southern Railway Company, which we shall call the defendant.

While at his work in December, 1913, in one of defendant's yards known as the Coster Yards, located near Knoxville, Tenn., plaintiff was struck and injured by one of defendant's engines. To recover $30,000 which he claimed as damages for the injury thus inflicted, he brought this action in the court below under the Employers' Liability Act of April 22, 1908 (35 Stats. 65). He alleged in his declaration that his injuries were caused by the negligence of the defendant. This allegation was put in issue by a plea of not guilty. After the testimony had all been heard by the jury, defendant moved the court to direct a verdict in its favor. The motion was overruled by the court and defendant excepted. The jury found for the plaintiff, and assessed his damages at $7,500. A motion for a new trial was made by the defendant. After hearing his motion the court expressed the opinion that the verdict was excessive to the extent of $2,500, and suggested that the plaintiff enter a remittitur to that extent. The plaintiff in open court accepted the suggestion and remitted $2,500 of the damages assessed by the jury in their verdict. Thereupon the court overruled the motion for a new trial and entered judgment for $5,000.

The defendant brought the case to this court and in its assignment of errors states two grounds upon which it asks a reversal of the judgment. The first error assigned is that the trial court erred in not directing a verdict in defendant's favor, and in not granting its motion for a new trial on that ground. The second error assigned is

that the damages remained excessive after the entry of the remittitur.

1. The questions thus raised were ably argued but after examination of the record we have reached the conclusion that there was no error in refusing to direct a verdict for defendant, and therefore none in overruling the motion for a new trial based on the same ground. While upon the testimony the question of plaintiff's right to recover may be a close one, we think the ruling of this court in the very similar case of Southern Railway Co. v. Smith, 205 Fed. 360, 123 C. C. A. 488, must control us, and we are content to rest our decision upon it without repeating what was there said.

2. The second error assigned is that the court should have granted a new trial upon the ground that the amount of the verdict was excessive, evincing caprice, passion or prejudice in plaintiff's favor in the minds of the jury, and that the amount remitted from the damages assessed still left the amount excessive. Respecting this, we repeat what was said by this court in Big Brushy Coal & Coke Co. v. Williams, 176 Fed. at page 533, 99 C. C. A. 102, and in Mason v. Smith, 191 Fed. at page 504, 112 C. C. A. 146, and by the Supreme Court in Holmgren v. United States, 217 U. S. 521, 30 Sup. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778, to the effect that this case falls within the settled rule that granting or refusing a new trial is matter of discretion and not subject to review.

The judgment of the District Court is affirmed.

BURKE ELECTRIC CO. v. INDEPENDENT PNEUMATIC TOOL CO.

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

No. 117.

1. PATENTS ⟸76—VALIDITY—PRIOR SALE—"ON SALE."

A contract for sale of articles subsequently patented, subject to approval by the buyer of a sample to be afterward submitted, is not a putting "on sale" of the invention, and does not invalidate the patent, where the sample is not furnished or approved until within two years prior to the filing of the application.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 92, 98; Dec. Dig. ⟸76.

For other definitions, see Words and Phrases, Second Series, On Sale.]

2. PATENTS ⟸101—VALIDITY—SPECIFICATIONS.

A patent for an electric motor *held* not invalidated by a too broad claim in the specification of the current frequencies at which the motor will operate, where the claim was made in good faith.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 141; Dec. Dig. ⟸ 101.]

3. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—UNIVERSAL MOTOR.

The Burke patent, No. 1,053,940, for a universal motor, *held* not anticipated, to disclose invention, and to be valid as against the claims of prior use and insufficiency of the specification; also *held* infringed.

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

Bill by the Burke Electric Company against the Independent Pneumatic Tool Company. Decree for complainant, and defendant appeals. Affirmed.

The following is the opinion of Learned Hand, District Judge, in the court below:

In this case there can be no question of the defendant's infringement, and therefore the case necessarily resolves itself into the issue of invalidity. The patent is attacked upon three grounds: Prior sale; improper specifications; lack of invention. In the last defense are included the so-called Birtman and United States Standard Electric Company uses, which are not strictly such, but are rather anticipations. There are also included the Latour patent, and the claim that the patent is only for a new use of that patent.

The first defense is that the patentee had the patented article "on sale" before September 9, 1907, the application being filed September 9, 1909. This defense rests upon the documents extracted from the plaintiff of his order to Barker for the first 100 motors ever made. Burke's own testimony was extremely vague about the whole matter, but I cannot say that it was insincere; on the contrary, he impressed me favorably. It appears that on June 27, 1907, Barker had written to Burke, asking about getting some of these motors, and the letter had been awaiting an answer for Burke's return. On June 6, 1907, the earliest fixed date, Burke wrote that the work upon the modified sample had been pushed along, and that the first motor would be sent on the 15th for Barker's approval. Burke in that letter "confirms our proposition" to furnish 100 motors, subject to approval of the first sample, showing that at some earlier time he had already made such a proposal. No sample motor had reached Barker by July 23d, and we have every reason to suppose that the "modified sample," when actually sent, was motor No. 1, shipped with another on September 26, 1907. My reason for saying this is that the letter of July 6th does not, in my judgment, distinguish between "the modified sample" and "the first of these light-weight machines for your approval"; on the contrary, it is "this first sample" which is to be "subject to your approval." On the entry of the order, No. 5114, appear the words "Date entered, August 29/07," which the defendant urges to have been necessarily the date of the closing of the contract. It is, of course, possible that Barker had accepted before that date, but it is also possible that it was only a factory direction. If that direction was in pursuance to Barker's acceptance, it still does not follow that he had passed upon the sample which he was to approve. We have, on the contrary, reason to suppose that he had not got such a sample, since, as I have said, the sample was apparently to be only the first of the series ordered, and we know that the first of the series was delivered on Septembr 26, 1907.

[1] The situation for the defendant at best is then only this: Before September 9, 1907, Barker and Burke had concluded an agreement to buy and sell 100 motors, subject to Barker's approval of the kind to be delivered. This I cannot think to have been putting the motor "on sale" under any of the cases. In Plimpton v. Winslow, 14 Fed. (C. C.) 919, the skates on the price list were already completed; in Dittgen v. Racine Paper Goods Co., 181 Fed. (C. C.) 394, many pouches had been sold; in Covert v. Covert (C. C.) 106 Fed. 183, the jack was actually exposed for sale in a shop; in Burton v. Greenville (C. C.) 3 Fed. 642, Bruce had actually sold lamp posts as early as November, 1874. The grain elevator in Barnett-McQueen Co., Limited, v. Canadian Stewart Co., 13 Canadian Exch. 186, had been completed for over a year before the application. In National Cash Register Co. v. American Cash Register Co., 178 Fed. 79, 101 C. C. A. 569, Juengst had actually delivered the machine to the Kruse Company more than two years before application filed. None of these cases fit the case at bar. Judge Lowell's decision in McCreery Eng. Co. v. Mass. Fan Co. (C. C.) 186 Fed. 846, held that taking an absolute contract to erect a ventilating system was putting the invention "on sale";

but that was reversed (195 Fed. 498, 115 C. C. A. 408), and is not an authority. Judge Denison went so far in the other direction, in Mershon v. Bay City (C. C.) 189 Fed. 741, as to say that an actual sale was not enough, when the buyer had the right to reject, provided that the period for rejection had not passed before the two-year period came into effect. I do not think it necessary to decide the question whether it puts the invention "on sale," if the inventor makes his first contract to sell the article as fully described therein, or by a sample submitted at the time, though the seller does not deliver till within two years. In the case at bar there was no contract of that character; it was a sale by future sample, and, as every one knows, the sample is a part of the contract; it measures the obligations of each, just as though its description were written in with the utmost particularity. The sample, so far as we can see, was not submitted till after September 9, 1907; at least, there is no proof that it was, and nobody was bound to furnish or accept anything till then. Burke could have changed the motor as he liked, Barker need not have accepted any motor at all. If Burke had found something quite different from the invention actually patented, he was as free to submit that as what he then had in mind. Nothing was sold or offered for sale till he was satisfied that he had got what would be successful. How, then, can it be said that he had agreed to sell any of the intermediate forms until the sample was actually sent on? I think the defense fails.

[2] The attack upon the specifications is threefold: That it is deceptive, in saying that the motor will run upon all frequencies of alternating current; that it is too vague to be followed, having no definite quantitative directions, and leaving the public to experiment; that the claims are in form functional, and in effect only for a new use of Latour's motor. I think that the first criticism is true, and that the language of the patent is broader than the facts warrant as now disclosed. Thus (page 1, lines 68–70) the patentee says that his results "are substantially independent of the number of cycles the single phase alternation current." Again (page 3, lines 68–70): "The speed and the efficiency is also substantially independent of the frequency of the alternating current." These statements, together with others, less explicit, indicating the same thing, are true only within certain limits. The commercial motors actually made will run successfully on alternating current up to 60 cycles, but not with satisfaction at 125 or 133. Indeed, it is the defendant's assertion that no practicable motor has yet been devised to run upon such frequencies and also on direct current. Still I cannot think that this has any effect upon the validity of the patent. There is no evidence that it was deliberately introduced to deceive the public, and, so far as appears, it was an honest mistake. It does not concern the construction of the motor, but of the results to be obtained.

The next criticism is that the patent has not enough directions for practical use, and the objection comes down to the proportion between rotor and stator turns and to the angle of the brush position. In direct current motors the stator field is always stronger than the rotor; in alternating current motors the opposite is true. Burke wished to put his motor, which was to operate upon both currents, among the alternating current class. Naturally, he did not mean to limit himself to any exact proportion, but he did indicate a normal proportion, two to one, which gave an index of what he understood. I think that his reference was clear enough to an art which already knew weak stator fields. His description of any element of his combination might be of such latitude as the practice of the art admitted for that element, always assuming that the new result to be obtained did not require more definite limitation. If the defendant hoped to succeed with such a defense, it should have shown that a successful universal motor depended upon a certain definite proportion of turns. Were that so, then the description would be insufficient, but it has not been shown to be so. So far as appears, the motor will work successfully if the elements are combined as described, though in size and proportion they stand anywhere within the limits which the art would recognize as included in their mention by name. When that is so, it is enough only to mention them by name. Particularly, and as regards the proportion of the stator to rotor

turns, so far as appears the implied reference to the alternating current art has not been shown to be inoperative.

As regards the brush position the defendant's case is even weaker. The exact angle of the brushes could not be predetermined, because it varies with the general structure and relation of the parts. To give any angle would have been a miscue; the angle must be found experimentally when the rest of the motor is designed. That experiment is, however, not the kind which requires any independent invention by one who would follow the patent, and which thus leaves the specification imperfect. You need only plot the two curves on the respective currents, and you will always find an area of substantial coincidence, within which the brushes should be put. Westinghouse Electric Mfg. Co. v. Montgomery Electric Light Co., 153 Fed. 890, 82 C. C. A. 636. It is as if a chemist were directed to add enough of an element to secure precipitation. Such a recipe would be an absolutely accurate guide to the result though the quantity varied with temperature or atmospheric humidity. What men need is a path to the goal; they will not be curious of the country it traverses.

The last objection is that the claims are functional. I can really see nothing in this exception that the second, third, and fifth claims conclude with the phrase, "whereby approximately the same speed and torque are maintained under either current," or its equivalent. Nothing is gained or lost by these words; if they are surplusage, they are at least harmless surplusage, adding no element to the claim, which is just as good without as with them. Finally, the assertion that the patent is for a new use is surely untrue. It is one question whether there is any invention over Latour, and another whether the patent is for a new use of Latour. Assuming for the time being that Latour showed the brush position, and that Burke's invention was only a species of the genus Latour, it was a definite enough species, and its differentia, whether good or not in point of invention, consist in the addition of specific new structural elements. Every patent for an improvement forbids the world to use that exact species of a genus which is otherwise free; that form becomes monopolized even as against the very inventor of the genus. While it is true that an inventor is entitled to all the uses of his invention, it is a mistake to suppose that he is entitled to every structural form it may take, regardless of any new invention necessarily imposed upon his own work to produce it. Indeed, were there no structural differentia to serve in this case, it might perhaps be urged that the particular brush position obtained by Burke's method could be said to be a species of Latour which he might not use. While he is entitled to all brush positions of his patent, and while his brushes might by accident be placed at the point predetermined under Burke's patent, at least there could be a process patent in finding the position as Burke points out. Whether there could be a structural patent merely for a given brush position may be admitted to be doubtful, but the question is nowhere presented by any of the claims and is moot.

[3] There finally remains the question of invention, upon which concededly the best reference is Latour, which is, therefore, the only one that need be considered. Before taking up Latour, it will be well to consider what was Burke's real invention. In direct current motors the problem of self-induction is substantially nonexistent. That phenomenon appears, it is true, whenever an electric circuit becomes charged with a current of electricity, but it exists only while the potential rises from zero to its maximum or when it falls again to zero. The period when this occurs with a direct current is so small that it can be disregarded for all practical purposes, for self-induction is a function of the change in potential, and there is no such change in a direct current. This is not wholly a correct statement in a series motor of the type here in question. The rotor is made up of a number of coils of wire, each surrounding a core of iron and terminating at adjacent bars of the commutator. The current is fed to these coils through brushes touching the commutator bars, and the coils are so wound that, if the current come to one end of one coil, one-half of it will pass, not only through that coil, but through one-half the whole number of coils on the rotor, and will be taken off at the opposite brush. The other half of the coils will take the other half of the current from

the brush in exactly the same way; thus the rotor is made into a magnet with a pole at each brush, the current being split in half and going in opposite directions around the two sides of the rotor.

Since, however, the brush is rigid and the rotor moves, each coil must at some time pass under the brush, and from being a coil which takes current around one side of the rotor must become one of those which takes it around the other. This involves a change of direction of the current in that coil, and a subsidence of the potential from its maximum to zero and from zero to its maximum again, though of opposite sign. In this process is precisely illustrated in small proportion the phenomenon of self-induction which the whole system illustrates when excited by an alternating current. Unless the brush is so narrow as not to span the interval between two bars, there must therefore be a moment when one of the coils is short-circuited, else the current in the whole rotor would be broken. As the current dies out in this short-circuited coil, there is established a counter pressure of self-induction, which causes a spark at the time the brush leaves one commutator bar. Thus, even in a direct current commutator motor, we have the problem of sparking, a phenomenon, it is true, of self-induction, but nevertheless quite different in scale from the phenomenon of the general self-induction of the whole system when excited by an alternating current.

Sparking, if uncorrected, causes serious damage to the motor; hence it had long been customary to correct it in direct current motors by a displacement of the brushes. Were it not for this phenomenon, the most efficient work would be done by a direct current motor, if the brushes were placed at right angles with the stator flux. This is true, because at that point the two fields are normal to each other, and the mechanical advantage of the magnetic attraction and repulsion of the poles is at a maximum. This is, moreover, called the neutral position of the brushes, since the brushes are in the neutral plane of the stator flux. Generally in such motors the core of the stator does not completely surround the rotor and the poles are not gradually worked up to a point of highest magnetic activity; the coils come and go abruptly into and out of the stator flux of uniform strength, itself much stronger than the rotor flux. Now, the custom was to bring the brushes within the edge of this strong rotor flux, and by so doing to counteract and destroy the self-induction of the short-circuited coil, produced in the way I have described. This displacement of the brushes was therefore known in the direct current motor art, but it was solely to correct sparking, and it always involved only slight angles of displacement, since the stator fluxes were always strong.

Furthermore, it was also known that a continued displacement of the brushes affected the speed of the rotor, not, as one might expect, to increase it, but the reverse. This increase was, however, at the expense of the total efficiency of the motor, since, the angle of the two fluxes being changed, they operate at less mechanical advantage; part of the stator flux, indeed, being neutralized in its action by another part, as may be seen by plotting them out in diagram. Hence it was at a loss of energy that the added speed was acquired.

Such was the knowledge respecting the direct current motor. The alternating current motor presented a different problem, because of the self-induction of the whole system. When the alternations of current are as high as even 25 to the second, the self-induction arising in the system will make the actual potential lag behind or out of phase with the impressed potential so much as greatly to injure the efficiency of the motor; hence it became of cardinal consequence to overcome the self-induction of the whole system. This had nothing to do with sparking, which was a wholly independent phenomenon requiring separate consideration. It was generally effected by using what are called compensating coils, either in series or shunt, so arranged that, when excited, they would create a flux, opposite in direction to the self-induced flux of the system, and so allowing the potential of the system to operate unimpeded.

Latour was the first, so far as appears in this record, to devise another means by which a part of the stator coils themselves were set to oppose the self-induction of the rotor itself and to act as compensation. As I have al-

ready noticed, any displacement of the brushes from an angle of 90° to the stator flux will affect the mechanical operation of the motor. Parts of both motor and stator will then produce torque in opposite directions; the effective circumference of each for torque will be diminished by four times the angle of displacement. This would be all lost, as it is in the case of direct current, were it not for the fact that when the fluxes meet at an angle a certain component of the stator flux will oppose the self-induced flux of the rotor, thus allowing the flux itself to operate unimpeded. While, therefore, the proportion of the two fluxes which remain in operative mechanical position is less, that part which is thrown out of operation does not remain indifferent to the total effect, but contributes by neutralizing the self-induction of the rotor. There is an equation of gain and loss between these two quantities which differs for every angle of the brushes. No one can say in advance just where the resulting energy will be greatest.

This was Latour's patent, but the defendant insists that his disclosure before the International Electrical Congress showed a nearer approach to Burke. That was a short paper, quite unintelligible to a layman, dealing with alternating current machines having commutators. The sixth and last of these was a single-phase series motor with "perfect" commutation, in which, as the title implies, he seems to be concerned with the commutation only. His suggestion is that the best commutation point for the brushes will be found to be where the resultant field of the two fluxes is normal to the line through the brushes. If the self-induction of the whole system is low, then he thinks the power factor will be pretty high, which may mean—especially if we read the paper with his patent in mind—that the stator coils, which act as compensation, will be enough to counteract a good deal of the self-induction. The most that can be gathered from this I believe is that if you get a theoretically good commutation point, based upon the assumption that you operate by direct current, you may use it as a commutation point for alternating current, and if you have correctly built your system you will also have a good power factor. That Latour supposed the same commutation point would serve for both currents I agree, but he was not thinking about the way to produce power factor at all, and the injection of that element as part of the disclosure seems to me gratuitous. What he meant was that, if the general design was good, the point where the line of the brushes was normal to the two fluxes would also be the point of highest power factor on alternating current. That he did not mean a motor like Burke's is shown by the fact that he necessarily presupposed a stronger stator than rotor flux, which is, indeed, a condition of operability if the brushes are to be set normal to the resultant.

If we assume, as perhaps we should, that he had his patent also in mind, and that he thought it insured a system of low induction, still in combination they show nothing more than that with his St. Louis disclosure you could find a perfect commutation, and with his patent you could get a pretty high power factor. That that power factor insured a coincidence of speed is a gratuitous assumption—first, because we cannot know that the power factor could in fact be made to approach unity; second, because we do not know that power factor alone determines speed. We do not know that Burke reached his result by an opposite path to Latour, even when all these assumptions are made. He did not keep a strong stator flux, nor did he fix his brushes as Latour recommends. He did so design a motor as to secure that coincidence, which Latour does not even suggest, and, if he had suggested, did not achieve.

The French paper contributes nothing more, except the statement regarding the relation of stator to rotor turns. Earlier in the same paper Latour has used his old diagrams, which presuppose a stronger stator flux without which the motor could not operate if the brushes were set normal to the resultant flux. I must confess that I have not been able to understand quite how Vreeland supposed the situation as shown in Figure 8 of the St. Louis article to be changed when the motor was in action, so that it might still remain true of a weak stator field. However, he was right to seize upon the statement in the French paper to support his position, coupled as it was with exactly the same figure as that of the St. Louis paper. Just what was the meaning of the language I am afraid I cannot learn, but it seems to me to refer to the possibility of greatly increasing the rotor turns when the motor is to operate

at high speeds. Such high speeds will be secured when, as in Latour's motor, the brushes are set where the full mechanical effect of the fluxes is not felt. Latour had just been saying that at high speeds there was not time for the establishment of induction in the short-circuited coils. I think he meant that you could therefore afford to increase the rotor flux and still keep your commutation good; but he does not say, and I do not know, why there should be a positive advantage in doing this. In any case the reference seems to me too obscure as a guide to the art, so far as I can accomplish the extremely difficult feat of putting myself in the position of one ordinarily skilled in the art.

I can, therefore, regard Latour as doing no more than showing how part of the stator coils could be used for compensation. He had no idea of a motor which would operate upon either current at a brush position where the speed would be the same for each. The defendant leaps this gap by saying that the step was obvious. Its argument is as follows: Under direct current, for every position of the brush in a given system, there is a characteristic speed, given the voltage; this speed is dependent upon the amount of the field operative at that angle. If the motor be driven by alternating current, for any supposed angle of the brush it would attain the same speed as under direct current, but for the self-induction of the system. The less the self-induction at a given angle, the nearer the two speeds will be at that angle; therefore it requires no invention, nor anything but common sense, to see that, if the self-induction can be neutralized at a given angle, the speeds will be the same. Hence, as soon as Latour showed how the power factor could be raised by brush shifting, he left nothing more for the art to do to get a universal motor.

Upon the assumption that the only element controlling speed was power factor, there is some force in this argument so far as it concerns the single element in the patent of securing the unity of speed. There are, however, a good many reasons to suppose that power factor is not the only element controlling speed. Burke is decided to the contrary; he frankly concedes that he does not understand all that does control speed, and says that he worked it out empirically. Vreeland was least satisfactory upon that branch of the case, and I conclude that his opinion was based more upon a priori reasoning than upon observation in a field with which he was confessedly not so familiar as in other branches of the art. Whether there be any "transformer action" which is independent of the self-induction of the system, whether the whole thing is as simple as Vreeland thinks, must remain to me a doubtful question. I must take it against the defendant.

Moreover there are some other considerations which militate against such an easy explanation. In the first place, every one agrees that the power factor never does reach unity; if so, the curves should never meet, to say nothing of crossing. Yet we find that they do meet and cross, and have areas where the direct current speed is less than alternating. Something certainly has intervened in such a case. Again, if the matter be so easy, why does the defendant assert that no one has ever succeeded in solving the problem for high frequency currents? Upon them there must be some point where the power factor is highest and where the speeds coincide. Burke thinks he can build such a motor, but the defendant does not.

Finally, though it be granted that power factor is all, how was it to be known that it could be brought so near unity as to give a practical coincidence? That certainly could not be ascertained a priori, nor did it arrive until the general designing of the motor had been again and again modified, if Burke is to be believed. No one has said that it will be bound to happen in every kind of motor, no matter what its design, and it is an assumption entirely unsupported by proof that the necessary designing was an obvious thing, open to every skilled artisan. Again, the commutation position is not a priori the same as the speed position, and how the two are to be made to coincide after the speeds have coincided is not shown to be obvious. I shall take Burke's explanation as he gives it: That he reached his result by more or less chance experiment, trying out a number of possible alternatives, guided partly by hypothesis, partly by past experiment, without any authoritative and complete understanding of how he was to reach what he wanted.

But the defendant says that Ells had no trouble in making such a motor

without knowing Burke's brush position. It is true that Ells so testified, but it is also true that, before making the infringing motor, he had had submitted to him the stator and rotor of Burke's very motor itself. In spite of his present insistence that it was left for only a short while with him, the slavish imitation of every detail leaves no doubt that the short time was ample enough to give Ells the key to the structure. It may well be that the brush position Ells borrowed from Latour's paper which he had heard: but it cannot be too often repeated that the defendant's insistence upon brush position as the sole significance of this patent is quite mistaken. I can well believe that, upon seeing the rotor and stator, it was obvious to any one skilled in the art that, to obtain the necessary compensation upon alternating current, the brushes must be shifted. I decline to believe that Ells, unassisted, learned that in that machine there would necessarily be a single position of the same speed upon either current; if he did, I believe it was after the event.

The supposed prior uses of the Standard Electric Works and of Birtman need not occupy much time. Beach clearly did not know anything about brush position, and could not have told whether the brushes were back or forward of the neutral, because he did not know what the neutral was. His tests of speed were only by ear, and amounted to nothing. Lum says that the stator windings were substantially in excess of the rotor, and that the brushes were in conventional position for a direct current series motor. He does not pretend to have measured the speeds on each current, or even to know what they actually were. Radtke's tests are at least open to grave doubt; but, if they were not, they would not prove that Beach had built a motor which would run with equal speeds except either free or with a very small load. When the load became 10 or 15 grams, the divergence was very marked. It does not appear, so far as I have found, that these are overloads. The test for 5 grams is very doubtful, owing to Radtke's change in his tables, upon the supposition that "he must have" used both kinds of current. Perhaps that is true, but his testimony has small probative force.

It is clear enough that we know too little about Beach's motor to regard it as the least of an anticipation. On the contrary, we know it had none of the features described in the claims—neither poles, nor brush position, nor neutral teeth, nor relative windings, nor incommensurate relation. Why it should be thought relevant, except for the unsupported claim that it was a universal motor, I confess I cannot see.

Birtman's motor has even less bearing on the case, if possible, and is put forward with less confidence. There was no effort to show that the brush position had been discovered, or that any of the other features were known except the relative number of windings. To these English did testify, but his testimony is far from satisfying the rigorous tests applicable, and it is pretty evident that his memory, unsupported by any document, was of the haziest kind. Birtman's testimony regarding the relation between the windings does not seem intelligible to me in any way; I can hardly believe that he had any recollection of the matter.

It is of small consequence whether Birtman's motor operated at the same speeds on alternating and direct currents, though I do not think that there is any valid testimony to that effect. The claims in suit are very narrow, and if as good results can be obtained by using Birtman's or Beach's motor, they are open to the defendant. The evidence of Durand and Drake satisfies me that a substantial demand can and did exist, both here and in Europe, for a universal motor, and that no one knew anything to fill it. Neither of these supposed anticipations seemed to answer; but, if they do, they are still open. It is not necessary to decide that this is a pioneer patent, or to trouble about construction of the claims. The defendant must stand nakedly upon the proposition that Burke's combination limited to the precise disclosure is a mere bit of ordinary craftsmanship. That really seems to me too obviously unreal a position to justify so long an opinion, had it not been for the elaborate attack made upon it. If this combination, reached after a series of patient and tentative experiments by an acknowledged expert of ability and ingenuity, is a part of the common heritage of the ordinary routineer, I can only say that I have been wholly blind to the proof.

The usual decree will pass, with costs.

John Robert Taylor, of New York City (Dyer & Taylor and J. E. Bull, all of New York City) for appellant.

C. V. Edwards and Lawrence K. Sager, both of New York City (Edwards, Sager, & Wooster, of New York City, of counsel), for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. Decree affirmed on the opinion of Judge Learned Hand.

Judge LACOMBE heard the argument, participated in the consultation, and concurred in the above.

SHERIDAN-CLAYTON PAPER CO. v. UNITED STATES ENVELOPE CO.

ST. JOSEPH PAPER CO. v. SAME.

(Circuit Court of Appeals, Eighth Circuit. May 1, 1916.)

Nos. 4364, 4365.

1. PATENTS ⊂=256—SALE OF PATENTED ARTICLES—RESTRICTIONS.

A purchaser of a patented machine must have notice that he buys with only a qualified right of use, having the right to assume, in the absence of knowledge, that the seller passes an unconditional title to the machine, with no limitations upon the use, and when a machine is sold without restrictions, though contrary to the seller's direction, the purchaser takes it free from restrictions.

[Ed. Note.—For other cases, see Patents, Dec. Dig. ⊂=256.]

2. PATENTS ⊂=301(1)—INJUNCTION—SUBJECTS OF RELIEF.

Many of complainant's devices for holding paper were sold free from patent restrictions, or were freed from restrictions because the purchasers were not notified. Defendant sold paper for use in such fixtures, and only in three instances was there an infringement of complainant's patent rights; it appearing that defendants made an effort not to infringe. *Held* that, where one of the sales which infringed was induced by complainant's own officers, defendants should not be enjoined; the injurious effect of the sales having long since passed, and the torts not being continuing.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 489, 493; Dec. Dig. ⊂=301(1).]

Appeal from the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Suits by the United States Envelope Company against the Sheridan-Clayton Paper Company and against the St. Joseph Paper Company. From orders issuing injunctions against defendants, they appeal. Order reversed.

Edwin J. Prindle, of New York City (Warren H. Small, of New York City, and Graham & Silverman, of St. Joseph, Mo., on the brief), for appellants.

Louis W. Southgate, of New York City (O. Ellery Edwards, Jr., of New York City, and George Y. Thorpe, of Kansas City, Mo., on the brief), for appellee.

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

HOOK, Circuit Judge. These are appeals by defendants from orders of temporary injunction. The suits were brought by the United States Envelope Company to enjoin contributory infringement of patents Nos. 819,488 and 819,682, issued May 1, 1906, for improvements in toilet paper fixtures. The defendants are dealers in paper specialties. The contributory infringement claimed was in sales by defendants of toilet paper to plaintiff's licensees for use by the latter on the patented fixtures, contrary to license restrictions. See Henry v. Dick Co., 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880. There was no patent on the paper or its particular form or arrangement.

[1, 2] We have not found it necessary to consider the validity or scope of the patents, nor whether there is such a privity between the vendor and vendee of materials sold for use on a patented device contrary to license restrictions as will estop the former from questioning the patent, nor whether the instrument relied on here as a license is sufficient for plaintiff's purpose, nor whether a patented device which, as regards restrictions upon its use, has once passed beyond the limits of the monopoly by an unconditional sale, can thereafter be brought back by agreement between the patentee and purchaser. We think the evidence showed quite clearly that there were a large number of toilet paper fixtures in use throughout the United States and the market territory of defendants not subject to license restrictions on which their paper could be used without trespass on plaintiff's rights. Some of these fixtures never were under the patents mentioned, and many, though so covered, had been sold outright by the plaintiff and its distributors, without reservation or restraint upon their use. It is no answer to say the distributors acted contrary to instructions. There can be no contributory infringement by sale of materials to a purchaser who is free. It was said in Henry v. Dick Co., supra:

"To begin with, the purchaser [of a patented machine] must have notice that he buys with only a qualified right of use. He has a right to assume, in the absence of knowledge, that the seller passes an unconditional title to the machine, with no limitations upon the use."

The legend cast in the plaintiff's metal fixtures contained the customary patent marks, but unlike the mimeograph of the Dick Company there was nothing otherwise to show a restriction or limitation upon the freedom of use. The result was that large numbers of them which were sold outright got into the hands of purchasers who were at liberty to use any make or kind of paper upon them. This condition was doubtless recognized by plaintiff in its attempt to regain control by giving its license contracts a retroactive operation, so as to include fixtures already in use. The unrestricted field open to all dealers in toilet paper of the kind and form handled by defendants was broad enough to repel any general inference of intent to infringe plaintiff's rights.

It devolved upon the plaintiff to show specific wrongdoing of a character to justify the remedy of injunction. In this respect we think the plaintiff failed. Three instances only were shown in a long period prior to the commencement of the suit, one of which occurred and was known to plaintiff more than a year before. In two of them one defendant participated, and in the third the other. One of the sales of paper was inspired by a representative of the plaintiff, and all were either inadvertent or by employés contrary to instructions. The injurious effect of the three sales was soon at an end. There was no continuing tort in the proper sense, nor do the sales shown disclose, in our opinion, a course of business persisted in or threatened. In every suit in equity the fair rights of the defendant should be considered with those of the complaining party. From what appears in the present record we are impressed with the good faith of the defendants and their efforts to avoid invading the plaintiff's rights. Some isolated cases of infringement would not unnaturally follow the confusion in the market between restricted and unrestricted fixtures, for which the plaintiff and its distributors or sales agents were largely responsible, and where the evidence of the license restriction was not upon the fixtures themselves, but rested in either word of mouth or detached instruments of writing. The defendants owe good faith and endeavor to avoid infringement, but they ought not to be excluded from a lawful market, nor suffer unduly from the lax business methods of the plaintiff.

The order of injunction is reversed.

F. E. FONSECA & CO. v. RUY SUAREZ & CO.

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

No. 235.

PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—CIGAR WRAPPER.

The Fonseca patent, No. 655,549, for a wrapper for cigars, discloses patentable invention, the device, while simple, being novel and of considerable utility; also *held* infringed.

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

Suit in equity by F. E. Fonseca & Co. against Ruy Suarez & Co. Decree for defendant, and complainant appeals. Reversed.

Philip C. Peck, of New York City (Thomas M. Rowlette, of New York City, of counsel), for appellant.

Max D. Steuer, of New York City, for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge. The subject of the patent is a simple wrapper for a cigar which is sufficiently described in the first claim. This claim is as follows:

"A cigar package comprising a cigar and the containing protecting cover, the said cover extending normally beyond the ends of the cigar and having its extended ends twisted to form practically cords which are wound back upon the cover and secured."

The result is that the cigar is covered in a neat paper case upon which any desired printing may be inscribed, such as the name of the cigar and its maker. The twisted ends form cushions which protect the cigar and the covering protects it when carried in the pocket or cigar case of the smoker. The nearest approach to the patent is the Whitney envelope which had a different object in view and has none of the distinctive features of the Fonseca patent.

The patent is on the border line between invention and mechanical skill, but we are inclined to think that we should resolve the doubt in favor of the patent. We think it is in the same category as the metallic castor patent which we recently upheld, which consisted in substituting a cup-shaped metal disk for the ordinary wheel castor. Barry v. Harpoon Co., 209 Fed. 207, 126 C. C. A. 301. See, also, Mahony v. Malcom, 143 Fed. 124, 74 C. C. A. 318; Williams v. String Wrapper Co., 86 Fed. 641, 30 C. C. A. 318; Gandy v. Belting Co., 143 U. S. 587, 12 Sup. Ct. 598, 36 L. Ed. 272.

The wrapper in question has many advantages which appeal to the smoker. It keeps the cigar clean, it prevents it from being broken at the ends if roughly handled and it enables the maker to advertise and identify his cigars which partly by reason of his covers, we may assume, have become popular with the public.

The decree is reversed with costs.

ANCHOR CAP & CLOSURE CORP. v. PRITCHARD.

(District Court, S. D. New York. April 3, 1916.)

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—CLOSURE FOR BOTTLES AND JARS.
   The Hull patent, No. 779,751, for closure for bottles, jars, and other receptacles, was not anticipated and is valid; also *held* infringed.
2. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—CLOSURE.
   The Hull patent, No. 1,134,067, for closure, *held* not anticipated and valid, and claims 4, 5, and 6 infringed.
3. PATENTS ⟸328—VALIDITY AND INFRINGEMENT.
   The Hull patent, No. 874,201, for a machine for sealing bottles, jars, and other receptacles, *held* not anticipated, valid, and infringed.
4. PATENTS ⟸244—INFRINGEMENT—REVERSAL OF PARTS.
   A mere reversal of parts in a patented machine does not avoid infringement.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 385; Dec. Dig. ⟸244.]
5. PATENTS ⟸328—VALIDITY AND INFRINGEMENT.
   The Hull patent, No. 1,134,065, for machine for vacuum sealing, claim 1, *held* not anticipated, valid, and infringed. Claims 14, 15, and 16 *held* void for lack of invention.

In Equity. Suit by the Anchor Cap & Closure Corporation against Edward Pritchard. On final hearing. Decree for complainant.

James Q. Rice, of New York City, for plaintiff.

Fay & Oberlin, of Cleveland, Ohio (John F. Oberlin, of Cleveland, Ohio, of counsel), for defendant.

LEARNED HAND, District Judge. There are four patents here in suit which should be treated separately.

Patent 770,751.

[1] This patent has no predecessors, except Kalling's two patents, 561,792 and 697,491. They differed from Hull's disclosure, because the bead was deformed by squeezing it against the side of the glass. It makes no difference whether the gasket was of a hard enough consistency, so that the nearest edges of the bead never touched the glass, or whether it collapsed so far that a part of the pressure was between metal and glass. In either case, the glass had to bear the whole of a pressure sufficient to deform the bead. It is, perhaps, not surprising, therefore, that Hull should have testified that the breakage when he witnessed the test ran as high as 60 per cent., although the patentee was giving a demonstration in the hopes of a sale. This evidence, coupled with the fact that no commercial use of the patent has ever been made, makes the conclusion reasonable that the patent was impractical.

I therefore find, first, that the disclosure operated upon a different principle from the patent in suit; and, second, that it is invalid in any case, because it did not contribute to the art a practical device.

The next question is of infringement, and this turns altogether upon whether, in the defendant's cap, the bead's "upper and lower inner walls firmly bind against the upper and lower surfaces of a peripheral portion of said ring, and hold squeezed from said groove the other peripheral portion of said ring." The defendant's bead, upon their own statement, "holds squeezed from said groove the other peripheral portion of said ring"; the only question is whether "the upper and lower walls firmly bind against the upper and lower surfaces." If this clause means that it must be only because of the approach vertically of the upper and lower walls that the gasket is extruded from its former position, then I agree that the defendant does not infringe. What makes the gasket move out in their case is that the area of a cross-section of the bead is reduced, not only by the approach of the upper and lower walls, but by intrusion of the side wall, which is bowed in, in the form of a re-entrant angle. It is true that this re-entrant angle drives before it nearly all of the gasket, but not quite all. All the sections actually made show that the gasket is pinched between the upper wall and the upper side of the re-entrant angle, and between the lower side of the re-entrant angle and the false wire. In short, the former opening within the bead is made too scant, partly by the approach of the walls, and partly by the toggle action of the side of the bead, and the gasket is driven out by both factors; but the resulting pressure between the bead and the glass makes the gasket fill every part of the space left within the bead. The approach of the walls does pinch all of the gasket which the re-entrant angle does not extrude from the bead; all the elements of the plaintiff's operation are present, and in addition the added element of the toggle-like angle, help-

ing at once to press and extrude the gasket. The addition of this element does not, in my judgment, avoid infringement.

Patent 1,134,067.

[2] There are two inventions set forth in this patent—one for a groove "formed from the excess metal of the beading"; the other for the application to a continuous walled vessel of the earlier patent. The defendant infringes the second invention (claims 4, 5, and 6), if it infringes the earlier patent at all, as I have found it does. Therefore the question under claims 4, 5, and 6 turns wholly upon validity.

The first question is of the prior use by Weller of the caps of Hull's patent, 795,284, upon the Phœnix finish bottles. Weller and Santen tell a straight enough story; they say that the Phœnix finish bottles ran somewhat unevenly, so that the caps would not fit. This led to a number of discards, and to use these up they ordered the caps from the Sure Seal Cap Company. If they did use them on Phœnix finish bottles, they certainly did practice the invention. That they did order and secure the Sure Seal Caps to the number of 330,000 in 1908 and 1909 every one concedes. That they used large numbers of them upon some bottles cannot likewise be disputed. The question then resolves itself into whether they used them upon Crown finish or Phœnix finish bottles, or rather whether they used them only upon Crown finish bottles. Although amply corroborated upon the purchase of the caps, Weller and Santen are not supported as to their use on Phœnix bottles; that rests solely on their memory. On the other hand, Hull says he went to Cincinnati to install the machine, and that while he was there they capped only Crown finish bottles; more than that he cannot swear. He does say, and Magrane confirms him, that such caps could not have been made to stay on catsup bottles which were pasteurized in an open oven, as they were pasteurizing them. The pressure would have forced off too many tops to make the effort commercially practical.

It does not seem to me that the use is proven beyond a reasonable doubt. Although Weller and Santen were obviously disinterested and honest witnesses, and it seems unlikely that they should have remembered the use of these caps on Phœnix finish bottles, if it were not so, it is of course possible that after seven years their memory may be at fault. If the caps were bought only to use on Phœnix finish bottles, why did not Hull see something of them? My doubt rests chiefly in whether the caps would have stayed fast. The Phœnix finish bottle has a slightly beveled top, and it seems to me most probable that under the pressures said to be generated when curing in an open oven they must have been loosened. Of course, I cannot myself speak of this matter; but the plaintiff's experts stand uncontradicted in respect of it, and the antecedent probability makes in its favor. If forced to choose upon a mere balance of probabilities, I might say that Weller and Santen were right in their memory; but when forced to apply the extreme test, that there should be no reasonable doubt about it, I cannot find the use proven.

There remains the question of whether the new use of the old patent to a straight-walled vessel is in itself patentable. Stated in that

way, perhaps, it is doubtful; but the new combination is not alone the cap, but the cap and the bottle. The prior art thought in terms of the coaction of these two elements, and it is unfair to treat them as though they could be separated functionally. It is quite true that no substantial change is necessary, once you have thought of putting such a cap on a straight finish bottle; but often the best inventions lie only in omitting what everybody thought necessary. That there was a great advantage in using a continuous wall is undoubted; it enabled the cap to be got off very easily and without danger of breakage. Why should not any one else have thought to do it before? I agree that in the case of goods which must be pasteurized it was impracticable to use these in open ovens, and if that were their only use, and they appeared at once after the pressure ovens were devised, I should be disposed to doubt their patentability. Their use is not so confined, however; they are used for many other purposes, and their use was in no sense dependent upon pasteurizing under pressure. It had apparently always been thought that some ridge or roll was necessary to hold on the cap. The first man who thought it was not necessary, and that the cap would stay on alone, contributed a real benefit, if it was only the benefit of daring to go without what the rest of the world thought necessary. When it turned out that he was right, he had helped the art, and ought to be allowed to hold his patent. The length of time that the art had been practiced before any one thought to omit the flange is good evidence that it took some one besides the ordinary routine craftsman to think of it.

I do not find it necessary to take up claims 2 and 3 under this patent. Indeed it would probably be necessary to reopen the trial to do so, because I excluded evidence relating to the meaning of the words "formed of excess metal in the beading"—a matter not clear from the mere patent. If the Circuit Court of Appeals should take a different view from mine with respect to claims 4, 5, and 6, it might be necessary that that proof should be taken, but, since all these claims are in one patent, the duration of the injunction will not be different, whether all or some only be sustained. As enough has been said to dispose of the actual device in suit, it seems hardly worth while to reopen the cause merely upon a chance which may prove to be of only academic interest.

Patent 874,201.

[3, 4] This patent is for a machine for putting on the caps mentioned in the other patents. Claims 1 and 3 are in suit, and do not require separate consideration. The defendant infringes, unless infringement can be avoided by a mere reversal of the parts. In the patent in suit the jaws, *22*, slide up and down in the casing, *20;* the upper die, *34*, remaining stationary. In the defendant's infringing device the jaws remain stationary, except for their pivotal action, and the die rises and descends to effect the capping. Of course, this avoids the claims literally, and, if literalism were all, there would be no infringement. However, a mere reversal of the parts will not avoid infringement. Walker v. Giles, 218 Fed. 639, 134 C. C. A. 395. The only question, therefore, is whether the claim is valid, or must be so narrowly con-

strued as to be confined to that relative movability set forth in the claim. Confessedly, the only anticipation is the patent to Asche, 538,890. The examiner had Asche before him, and cited it against some of the claims, but not claim 3. He did cite it against claim 1, which was changed so as to refer only to the vertical motion of the jaws in deforming the bead. Asche had no such relative vertical motion, for his jaws came in from four sides laterally. It is suggested that the change in any event was not patentable, but I can see no merit in this contention. The machine is a complicated one, and it would be the merest speculation to say it was within the competency of the ordinary skilled artisan, whose ingenuity I am not disposed to rate very highly. It is quite possible that the scope of the patent must be held strictly to the disclosure itself; but that question is academic here, for the defendant has copied the machine faithfully, except for the mere reversal of the parts.

Patent 1,134,065.

[5] In this patent two features of a second machine are concerned. The first, covered by claim 1, is the location of the spring, *47*, supporting the platform, *42* (Fig. 4), within the tube, *41*. This tube must have a motion relative to the bottom of the ceiling chamber, *73*, and must therefore be hermetically packed as indicated at *76*. The defendant has copied this, and urges in justification the prior patent to Landsberger, 842,320, which is the nearest reference. In this patent the platform, *25*, is movably supported on a rod, which in turn is supported by a spring, *49*. The spring is outside of the air chamber, and as the chamber must be airproof the rod must slide through a hermetic packing. The result is that the spring must be heavier, and the resiliency of the platform, *25*, less sensitive, than if the spring were within the chamber. It perhaps would not be difficult, when the matter was suggested to adapt Landsberger to Hull's device; but it was a convenient detail, which added a real and practical advantage to the operation of the machine. I do not feel disposed to say that it did not take any patentable ingenuity to make it. A decree may therefore go upon that claim.

The final invention is the locking doors, claims 14, 15, 16. There must be a door to the vacuum chamber, and this must be packed at its edges, and firmly held, or the air will come in. Various forms of door are possible, and the plaintiff has chosen one; that is, carrying the doors upon substantially parallel arms. Such arms were not new in mechanics, though they were new in precisely this situation. The case is close, but I should hardly consider the swinging of a door in such a way a patentable novelty. It seems to me a mechanical detail, on which the general mechanical arts offered several possible alternatives. I shall not, therefore, issue a decree upon these claims, which I think void for nonpatentability.

A decree will go in accordance with the foregoing opinion, without costs.

SLIP SCARF CO. v. CHURCH, WEBB & CLOSE, Inc.

(District Court, S. D. New York. January 17, 1916.)

PATENTS ⟸328—INVENTION—NECKTIE.

The Mills patent, No. 1,109,858, for a necktie, *held* void for lack of invention, on satisfactory evidence of prior public use by two or more others, who manufactured similar ties for the market.

In Equity. Suit by the Slip Scarf Company against Church, Webb & Close, Incorporated. On final hearing. Decree for defendant.

This is the ordinary complaint in equity for the infringement of patent to Mills, No. 1,109,858, for a new kind of neckwear. The claims in issue are 4, 5, 6, and 7, which are as follows:

4. "A necktie formed of suitable fabric folded and shaped in a flat tubular form, embodying a narrow neckband portion and tying-end portions at the ends of the neckband portion, the edges of the back fold of the folded fabric in the tying ends being intermediate the edges of the tie, and interlining in the tying-end portions, and stitches in the tying-end portions attaching the interlining to the back fold only of the tie throughout the tying ends of the tie whereby said stitches will not appear on the outer face of the tie."

5. "In a necktie having a neckband and two tying ends formed of a fabric material cut and folded to form the face and back of said necktie, the edges of said material meeting on the back of the tie intermediate the edges of the tying ends and a reinforcing strip extending substantially throughout the length of said necktie and secured to the fabric of the back only of the tying ends of said necktie."

6. "A necktie formed of a folded fabric and comprising a narrow neckband portion, knot-forming portions at the end of the neckband portion and enlarged ends, the edges of the folded fabric forming a longitudinal seam at the back of the tying ends of the necktie in combination with a longitudinally extending, relatively strong, inelastic flexible reinforcing strip reinforcing the back of the scarf throughout the neckband and a substantial portion of the tying ends thereof, longitudinal stitching connecting said reinforcing strip to the back fold only of the said folded fabric throughout the said knot-forming portions, and lines of stitching connecting said reinforcing strip to back and face folds of the tie throughout the neckband portion thereof."

7. "A necktie formed of suitable fabric folded and shaped in a flat tubular form, embodying a narrow neckband portion and wider tying-end portions at the end of the neckband portion, the edges of the back fold of the folded fabric in the tying ends being intermediate the edges of the tying ends of the tie, an interlining in said tying-end portions, a reinforcing strip extending throughout the neckband and the tying-end portions, said strip being substantially equal in width to the neckband portion, and stitches attaching the interlining of the tying ends, to the back fold only, of the said folded fabric throughout the tying-end portions, so arranged that said stitches will not appear on the outer face of the tie."

Nothing need be said regarding infringement, since the case goes off upon the issue of validity. The patentee is a lawyer, associated with the well-known firm of Kenyon & Kenyon, who had charge of the conduct of another litigation in this court before Judge Mayer concerning a patent to Kays, a large manufacturer of neckwear, whom Kenyon & Kenyon represented. During the course of that litigation Mills devised the patent now in suit, the novelty of which consisted in introducing a strip of unyielding material, like muslin, within the scarf proper, usually made of soft material, such as silk, and frequently cut on the bias. In addition there was put within the tying ends of the scarf an interlining, such as light flanel. The muslin "reinforcing strip," as it is called, was stitched to the interlining and the two stitched to the back of the scarf in the tying ends, so that no stitching should be seen from the front. In the neckband the reinforcing strip was stitched firmly

through the material of the scarf. The result was to put the strain of the pull upon the reinforcing strip and to relieve the flimsier fabric of the scarf. Claim 4 is for the interlining alone in the tying ends, stitched to the fold of the scarf; the fold being at the back and between the scarf edges. Claim 5 is for the reinforcing strip, stitched to the back only, of the tying ends in the same way as the interlining in claim 4. Claim 6 is for the reinforcing strip stitched to the fold at the back only of the tying ends, and through both front and back of the scarf over the neckband portions. Claim 7 is for the combination of reinforcing strip, interlining, and stitching to the back only of the folds of the tying ends.

At the trial the issue of infringement was not seriously contested, but the defendant put in evidence numerous patents for scarfs, approaching more or less near to the patent in suit, and also attempted to prove five distinct prior uses. These were of scarfs made in New York before the date of the invention, May 31, 1912, by the following neckwear manufacturers: Bachrach, C. Stern & Mayer, Oppenheimer, Franc & Langsdorf, James R. Keiser, Incorporated, and J. J. Riker & Co. The plaintiff does not dispute that these scarfs, if proved, would anticipate, but does assert that no one of them has been proved. In addition the defendant insists that Mills borrowed his invention from an exhibit in the former suit, a scarf made by Blanchard & Price, in professed accordance with a patent to Blanchard, No. 954,017, which was put in evidence.

Alan D. Kenyon, of New York City, for plaintiff.

Joseph L. Levy and William R. Davis, both of New York City, for defendant.

LEARNED HAND, District Judge (after stating the facts as above). I shall first consider the alleged prior use of C. Stern & Mayer, and then that of James R. Keiser, Incorporated. These in my judgment dispose of the patent.

On February 7, 1911, Ackerman, a salesman for C. Stern & Mayer, took an order for scarfs from Gaston Heilbroner amounting in price to $95.06, the order for which in Ackerman's hand is in evidence and cannot be questioned. There were three separate forms of scarf specified in this order, "345," "like shape," and "320." Nothing turns upon forms "345" and "320," and as they were apparently stock forms they may be omitted. The phrase "like shape" reasonably means made after some form then first submitted, and Ackerman says that Heilbroner gave him a form which he was to copy for that part of the order. This testimony fits in so closely with the written order as to be free from any reasonable doubt. Seven dozen "like shape" scarfs were ordered to be made up of 13 separate patterns of silk, indicated upon the order by 13 separate numbers. Each of these numbers indicates a separate silk pattern, and is contained in a swatch-book comprising the period of the order, February, 1911. The practice of the manufacturer was to cut pieces off the various patterns of silk when he first received them, and to give each pattern a number, and paste the piece along with its number in the swatch-book. The appropriate entries from this swatch-book corresponding to the numbers of the silks contained in Ackerman's order "like shape" were put in evidence without objection.

At the trial there was produced from the custody of C. Stern & Mayer a scarf made up of the same silk as was found in the swatch-book under No. 1146, which was one of the 13 patterns used to fill the

"like shape" part of the order of February 7, 1911. To the back of this scarf was affixed a label bearing the words, "Gaston Heilbroner, 302 Third Avenue, New York Smart Haberdasher." The scarf itself is made in such a way as to anticipate the patent in suit. So far the proof is of such a kind as admits of no doubt whatever. The missing link is the proof that the scarf in evidence is made in accordance with the form submitted by Heilbroner and denoted by "like shape." To supply this link the defendants produce the testimony of Stemsky, their manager of manufacturing, of Heilbroner, and of Ackerman. It may be granted to the plaintiff for argument that even the combined testimony of these three men, of whom Heilbroner, at least, must be held to be absolutely impartial, would not be enough to supply the degree of proof necessary in such cases. Is there anything else? Heilbroner swears that he had only one shop while in business, and that it was at 302 Third avenue, New York. This shop he gave up in June, 1911, and went into the employ of Weber & Heilbroner, where he now is. It is true that we have no independent documentary evidence of the time when he gave up this shop, and if anything turned upon its being in June, 1911, the case might fail. We cannot suppose, however, that a man would be wrong about the season and year in which such a thing happened in his life, at least within the past five years. We may take it as established beyond a reasonable doubt that Heilbroner closed his shop during the summer of 1911.

How, then, are we to account for the existence of the scarf in evidence, Exhibit O, with the label, "Gaston Heilbroner," etc. Obviously, taken alone, the scarf proves nothing; it could have been made up at any time. Yet every act must have a motive, and what possible motive could there be in making up such a scarf with such a label after Heilbroner had closed his shop? We have as the only alternatives either to suppose that the scarf, Exhibit O, was in fact one of those made for Heilbroner from pattern 1146, which we know to have been received at about the time of the order, or to suppose that it was made up after May 31, 1912. It may perhaps be admitted that it might have been made up afterwards, were it not for the label, securely sewed to the back, indicating that it was made for Heilbroner at 302 Third avenue. I lay aside the possibility of deliberate fabrication, which the plaintiff does not assert, and which is not to be assumed in the absence of proof. No other possibility occurs to me which would account for the presence of the label, if the scarf was made up after Heilbroner went out of business. The label is a separate piece of fabric sewed on with some purpose, and it seems to me most unreasonable that it should have been put onto a scarf made up for anybody else. If it was intended only as a sample to be kept in the factory for reference, why should any label at all be put on? Or if any label was put on, why should Heilbroner's be selected a year after he had stopped business? The rule of proof does not require the exclusion of every conceivable whimsy of doubt which capricious ingenuity may invent. Short of some such mental exercise, I can see no explanation for this scarf, made as it is, except that it was one of

those made under Ackerman's order and retained as a sample of the new form, "like shape," which Ackerman says Heilbroner gave him and in following which the silk pattern found in the exhibit was with others to be used. The recollections of Stemsky, Ackerman, and Heilbroner, therefore, appear to be corroborated in such a way that nothing short of deliberate fabrication will account for the facts. Therefore I find that the prior use of C. Stern & Mayer has been proved.

As to the J. Keiser & Co. use the facts are as follows: Ruston, the manager of manufacturing, produced three scarfs, J^1, J^2, and J^3, which had come from the possession of the manufacturer, and which Ruston recognized as of the make of the company put upon the market in 1915 and 1916. He had got them from the foreman, whom he had told to search for them in the sample box in which the manufacturer kept samples of all new shapes as they were put out upon the market. Sarah Steele, the forewoman, also recognized the scarfs as of the manufacture of the company, and she placed them by virtue of their silk at the same period. She had told the foreman where to get them.

The defendant insists that this testimony of Ruston and Steele has not been sufficiently corroborated by contemporaneous documentary evidence to put it beyond reasonable doubt. The link is the fact that the silks of which J^1, J^2, and J^3 are made were issued once, and once only, all before January 1, 1907. This is proved beyond the least possible doubt as follows: Nellie Lees was in charge of a card index system for keeping track of silks. The factory, when it issued a new silk, gave it a number as it came to Nellie Lees, which she put upon a new card in her index, cutting off a sufficient piece for identification and pasting it on the same card. When samples of the silk were issued to salesmen, Nellie Lees checked with the date against their names on the back of the card, and checked again in red when they returned the samples. If the silk was reported out, she noted it also upon the card. The cards show that the latest of these silks, L^1, was issued late in December, 1906, and was reported out on January 29, 1907. If any second issue of the same silk was made, it would be again checked upon the card.

The plaintiff says that, if the silk was duplicated at a later period, it would receive a new card and a new number. It is mistaken in so understanding Nellie Lees' testimony. She never made out a new card unless the factory sent her a new number with the silk. She made no effort to look for old silks when the factory sent her a silk, but relied wholly upon the factory. Since these silks are all reported out, any mistake in putting an old silk upon a new card would therefore arise from a mistake of the factory in failing to keep a proper record of its silks. The questions, 58–61, on which the plaintiff relies, do not prove what it thinks. In that portion of her testimony Nellie Lees was apparently speaking of her comparison of samples returned by salesmen with the swatch-cards to find the right ones, though it is not certain that she and her questioner were understanding each other. Be that as it may, the whole of her testimony leaves no doubt that she relied on the factory for her new numbers.

Now it is of course possible that once a factory should give an old

silk a new number, and that therefore there might be another undiscovered card in Nellie Lees' card index with the same silk as J^1, J^2, and J^3, but that this should happen three times, and should happen to just these scarf patterns, is much more than three times as unlikely. We may therefore say with every reasonable certainty that these scarfs were made at about the time when the silks were issued, and that they were made up for the salesmen to take out with them, because for about every ten silks one scarf pattern would be made up. A sample was then returned to the sample box of each scarf pattern, but not of each silk. The idea that these three were all made up over five years after they had been reported out seems to me fantastic. Yet there is an added corroboration, not sufficient alone, perhaps, but still significant. To each of these scarfs is attached a pin ticket, which it was customary for the superintendent, Loomis, to put upon each sample kept in the sample box, which designated the scarf pattern. Loomis had left the employ of Keiser, and Sarah Steele said she did not know his whereabouts; had he been called, his testimony as to each particular pin ticket could hardly have added anything of value. We find a pin ticket with the No. 1551 on J^1, and we find sales in substantial quantities of No. 1551 during the first three months of 1907, to fill the orders which salesmen were making as shown by the swatch-card, L^1. Leaving out of account deliberate fabrication, the plaintiff can account for the correspondence between pin ticket and sales only on the possibilities, either that there was another sample 1551 in the sample box, or that the pin ticket had been misplaced. That there should be another sample with the same number is most unlikely in itself, and as to both possibilities the chance is reduced to negligible force by the fact that the silk of J^1 was used only in that period. The idea that it was made of a chance remnant at a subsequent time, when the manufacturer did not mean to run that silk, no one would seriously urge. The correspondence of pin ticket, sales, and silk seems to me so strongly to corroborate Steele and Ruston that the result admits of no reasonable doubt.

The Bachrach use seems to me to be thoroughly established through the corroboration of Fanny Lewis' testimony through her entry, "Muslin strip all ov." on Sero Sq. The entry, "New Sero 1912," at the top, I have no doubt was a subsequent entry. No one can read this testimony without, in my judgment, being satisfied that Bachrach made the scarfs before May 31, 1912; but there is undoubtedly some technical, highly technical, difficulty in the proof of the swatch-books, and rather than rest the case upon a question of evidence not absolutely certain, I prefer to make no finding upon the Bachrach use.

The Oppenheimer use is perhaps weaker than Bachrach's, and is subject to the same possible weakness in the proof of the swatch-books. I make no finding upon it, though I have no question in fact that Oppenheimer made the ties as is claimed.

The Riker use is the weakest of all; I should think there might be an honest doubt regarding it.

The Blanchard patent, No. 954,017, left a very small scope for invention if there was any at all. The reinforcing strip is clearly dis-

closed from end to end and the interlining in the tying-ends. The disclosure is of a bow or butterfly tie, not a scarf; but no invention certainly can lie in the change. Mills' only novelty over Blanchard rests in the stitching of the strip, lining, and silk in the tying ends to the back folds of the scarf. This Blanchard did not show, but Tatton, 1902 British, 14,289, shows a reinforcing strip stitched to the back only of the scarf, and a long scarf at that. I can attach no importance to the fact that the silk is not brought together into one fold at the back, but is stitched to the reinforcing strip in two seams. If Tatton had put in his interlining in the tying-ends, I should have certainly been unable to see any patentable novelty between him and Mills. Thus invention can rest only in combining the two disclosures of Blanchard and Tatton, and I am extremely doubtful whether the patent could stand if it did not have to meet prior uses. It seems to me to be one of those trifling readjustments of well-known forms which ought never to have escaped the examiner. In any case it was not the work of a manufacturer seeking to satisfy that cherished friend of courts, the long-felt want. Rather it was a bit of academic ingenuity by a lawyer, whose imagination was stirred by a litigation which certainly came very close to his supposed invention. I need not find that Mills saw the Blanchard & Price scarf, or that it was a prior use itself. I cannot disregard the fact that there existed the precise invention corporeally embodied and within his very grasp. That certainly should have some bearing upon the difficulty of taking the step which he took to unite Blanchard and Tatton.

Bill dismissed, for want of invention, with costs.

INTERNATIONAL CURTIS MARINE TURBINE CO. et al. v. WILLIAM CRAMP & SONS SHIP & ENGINE BLDG. CO.

(District Court, E. D. Pennsylvania. March 20, 1916.)

No. 263.

UNITED STATES ⊂⊃97—APPROPRIATION OF PATENT—CONTRACTOR FOR MAKING DEVICE FOR GOVERNMENT—LIABILITY FOR INFRINGEMENT.

Act June 25, 1910, c. 423, 36 Stat. 851 (Comp. St. 1913, § 9465), which provides that the owner of a patent covering an invention which shall be used by the United States without license may recover reasonable compensation for such use by suit in the Court of Claims, in effect provides for the appropriation by the government by right of eminent domain, of a license to use any patented invention, which includes also the right to make the patented device; and, having such right, the government may contract for the making of all or any part of the same, and the contractor is protected against liability for infringement, the owner of the patent being limited to the remedy provided by the statute.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 76; Dec. Dig. ⊂⊃97.]

In Equity. Suit by the International Curtis Marine Turbine Company and the Curtis Marine Turbine Company of the United States against the William Cramp & Sons Ship & Engine Building Com-

pany. On rehearing sur defendant's motion to exclude evidence before special master. Motion denied.

Fish, Richardson, Herrick & Neave, of Boston, Mass., for plaintiffs.

Edwards, Sager & Wooster, of New York City, and Dickson, Beitler & McCouch, of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. Since the argument upon the rehearing, the Circuit Court of Appeals for the Second Circuit, in 231 Fed. 1021, — C. C. A. —, has affirmed the decree of Judge Hough in the case of Marconi Wireless Telegraph Company of America v. Emil J. Simon, 227 Fed. 906, upon Judge Hough's opinion; Judge Ward dissenting. Judge Hough in his opinion said:

"The questions, therefore, become the following: (1) What is the legal position of the sovereign in respect of patent rights granted by itself under the Act of 1910? (2) How does that act, or more accurately the legal position of the United States thereunder, affect or protect an independent contractor?

"So far as the first query is concerned, it has been fully and finally answered by Crozier v. Krupp, 224 U. S. 305 [32 Sup. Ct. 488, 56 L. Ed. 771], which holds that, having regard to 'the undoubted authority of the United States as to such subjects [as patents] to exercise the powers of eminent domain, the statute * * * provides for *the appropriation of a license to use the inventions;* the appropriation thus made being sanctioned by means of compensation for which the statute provides.' It may in some sense be true, as is urged by the plaintiff, that the act is remedial, and does not disturb any of the rights of a patentee which existed before its passage. But it is also true that, if the act creates a legal status, the relation of the holder of that status to the rest of the world is affected by the statute, whether such change or modification of relation be specifically mentioned or described in the act or not.

"The Supreme Court has defined the somewhat inartificial language of the statute. What the act contemplates being done by the United States is to *use* an invention 'described in and covered by a patent.' This is held to be equivalent to the expropriation or appropriation of a 'license to use the inventions.' This means a license in its widest sense; i. e., both to make and to use, and possibly to sell, but certainly both to make and to use. In this instance the Navy, through its officers, has appropriated by right of eminent domain a license to make and use any and all articles covered by the patent in suit. It could plainly make them in its own yards or other work places by its hired employés or permanent officers. It could take Simon into its employment at a stated stipend, and it could even make that stipend the exact amount of his estimated profit under the contract. If this had been done, the plaintiff could certainly do nothing but institute an action in the Court of Claims. Simon would be as immune as an admiral. However repugnant to business and professional feeling this method of riding roughshod over the rights of a patentee may be, it is difficult for me to perceive that there is any substantial difference between what the government admittedly might have done and what it has done in respect of this contract. Any distinction drawn between doing an infringing job by day's work and doing the same job by contract is without substance.

"But it is said (and here hangs the plaintiff's whole case) that before the act of 1910 the holder of a patent could sue a contractor with the government for infringement as fully and freely as he could any one else, provided always that he did not by injunction or otherwise interfere with government possession of anything (however obnoxious to the patentee's rights) actually in governmental use. Brady v. Atlantic Works, supra [Fed. Cas. No. 1,794]; International, etc., Co. v. Cramp, 211 Fed. 124 [127 C. C. A. 522] and cases therein cited. In my opinion this is true, but not so as to the corrollary stated by plaintiff, viz., that since this right existed before the act of 1910, and is not explicitly taken away by that statute, it must still survive as fully as of old.

If the reason of the law fails, the law ought to fail with it; this maxim seems to me to apply very forcibly here. The reason for permitting actions for infringement by private parties against government contractors was that since infringement was a *tort*, and the United States had never consented to be sued *in tort*, patentees were without remedy. Now they have such remedy under the statute, and cannot take what the statute gives (or imposes), and retain what they had before, if it interferes with governmental enjoyment of its license. The United States has a license under this patent to make, use, and perhaps to sell, to any extent deemed beneficial to the commonwealth, and without any territorial or other limitation upon its right. A licensee to make and use is not (in the absence of specific language in his license) limited to making with his own hands, in his own shop, or by his own employés. He may employ, procure, or contract with as many persons as he chooses to supply him with that which he may lawfully use, provided such conduct does not change his relation to the licensor. In my opinion this is exactly what the government has done here, and Simon is not an infringer, because he is supplying lawful goods to a lawful licensee. Foster Hose Supporter Co. v. Taylor Co., 191 Fed. 1003 [111 C. C. A. 667]."

The decision of the Circuit Court of Appeals for the Second Circuit adopting the opinion of Judge Hough is to be regarded as decisive of the question here raised, unless the Circuit Court of Appeals for this circuit in its opinion and decree ordering an accounting determined as the law of this case that, in a suit by a patentee against an independent contractor, an accounting should be had of profits accruing in making turbine engines for torpedo boat destroyers for the government under contracts entered into after June 25, 1910.

The present suit was commenced in 1909, and the contracts under consideration upon the appeal were Nos. 30 and 31, entered into in 1908. There was apparently nothing before the court relating to contracts with the government subsequent to the passage of the act of June 25, 1910, and there is no discussion of any such transactions by the court in its opinion. Contracts Nos. 47, 48, 49, and 50 were not entered into until 1911, and it is apparent that the sole question before the court, where the question of jurisdiction was discussed, was one of equitable jurisdiction of a suit begun prior to the act of June 25, 1910. This is apparent from the following language in Judge Buffington's opinion (211 Fed. at page 152, 127 C. C. A. 550):

"Since the litigation began, the *two torpedo boat destroyers referred to* have been finished and delivered to the government, and the plaintiffs do not now ask that the decree shall in any wise be directed against these vessels, or against the government in respect thereof. The bill contains no averment that the defendant is building or threatening to build infringing turbines *for commercial use;* only certain ships of war are involved in the suit, and, for reasons to be briefly stated, we are of opinion that no injunction should now be granted. We do not agree that the court below should have dismissed the bill for want of jurisdiction. Neither the United States nor one of its officers is a party defendant, but the suit is brought solely against a private corporation that had contracted to do certain public work. The bill was filed in 1909, and we think *there was then* no doubt that the court below had the right to entertain it. * * * But since the suit was brought the act of 1910 has been passed, and has been interpreted by the Supreme Court in the recent case of Crozier v. Krupp, 224 U. S. 290, 32 Sup. Ct. 488, 56 L. Ed. 771. This statute, we think, furnishes a practical solution of the questions arising upon this branch of the case. Even if the plaintiffs did not disclaim the desire to interfere with the government's possession of the vessels, there is no longer any ground upon which a final injunction can be properly rested, even in a suit against a contractor with the government, where the dispute concerns such

property as vessels of war. *If the United States has infringed*, or shall hereafter infringe, the patents that we have been considering, the act of 1910 permits the plaintiffs to sue in the Court of Claims. Crozier v. Krupp, supra. And if the defendant shall undertake to infringe hereafter by making offending turbines *for commercial use*, relief can be obtained by another suit."

It seems to be conclusive, therefore, that the Circuit Court of Appeals had not before it in the consideration and decision of the case the situation now presented, and that its order for an accounting should not be construed as intended to include an inquiry whether the turbine engines in torpedo boat destroyers made by the defendant under contracts with the government entered into since June 25, 1910, infringed the plaintiffs' patent (as would have been the inquiry but for the provisions of the act of 1910), and, if found to be infringements, an inquiry and report regarding the defendant's profits. There was no decision by the Circuit Court of Appeals that the license acquired by the United States by right of eminent domain to use the invention of the plaintiffs' patent was not a license under the broad signification of the term "license to use," including the right to make and use, as was held by the special master in overruling the objection of the defendant to any inquiry into any transaction under contracts Nos. 47, 48, 49, and 50.

The court will therefore follow the construction of the act of 1910, adopted in Marconi Wireless Telegraph Company of America v. Simon, applying the doctrine of Crozier v. Krupp to a suit by a patentee against an independent contractor with the government. It is therefore held that the defendant is not, as to the contracts entered into since June 25, 1910, an infringer, and is not liable to an accounting for anything done under those contracts, and that the special master was in error in overruling the motion of the defendant to exclude from its accounting the profits, if any, made by defendant for building turbine engines under contracts 47, 48, 49, and 50.

It is ordered that the action of the special master in overruling the defendant's objection be overruled, and that the defendant's objection be sustained, without prejudice, as noted in the memorandum opinion filed July 2, 1915.

UNITED STATES v. SHANAHAN.

(District Court, E. D. Pennsylvania. April 8, 1916.)

No. 1377.

1. ALIENS ⇐60—NATURALIZATION—RIGHT.

The admission of aliens to citizenship is a privilege, not a right, and Congress may prescribe the conditions under which the privilege may be enjoyed; but when the alien has complied with the prescribed conditions the privilege ripens into a right.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 117, 118; Dec. Dig. ⇐60.]

2. ALIENS ⇐71½, New, vol. 7 Key-No. Series—NATURALIZATION—PROCEEDINGS TO CANCEL—FINDINGS OF FACT.

In proceedings to cancel a naturalization certificate because illegally granted, the finding of the court which granted the certificate that the

applicant had continuously resided within the United States for the prescribed time will not be reviewed, even if, on the evidence, the court hearing the petition to cancel would have reached a different conclusion.

3. ALIENS ⟸71½, New, vol. 7 Key-No. Series—NATURALIZATION—PETITION TO CANCEL—"ILLEGALLY PROCURED."

A naturalization certificate can be canceled, because "illegally procured," where any of the jurisdictional facts necessary to the granting of the certificate are absent from the record.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Illegally.]

4. ALIENS ⟸62—NATURALIZATION—"RESIDED CONTINUOUSLY."

The requirement of the naturalization laws that the applicant shall have "resided continuously" in the United States for the prescribed time, does not require his unbroken physical presence during that time, but only that he maintain a bona fide residence and domicile here, and is a question of fact, into which intention enters as a controlling element.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 123–125; Dec. Dig. ⟸62.

For other definitions, see Words and Phrases, Second Series, Resided Continuously.]

Petition by the United States against Roger Shanahan for the cancellation of a naturalization certificate. Petition dismissed.

Robert J. Sterrett, Asst. U. S. Atty., and Francis Fisher Kane, U. S. Atty., both of Philadelphia, Pa.

O. Charles Brodersen and Benjamin H. Leiterman, both of Philadelphia, Pa., for respondent.

DICKINSON, District Judge. The respondent was naturalized July 17, 1914. There was and is no reason to doubt that he emigrated from Ireland to this country with the full bona fide purpose to cast his lot with us. He followed this with the required declaration of his intention to become a citizen. He then filed his petition in accordance with the requirement of the law, and supported this with the full measure of proof that he was (otherwise than because of the objection next stated) entitled to be granted the privilege of citizenship for which he asked. The court "was satisfied" by the proofs submitted and admitted him. The objection referred to was based upon the fact that after he had made his declaration of intention he received a message from his old mother that she was critically ill, and wished to again see her son before she died. Answering to this appeal, he went to her. The good faith of his statement that he went only in response to this appeal, and with every purpose to continue his residence in America, is evidenced by the fact that he came back on the first ship which sailed for this country after his mother was buried. The present petition for cancellation of his certificate of naturalization is based upon the sole ground of this break in the time of his physical presence in this country, and that because of this he has not "continuously resided" here. There is no suggestion of imposition upon the court, or concealment or attempted concealment of the facts, much less of fraud, and no suggestion even that the "certificate of citizenship was illegally procured," except in the averment of error in the court in its finding of the fact of continuous residence.

Congress, in pursuance of its constitutional power "to establish a uniform rule of naturalization," has provided us with our present system. These laws confide the power to certain courts, and impose the duty upon the District Courts of admitting to citizenship. Certain things are preliminarily essential to the exercise of this power. These are the jurisdictional facts. One of them is a previous declaration of the intention of the applicant to become a citizen. Another is that he shall within the prescribed time thereafter file his petition in the required form, and this petition must be verified by the affidavits of at least two credible witnesses, who are themselves citizens, to the fact of residence, etc. What follows is a matter of "proofs." In other words, it is a finding of facts from evidence. This is a judicial act, or a judgment, the memory of which is preserved in the records of the court. Congress has further made it the duty of the United States district attorney upon a certain showing to institute proceedings for "setting aside and canceling" certificates of citizenship on the ground (as already stated) "of fraud," or on the ground that they were "illegally procured."

[1] It is, of course, true that, outside of the acts of Congress, admission to citizenship, like the admission of aliens to our shores, is not a right, but a privilege. Congress may prescribe the conditions upon which these high privileges may be enjoyed, and may commit to any official or tribunal the determination of any questions of fact upon which the privilege may depend. The right of appeal from the judgment rendered may be given or withheld. Congress has seen fit to commit the determination of the facts to the courts, and has made no provision for an appeal from the judgment reached. When an applicant has met all the requirements of the law, the privilege accorded him ripens into a right. It is his legal right to submit his petition and proofs to the court as the constituted tribunal to pass upon them. If certain facts appear to the satisfaction of the court, he is entitled to citizenship.

[2] In similar proceedings like findings made by an official or tribunal other than a judge or a court are not disturbed because a different conclusion might have been reached on the facts. The courts will not assume to sit in judgment to review findings of fact which it is the duty of another tribunal to make. This is the established rule. U. S. v. Rodgers, 191 Fed. 970, 112 C. C. A. 382. Why should not the same rule apply to a finding by a judge or a court? The principle remains the same when the court in one form of proceeding is asked to review its findings made in the course of another proceeding.

[3] The rule, of course, has its limitations. These are well recognized. They have their practical application in this provision of the law for cancellations. If the certificate was procured by fraud, it may be canceled. So likewise if it "was illegally procured." The absence from the record of any of the jurisdictional facts would make the certificate "unlawful," because issued without warrant of law. The moment, however, we get beyond the record and the jurisdictional facts, we get into the domain of the "proofs." In the first place, we have no record of what these were, and in any event, in the absence of fraud, or an abuse of power by the tribunal which has passed

upon them, we are doing nothing else than hearing the evidence over again and retrying the case on its facts.

[4] The law, it is true, requires the applicant to have "resided continuously" in the United States the prescribed time. If this means an unbroken physical presence, this applicant, under the facts averred now, should not have been admitted, and his admission by the court might well be held to be such an abuse of power as to make the issue of the certificate "illegal." This, however, it does not mean. It means only that the applicant shall have maintained a bona fide residence or domicile here. This has been determined for us in the case of U. S. v. Cantini, 212 Fed. 925, 129 C. C. A. 445, with a clearness of statement which should finally settle this strangely vexing question of what constitutes residence. It is a question of fact, into which intention enters as a controlling element. Intention is a mental attitude, but we are not dependent for a knowledge of its existence wholly upon verbal declarations. They are evidence only, and may be overborne by the persuasive force of other facts, which are also in evidence. Physical presence in the claimed place of residence is consistent with the claim of domicile, and absence may be found to be inconsistent with such a claim. It cannot be said, however, that absence, even when prolonged, is necessarily, or of itself, so inconsistent as to compel a finding against residence.

Take what would seem now to be the facts of this case. A visit to Ireland, made on the appeal of a dying mother, coupled with an immediate return as soon as the son had seen her buried, would be thought by no one to in itself negative the fact of a continued residence in this country; nor would the length of the stay, if such were the sole motive of the visit, of itself control the decision. It can be easily understood that days might lengthen into weeks, and weeks into months, without weakening the evidence of an intention to keep his residence here. It is the happy heritage of the Irish people that the ties of family affection are not lightly held or easily broken, and it is proper to take this into account in weighing evidence of this kind. Indeed, were we now weighing this evidence, it is easy to understand that it might be so strong as that the number of months over which the visit lasted would not control the judgment. We have before us now nothing but the length of the visit. Viewed by itself alone, it must be confessed to be staggering to belief in it as a visit. Did we have before us now, as the court had then, all the detail facts and circumstances, the length of time might impress us less. It may be that the length of the visit was given less weight than it otherwise would have had because of the effort made then, as is made now, to impress us with the view that an unbroken physical presence is required by the act of Congress.

However this may be, the conclusion reached is that the court, when it admitted this applicant, was "satisfied" of the fact of residence, and, being so satisfied, it was proper to admit him to citizenship, and we see no justification for canceling the certificate because of the fact (even if it were the fact) that from a view of part of the proofs which were then before the court we differed in our judgment of the weight of the evidence.

The petition to cancel is dismissed.

IVANOFF v. MECHANICAL RUBBER CO.

(District Court, N. D. Ohio, E. D. February 11, 1916.)

No. 9229.

1. REMOVAL OF CAUSES ⟸11—CAUSES REMOVABLE—"JURISDICTION"—"THIS TITLE."

Judicial Code (Act March 3, 1911, c. 231) § 28, 36 Stat. 1094 (Comp. St. 1913, § 1010), authorizes the removal into the District Court of the United States for the proper district by nonresident defendants of suits of a civil nature of which the District Courts of the United States are given jurisdiction by "this title," which includes the entire Judicial Code. Section 51 (section 1033) provides that, except as provided in the following sections, no civil suit shall be brought in any District Court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but that, where the jurisdiction is founded only on diverse citizenship, suit shall be brought only in the district of the residence of either the plaintiff or the defendant. *Held*, that an action by a nonresident alien against a New Jersey corporation cannot be removed from an Ohio state court to the District Court for the Northern District of Ohio, as "jurisdiction" is authority to hear and determine a cause, and section 51 places the right to hear and determine such case as much beyond the authority of such District Court as if it was excluded by the section defining the jurisdiction of District Courts.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 29–31; Dec. Dig. ⟸11.

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

2. REMOVAL OF CAUSES ⟸11—CAUSES REMOVABLE.

Only cases within the original jurisdiction of the District Court are removable from state courts.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 29–31; Dec. Dig. ⟸11.]

At Law. Action by Todor Ivanoff against the Mechanical Rubber Company. On motion to remand. Motion sustained.

Payer, Winch & Rogers and E. P. Strong, all of Cleveland, Ohio, for plaintiff.

Reed, Eichelberger & Nord, of Cleveland, Ohio, for defendant.

CLARKE, District Judge. [1] This cause was commenced in the court of common pleas of Cuyahoga county. The plaintiff is an alien; the defendant is a corporation organized under the laws of the state of New Jersey. Within the time prescribed by statute, the defendant filed a petition for removal to this court, and before taking any other action in the case the plaintiff filed a motion to remand the cause to the state court.

Removal of cases from state to United States courts is provided for in sections 28 to 39, inclusive, of the Judicial Code, and the clause of section 28 applicable to this case reads as follows:

"Any other suit of a civil nature, at law or in equity, of which the District Courts of the United States are given jurisdiction by this title, and which

are now pending or which may hereafter be brought in any state court, may be removed into the District Court of the United States for the proper district by the * * * defendants therein, being nonresidents of that state."

"This title" in the above clause includes the entire Judicial Code, approved March 3, 1911, but the essential reference is to section 24. The plaintiff being an alien and the defendant a nonresident of this district, because organized under the laws of New Jersey, this case could not have been commenced in this court. Galveston, etc., Ry. v. Gonzales, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248.

[2] Only cases within the original jurisdiction of the District Court are removable from state courts. Cochran v. Montgomery County, 199 U. S. 260, 26 Sup. Ct. 58, 50 L. Ed. 182, 4 Ann. Cas. 451. Thus the question for decision becomes: Can this court acquire jurisdiction by removal, when it would not have had original jurisdiction if the same case had been commenced in this court?

The distinction which some courts have drawn between the jurisdiction of district courts as defined in section 24, and as the scope of that jurisdiction as modified by the venue sections, especially by section 51 of the Judicial Code, holding that jurisdiction is given by section 24 over cases which cannot be commenced in District Courts under section 51 seems to this court illusory and misleading.

Jurisdiction has been authoritatively defined as "authority to hear and determine a cause." Daniels v. Tearney, 102 U. S. 418, 26 L. Ed. 187; Simmons v. Saul, 138 U. S. 454, 11 Sup. Ct. 369, 34 L. Ed. 1054. And it is dealing with words rather than with realities to say that section 24 gives to this court jurisdiction over a cause which section 51 declares shall not be commenced in this court. The right to hear and determine the case is placed as much beyond the authority of the court by the venue sections as it would be if section 24 were so narrowed as clearly to exclude it.

The conviction that the fact that this cause could not have been commenced in this court places it beyond the jurisdiction of this court for purposes of removal leads me to agree with Ex parte Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, and with Mahopoulus v. Chicago, etc., Ry. Co. (C. C.) 167 Fed. 165, and Sagara v. Chicago, etc., Ry. Co. (C. C.) 189 Fed. 220, rather than with those decisions which frankly disagree with the conclusions of the Wisner Case, or which distinguish away its authority to the vanishing point.

Therefore the motion to remand will be sustained.

THE CETRIANA.

(District Court, N. D. California, First Division. March 23, 1916.)

No. 15824.

1. ADMIRALTY ⟸50—BRINGING IN NEW PARTIES—ADMIRALTY RULE 59.
Admiralty rule 59 (29 Sup. Ct. xlvi), permitting the bringing in of other parties on petition of a respondent, is not limited to collision cases, nor to cases where a joint liability is alleged in the petition.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 414–429; Dec. Dig. ⟸50.]

2. ADMIRALTY ⟸50—BRINGING IN NEW PARTIES—RIGHT OF RESPONDENT.
In a suit against a steamship for failure to deliver cargo, claimant may properly bring in, under admiralty rule 59, or in analogy therewith, another vessel upon an allegation that under the bills of lading respondent had the right to transship the cargo in question, and did so upon the vessel so brought in, which became solely responsible for its delivery. Nor is the right to bring in such vessel defeated by the fact that another suit by libelant against her, for the same cause of action, is pending in the same court; it being to the advantage of all parties that the entire controversy should be settled in one proceeding.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 414–429; Dec. Dig. ⟸50.]

In Admiralty. Suit by Frank G. Hammer and William H. Hammer, copartners, against the British steamship Cetriana; William Eadie, claimant. On exceptions by Sudden & Christensen, claimants of the steamship Mazatlan, to petition of respondent for bringing in such vessel. Exceptions overruled.

Nathan H. Frank and Irving H. Frank, both of San Francisco, Cal., for petitioners.

Andros & Hengstler and G. W. Bell, all of San Francisco, Cal., for third party.

DOOLING, District Judge. In this action Hammer & Co. libel the steamship Cetriana for failure to deliver cargo. The owners of the Cetriana have answered, denying liability, and have in addition filed a petition praying that the Mazatlan, another vessel, be brought in. The petition and answer both set up the fact that the Cetriana had in accordance with the bills of lading the right to transship the cargo in question, and did transship it upon the Mazatlan, and that for any failure to deliver the same the Mazatlan is solely liable.

The petition is presented on the theory that this presents a case analogous to that provided for in admiralty rule 59 (29 Sup. Ct. xlvi). The owners of the Mazatlan have excepted to the petition, on three grounds: (1) That rule 59 applies only to cases of collision; (2) that the owners of the Cetriana do not aver a joint liability on the part of the Mazatlan, but plead that she is solely liable; and (3) that there is another action pending in this court, brought by the present libelants against the Mazatlan, for failure to deliver this same cargo, and that the Cetriana, if her protection demand such procedure, may intervene in

that suit; that in the action just mentioned the Mazatlan has given a bond in the sum of $2,300 to cover precisely the same damage that is complained of here, and has been compelled by reason of this petition to give a bond in this action in the sum of $2,000, and has also given a cost bond in the sum of $500 on each proceeding.

[1] The principle upon which rule 59 is based has been applied in many cases other than collision by the admiralty courts, and indeed it was the application in the first instance of such principle by a trial court that resulted in the promulgation of the rule in question. The exception that the rule can only be applied in collision cases is therefore not well founded.

[2] As to the other exceptions, it may be well to note that the Cetriana does not seek to bring in a party with whom she shows herself to be in no connection. She was the original contractor with the libelants. To her they delivered the cargo in question. Being called upon to respond in damages for failure to deliver such cargo, she says:

"I delivered the cargo to the Mazatlan under a power conferred on me so to do by the bill of lading. If the cargo has not been delivered, it is not my fault, but that of the other vessel. Let her be brought in, and the whole controversy will be determined in this proceeding."

The fact that in pleading she asserts a sole liability on the part of the Mazatlan does not seem under the circumstances a sufficient reason for denying her petition. In Dailey et al. v. City of New York (D. C.) 119 Fed. 1005, Judge Adams, in bringing in a third party, not under rule 59, but in analogy therewith, says:

"The principle upon which the rule is based is applied by analogy in other cases to assist in the administration of justice by requiring the appearance of any additional defendant who may be responsible for the claim or a part thereof."

Here, the cargo having been transshipped to the Mazatlan, it is to the advantage of all that the controversy be settled in one action. Indeed, if there be, as suggested, two actions pending, the court will try them together. The fact that the Mazatlan must give an additional bond in this case is not important, if the "proper administration of justice" require her to be brought in. The questions as to the liability of both vessels, or as to the liability of either, for the failure to deliver the cargo to libelants, are so closely united that due administration will be advanced by having all parties before the court in one proceeding. It may be noted, too, that the objection here does not come from the libelant, but from the third party.

The exceptions are overruled.

UNITED STATES v. BOPP et al.

(District Court, N. D. California, First Division. March 23, 1916.)

No. 5885.

1. COURTS ⊜337.—FEDERAL COURTS—AUTHORITY OF STATE STATUTES.
State statutes relating to criminal procedure have no application to prosecutions in the federal courts.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 908; Dec. Dig. ⊜337.]

2. INDICTMENT AND INFORMATION ⊜15(4)—EFFECT OF SUSTAINING DEMURRER—SECOND INDICTMENT FOR SAME OFFENSE.
The sustaining of a demurrer to an indictment is not a bar to the return of a new indictment by the grand jury which has already heard the evidence.
[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 86, 448; Dec. Dig. ⊜15(4).]

3. CRIMINAL LAW ⊜280(2)—PLEA IN ABATEMENT—GROUNDS.
An averment in a plea in abatement to an indictment, made on information and belief, the sources of which are not stated, that the grand jurors who returned the indictment were without knowledge of its contents, is not sufficient to overcome the presumption of regularity, or even to warrant the court in investigating the proceedings before the grand jury.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 647, 648; Dec. Dig. ⊜280(2).]

Criminal prosecution by the United States against Franz Bopp, E. H. Von Schack, Wilhelm Von Brincken, J. F. Van Koolbergen, Margaret W. Cornell, Charles C. Crowley, and Louis J. Smith. On plea in abatement, motion to quash indictment, and demurrer to plea. Demurrer sustained, and motion denied.

See, also, 230 Fed. 723.

John W. Preston, U. S. Atty., and Annette Abbott Adams, Asst. U. S. Atty., both of San Francisco, Cal.

J. P. O'Brien, of San Francisco, Cal., and Samuel Platt, of Carson City, Nev., for defendants Cornell and Crowley.

George A. McGowan, of San Francisco, Cal., for defendant Von Brincken.

Sullivan & Sullivan and Theo. J. Roche, of San Francisco, Cal., for defendants Bopp and Von Schack.

DOOLING, District Judge. The defendants have presented a plea in abatement and a motion to quash the indictment herein for the various reasons in such plea and motion stated. The government has demurred to the plea. The only matters of importance, as it seems to me, that are set forth in either the motion or plea, are those which have to do with the sustaining of a demurrer to a former indictment, and with the asserted lack of knowledge on the part of the grand jurors as to the contents of the present one.

[1] As to the former, it is urged that, a demurrer having been sus-

tained to a previous indictment returned by the same grand jury (230 Fed. 723) and no order of resubmission having been made by the court, the judgment on demurrer was final, and became an absolute bar to any other prosecution for the same offense. This is, indeed, the provision of the Penal Code of the State of California. I cannot agree with counsel, however, in their contention that this court is bound in this matter by the state law.

[2] It is, however, further urged that, even if the state law be not applicable, the defendants are still exempt from further prosecution because at common law such was the effect of a judgment sustaining a demurrer. It is quite true that upon the sustaining of a demurrer to an indictment at common law the judgment was that the defendant be discharged, and indeed that was in effect the judgment here. But I do not understand that to mean that they are discharged finally from any further prosecution at all, but that they are discharged from further prosecution upon that particular indictment. That was the effect of the judgment here, but I know of no reason why, because a demurrer has been sustained to an indictment which was insufficient in form or substance to put the defendants upon trial, a new indictment, curing the defects found in the former, may not be returned by the grand jury which has already heard all the evidence, if they desire to do so. The court and the district attorney are without the power to amend an indictment, and for that reason a judgment sustaining a demurrer thereto is necessarily final as to that particular pleading. But it is in no sense a judgment on the merits, and the grand jury possesses the power to amend which is lacking both in the court and the prosecuting officer.

[3] It is further urged that the grand jurors were without knowledge as to the contents of the indictment in question. This averment is made upon information and belief alone, and such an averment is, in my opinion, not sufficient so to overcome the presumption of regularity which the law attaches to the return of an indictment as to compel or even to warrant the court in investigating the proceedings before the grand jury which resulted in such return. It was stated on the argument that the defendants had the right to "ascertain" whether or not the grand jurors were acquainted with the contents of the indictment, and that seems to me, under the circumstances, what they are endeavoring to do. No facts are stated upon which their "belief" is founded, and the sources of their "information" are not disclosed. Upon such averment as this, which might safely be made by any defendant, the court would be compelled to inquire into the proceedings of the grand jury upon every indictment returned, a thing which I do not believe is contemplated by the law.

The demurrer to the plea in abatement is sustained, and the motion to quash denied.

UNITED STATES v. NEW YORK CENT. & H. R. R. CO.

(District Court, N. D. New York. May 1, 1916.)

1. ALIENS ⟸56 — IMMIGRATION — CONTRACT LABORERS — PREPAYMENT OF TRANSPORTATION.

A railroad company, which sent its duly authorized agent into Canada to employ men to work on its section in the United States, and furnished the agent with free transportation over its own lines for the men he should employ, is guilty of a misdemeanor, under Act Feb. 20, 1907, c. 1134, § 4, 34 Stat. 900 (Comp. St. 1913, § 4248), making it a misdemeanor for any person or corporation in any manner whatsoever to prepay the transportation of any contract laborer into the United States.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 113–116; Dec. Dig. ⟸56.]

2. ALIENS ⟸56—IMMIGRATION—CONTRACT LABORERS—"SOLICIT."

The corporation was also liable to the penalty imposed by section 5 of that act (Comp. St. 1913, § 4250) on any corporation which knowingly solicits the immigration of any contract laborer, though the laborers employed were denied admission by the immigration authorities, since to "solicit" does not imply success, but merely means to incite.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 113–116; Dec. Dig. ⟸56.

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

3. WORDS AND PHRASES—"PERSUADE."

While the primary meaning of "persuade" is to advise or counsel, it has a secondary meaning, which is to prevail upon by demonstration, exposition, or argument, and implies the completed act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Persuade.]

At Law. Action by the United States against the New York Central & Hudson River Railroad Company to recover a penalty for the violation of Act Feb. 20, 1907, c. 1134, §§ 4, 5 (34 Stat. 900). Judgment ordered for the United States.

Dennis B. Lucey, U. S. Atty., of Ogdensburg, N. Y.

McLarey & Allen, of New York City, and Alex. H. Cowie, of Syracuse, N. Y., for defendant.

RAY, District Judge. The defendant is a railroad corporation organized and existing under the laws of the state of New York and engaged in the business of a common carrier and in operating and constructing railroads and branches thereof in the state of New York and in the Northern district thereof, and one or more of which branches extend into the Dominion of Canada, kingdom of Great Britain. The defendant had in its employ as supervisor of tracks, including the branch extending into Canada on the Adirondack Division and to Adirondack Junction in the Dominion of Canada, one Fred W. Vincent, who had power and authority from the defendant to employ and discharge manual laborers on its tracks and in the construction and repair of its railroad. Shortly prior to June 6th the defendant was in want

of men to work for it on its tracks as manual laborers, and said Vincent, acting pursuant to his authority in employing and discharging laborers, wrote to one Enrico Canale a letter of which the following is a copy and delivered same to the said Canale:

"New York Central & Hudson River Railroad Company.

"Remsen, 6/6.

"E. Canale, Brandreth—Dear Sir: I called up Mr. Sisti about the five men that you spoke about; he says that he don't know anything about them, so if you could get a hold of them send them to me as I am ten men short in extra gang now. About these men at Canada, could you get them if you went after them with a pass. Let me know at once. If you can get some go after them at once.

"Yours truly, [Signed] F. W. Vincent."

Shortly prior thereto the defendant company had issued and delivered to said Canale a pass giving him free transportation between Keepawa and Fulton Chain in the Northern district of New York and on one of the branches of said defendant company, and had also issued a free pass giving free transportation to ten employés of the company as follows:

"New York Central Railroad Company, Buffalo and East. 1913. C. H. 55. Pass 10 employés. Account Laborers M. of W. Dept. When identified. Between all stations Adirondack Division. Good until June 30, 1913."

This pass was delivered to Fred W. Vincent and by him to said Canale shortly before the delivery of said letter. Said Enrico Canale was in the employ of the defendant company under and subordinate to said Vincent as section foreman of section 14 in said Northern district of New York. He was subject to the control and orders of said Vincent. At said times Columbi Napoleoni, Giuseppe Papi, Giuseppe Bove, Pietro Bove, and Antonio Tenace were alien laborers, not citizens or residents of the state of New York, but citizens of the kingdom of Italy and alien manual laborers, and were then at or near Montreal, in the Dominion of Canada, kingdom of Great Britain, and did not belong to any class permitted to enter the United States under the provisions of the Contract Labor Law.

Pursuant to the directions and authority of said letter the said Enrico Canale proceeded to Montreal, Canada, and there solicited and engaged the said persons, alien contract laborers, to come into the United States and work for the defendant railroad company. On the 9th day of June, 1913, two of said contract laborers, Napoleoni and Papi, appeared before the board of special inquiry of the United States Immigration Service in the Montreal district and then and there applied for admission into the United States. An inquiry was set on foot as to their right to enter the United States, and this inquiry was held open until the 10th day of June, 1913, on which day the said Giuseppe Bove, Pietro Bove, Antonio Tenace, Columbi Napoleoni, and Giuseppe Papi, accompanied by the said Enrico Canale, appeared before the said board of special inquiry of the United States Immigration Service, the entire board being present, and application was then and there made for the admission into the United States of said persons, and said Canale then and there requested the admission of said persons into the United

States. The inquiry resulted in the rejection of said persons, and they were refused admission into the United States.

It was clearly the intent and purpose of the defendant, acting through its said agent, Vincent, to secure the immigration and importation into the United States of the said five alien contract laborers, and it is clear that they were encouraged to come into the United States as contract laborers and employed as such, and encouraged and solicited to migrate into the United States as such. It is also clear that the pass was to be used by Canale in traveling back and forth, and that the pass for ten employés was delivered to Canale to be used by him in bringing such alien contract laborers into the United States.

[1] It appears from the facts stated: (1) That defendant in the state of New York, Northern district, did certain acts for the purpose of actually bringing these alien contract laborers into the United States by authorizing its agent to engage them and bring them into the United States to there perform manual labor and by furnishing him with a pass, or free transportation, over its roads while engaged in the performance of this undertaking, and by also furnishing him with a pass, or free transportation, for such alien contract laborers from Canada to the border of the United States, and then to their destination in the United States, should he engage them and succeed in getting them across the border, thereby prepaying their transportation. (2) The actual engaging or hiring and solicitation of these laborers to come into the United States was, so far as appears, done in Canada, but was done by the authority and direction of the defendant. In short, the defendant sent its agents and employés, with full authority to hire such alien contract laborers and bring them into the United States, into Canada, there to employ such laborers and induce and solicit them to come into the United States, and in the United States engage in manual labor for the defendant, and prepaid their passage by issuing free transportation for them over its own road from Canada into the United States. (3) Such agent of the defendant, so authorized, in execution of his agency, actually went into Canada and induced and solicited such contract laborers to come into the United States, and they with the aid and at the procurement and solicitation of the defendant undertook to come in, and the defendant by its said agent undertook to bring them in, their passage being prepaid by defendant; but, the purpose being disclosed, they were turned back and denied admission.

Therefore there was no *actual coming* into the United States, no *actual* entry, no actual immigration or importation of such contract laborers *into* the United States. The statute says (Act Feb. 20, 1907, c. 1134, § 5 [2 U. S. Comp. Stat. 1913, § 4250]):

"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 immigration or importation of any contract laborer into the United States shall forfeit and pay for every such offense the sum of One Thousand dollars," etc.

Section 4 of the same act (Comp. St. 1913, § 4248) reads as follows:

"It shall be a misdemeanor for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any

way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the terms of the last two provisos contained in section 2 of this act. 34 Stat. 900."

The passage of these five alien contract laborers was as much prepaid by this defendant, by issuing and delivering the pass with intent that it be used for the purpose, as if the defendant had paid actual cash. By section 4 it is a misdemeanor *"in any manner whatsoever* to prepay the transportation" of "contract laborers into the United States," and in my judgment this is done when the corporation, owning and operating transportation lines reaching into the foreign country, furnishes free transportation over its own lines for alien contract laborers employed by it in such foreign country to come into the United States and perform manual work and labor for it here. Prepaying the transportation is assisting or encouraging the importation or migration, and clearly section 4 of the act makes it a misdemeanor *"in any manner whatsoever* to prepay the transportation * * * of any contract laborer * * * into the United States." The gist of the offense is in prepaying the transportation, and the offense is committed when that is done, whether the contract laborers succeed in getting into the United States or not.

[2] So under section 5 of the act the offense is committed by engaging and *encouraging or soliciting* the coming or immigration of alien contract laborers into the United States, and the offense is complete when the alien manual laborers are actually engaged and encouraged or *solicited* to come in, free transportation having been provided beforehand and delivered for use by the defendant in the United States. This is made clear by the language of Mr. Justice Brewer in Lees v. United States, 150 U. S. 476, 480, 14 Sup. Ct. 163, 164 [37 L. Ed. 1150], where, discussing the Alien Contract Labor Law, as amended by the act of February 23, 1887 (24 Stat. 414, c. 220), the learned justice said:

"Given the power to exclude, it [Congress] has a right to make *that exclusion effective* by punishing those who assist in introducing, *or attempting to introduce,* aliens in violation of its provisions."

The language of sections 4 and 5 of the act of February 20, 1907, makes this clear, for the act of "soliciting the migration" of alien contract laborers subjects the offending party to the penalty imposed, and the statute so reads. To "solicit" and "soliciting" do not even imply success. The Century Dictionary says:

"Solicit. 1. To arouse or incite to action; summon; invite; tempt; allure; entice. 2. In criminal law, to incite another to commit a crime. To entice a man in a public place; said of a prostitute. To endeavor to bias or influence by the offer of a bribe. 3. To disturb; disquiet; make anxious. 4. To seek to obtain; strive after, especially by pleading; ask a thing with some degree of earnestness or persistency; as to solicit an office or favor; to solicit orders. 5. To petition or ask (a person) with some degree of earnestness or persistency; make petition to. 6. To advocate; plead; enforce the claims of; act as solicitor or advocate for or with reference to."

It seems to me clear that, when a corporation has transportation lines for passengers or travelers running into Canada, and, desiring

manual laborers, issues free transportation for such laborers, and sends its agent, provided therewith, into such country for alien contract laborers, with power to solicit and engage them and deliver or use such passes for bringing them into the United States, and such laborers are actually solicited and engaged, and an effort is made to bring them into the United States, the offense against the statute has been committed, even if the officers of the law intervene and prevent the laborers from crossing the border. In my judgment the statute was aimed at attempts to bring in such alien contract laborers, if accompanied by acts committed, some in the United States and some in the foreign country even if the attempt proved abortive and actual migration was prevented.

The defendant corporation was in the United States and there operating, and it was there that it set on foot the offending against the statute and did some of the acts complained of. If *all* the acts had been done in the Dominion of Canada, it might be contended that no offense at all was committed in the United States or within the jurisdiction of this court. United States v. Nord Deutscher Lloyd (C. C.) 186 Fed. 391. However in United States v. Craig (C. C.) 28 Fed. 795, it was said:

"It seems that Congress has power to punish by indictment offenses committed by citizens of the United States upon foreign soil"—meaning, of course, offenses against laws of the United States.

[3] In United States v. Craig, supra, it is true that Judge Brown held, not necessarily or because the question *was in the case,* but because it might arise later in the progress of the case, that the statute as it then read, *taken all together,* indicated an intent on the part of Congress that actual migration or importation into the United States of the alien contract laborers must follow the solicitation and employment. See pages 799, 800. The learned judge cited as authority for his dictum the case of Respublica v. Roberts, 1 Dall. 39, 1 L. Ed. 27, where defendant was indicted under a statute declaring that any person who shall "knowingly and willingly aid or assist any enemies at open war with this state," etc., "by persuading others to enlist for that purpose, shall be adjudged guilty of high treason." Then the court held that the word "persuading" meant "succeeded in procuring others to enlist." This was, of course, the only fair and just construction to put upon such a drastic statute; for, while the primary meaning of the word "persuade" is "to advise; counsel; urge the acceptance or practice of; commend by exposition, argument, demonstration," etc., it has a secondary meaning, "to *prevail upon* by demonstration, exposition, argument, entreaty, etc.; argue or reason into a certain belief or course of conduct; induce; win over." "Persuading" implies the completed act. So does "persuasion," which means "the act of persuading, influencing, or winning over the mind or will to some conclusion, determination or course of action." See Century Dictionary.

On the other hand, as we have seen, "solicitation" or "solicit" has no such meaning, and from it alone we draw no conclusion that the act of solicitation or of soliciting has met with success. The writer of Acts, 26:28, had in mind, when he wrote "*Almost* thou persuadest me to

be a Christian," the difference between solicit and persuade as commonly understood. He did not write, "Almost thou solicitest me to become a Christian." If we say, "Thou solicitest me to become a Christian," we give no indication we are convinced or won over; but if we say, "Thou persuadest me to become a Christian," we affirm that our mind is convinced and our course of action determined upon. In the case referred to, in determining the meaning of "persuading," the court construed it in the most merciful way, gave the defendant the benefit of any doubt as to which meaning was intended by the lawmakers, as was its duty. When we construe the meaning of "solicit" or "soliciting," we must give the word its *only* meaning and that does not include or imply a *successful* solicitation.

I am of the opinion, and hold, that a successful solicitation in this case was not necessary to complete the offense against the provisions of the statute; that is, that to incur the penalty it was not necessary that the alien contract laborers should have actually entered into the United States. As there was but one solicitation, all one act, the defendant incurred one penalty.

There will be a judgment for one penalty of $1,000 and costs. So ordered.

GIDEON v. REPRESENTATIVE SECURITIES CORP. et al.

(District Court, S. D. New York. April 10, 1916.)

1. CORPORATIONS ⟸123(23)—CORPORATE STOCK—REDEMPTION OF PLEDGE—PARTIES.

In a suit to redeem stock of New York corporation, whose by-laws were not shown to differ from the ordinary by-laws in regard to the transfer of corporate stock, which stock had been sold by the pledgee in violation of the pledgor's rights, a transferee of the stock, not residing in the district in which the suit was brought, to whom the stock had not yet been transferred on the books of the corporation, is a necessary party, and may be joined as defendant, since, under Stock Corporation Law N. Y. (Consol. Laws, c. 59) § 50, providing that the stock of a corporation shall be transferable in the manner prescribed in that law and in the by-laws of the company, it is the transfer on the books that passes the title, and the court therefore has jurisdiction over the stock under Act March 3, 1875, c. 137, § 8, 18 Stat. 472 (Comp. St. 1913, § 1039), giving the District Court jurisdiction to enforce a legal or equitable claim to property, real or personal, situated within the district.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. ⟸123(23); Pledges, Cent. Dig. § 125.]

2. INJUNCTION ⟸137(3)—TEMPORARY INJUNCTION—GROUNDS FOR DENIAL—DOUBTFUL RIGHT—DELAY.

In a suit to redeem from a pledge corporate stock sold by a pledgee in violation of the pledgor's rights, where the stock had not been transferred on the corporation's books, but plaintiff had already been defeated in a similar suit in the state court, and his delay in filing the suit was not sufficiently explained, a temporary injunction will not be granted to restrain the transfer of the stock on the corporation's books.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 308, 309; Dec. Dig. ⟸137(3).]

In Equity. Suit by George G. Gideon against the Representative Securities Corporation and another. Plaintiff moves to join Roy Curfman, a resident of another state, as party defendant, and for a temporary injunction. Motion to join granted, and motion for injunction denied.

This is a motion to add as a party defendant one Roy Curfman, a resident and citizen of the state of Missouri, under the following circumstances: The plaintiff was the owner of certain shares of stock in the defendant company, Hinds, Noble & Eldredge, a New York corporation, which shares he pledged to a third party, who afterwards sold the same to the Representative Securities Corporation. The suit was brought upon the theory that the sale, which was in supposed satisfaction of the pledge, was not in accordance with the rights of the pledgee under the note, and that the plaintiff could therefore redeem the same in the hands of the Representative Securities Corporation. Pending the suit, the Representative Securities Corporation has conveyed the stock to Curfman, whom the plaintiff wishes to join upon the theory that he is not a bona fide purchaser for value. The objection is raised that he cannot be served, being a nonresident, to which the plaintiff answers that its claim arises under Act March 3, 1875, c. 137, § 8, 18 Stat. 472 (Comp. St. 1913, § 1039), since the suit is to enforce a legal or equitable claim to real or personal property within this district. An injunction is also asked against Hinds, Noble & Eldredge's transferring the stock upon its books in case Curfman's certificate shall be presented for transfer.

Lewis & Kelsey, of New York City, for plaintiff.

Edward F. Clark and Roger Hinds, both of New York City, for defendants.

LEARNED HAND, District Judge (after stating the facts as above). [1] I think that Jellenik v. Huron Copper Mining Co., 177 U. S. 1, 20 Sup. Ct. 559, 44 L. Ed. 647, controls. The defendants suggest that that case turned upon the peculiar provisions of the Michigan statute, recited on pages 11 and 12 of the opinion; but the provisions were not peculiar. The only relevant portions were that the stock should be transferred only on the books of the company, in such form as the by-laws direct, or the directors shall prescribe. Section 50 of the Stock Corporation Law of New York provides that the stock of a corporation shall be transferable in the manner prescribed in that law and in the by-laws of the company. There is no evidence that the by-laws of the corporation in question are different from the usual by-laws, which generally provide that stock shall be transferred on the books of the company. It is the transfer on those books which transfers the title (N. Y. & New Haven R. R. v. Schuyler, 34 N. Y. 30), not the transfer of the certificate. The latter only constitutes the transferee an attorney in the name of the holder to make the transfer upon the books of the company. There is no need, therefore, to have personal jurisdiction over Roy Curfman, and on that account the case is unlike York County Bank v. Abbot (C. C.) 139 Fed. 988. If the plaintiff should succeed, he could redeem the stock by paying the amount of his debt into the registry of the court for the benefit of Curfman; the court would then direct Hinds, Noble & Eldredge to transfer the stock upon its books to the plaintiff, which would change the title to the shares and put them in the plaintiff. In order to protect the corporation, it could be permanently enjoined from issuing any stock to Curfman or his transferee. Curfman, if made a party to

the suit, would be estopped by this finding and could never succeed in a new suit. Perhaps his transferee pendente lite would not be concluded; but that question is quite separate from the question whether Curfman's affirmative action is necessary to transfer title, and whether, if joined, any relief could be granted against him.

[2] I will not, however, give an injunction. The plaintiff has been already beaten in a similar suit in the Eastern district of New York, where success was concededly necessary for his success here. The plaintiff's rights are certainly far too problematical for interlocutory relief. Besides, the delay is not sufficiently excused.

The motion to join Roy Curfman as party will be granted, and the motion for the injunction will be denied.

FURNESS, WITHY & CO., Limited, v. LOUIS MULLER & CO.

(District Court D. Maryland. March 29, 1916.)

SHIPPING ⊂⊃52—CHARTERS—BREACH.

The charterer of a steamship for carrying a cargo of wheat from Baltimore to one of a number of European ports, in August, 1914, *held* not justified in refusing to load the vessel because of the war; it appearing that none of the named ports was blockaded, and that other vessels carried cargoes safely at about the same time.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 211–213; Dec. Dig. ⊂⊃52.]

In Admiralty. Suit by Furness, Withy & Co., Limited, a corporation, against Louis Muller & Co., a corporation. Decree for libelant.

Whitelock, Deming & Kemp and John B. Deming, all of Baltimore, Md., for libelant.

Venable, Baetjer & Howard and Charles McHenry Howard, all of Baltimore, Md., for respondent.

ROSE, District Judge. The libelant, Furness, Withy & Co., Limited, is a British corporation. It seeks damages for the breach of a contract to furnish a cargo to one of its ships and to pay the agreed freight thereon. It will be called the owner. The respondent, Louis Muller & Co., is also a body corporate, organized under the laws of this state. It will be called the charterer.

The charter was made in May, 1914. By it the owner undertook to put at charterer's command at Baltimore, some time between the 5th and 25th of August, 1914, a steamer to carry 32,500 quarters of grain to that one of the six ports, Avonmouth, London, Antwerp, Rotterdam, Havre, or Dunkirk, which the charterer should name at the time of the signing of the bills of lading. If it designated either Havre or Dunkirk, it was to pay extra freight at the rate of 4½d. a quarter. On the 7th of August the owner tendered the steamship Kelbergan to the charterer. Its lay days began at 7 a. m. on the 8th and ended on

the 14th, on which last-named day the charterer told the master that it would not furnish the cargo. It is admitted that the owner did everything it was called upon to do.

The defense is that the outbreak of the European war made performance impossible, or at all events so changed the conditions existing at the time the charter was made as to justify either party in treating it as at an end. What made performance impossible? There was plenty of grain in Baltimore. It was wanted on the other side. The ship was ready to take it. The trouble was twofold. The charterer did not wish to ship without insuring the cargo against war risks. During the first two weeks of August, 1914, such insurance was hard to get, and could be obtained, if at all, only at rates which seemed then unreasonable, and which later events have demonstrated to have been so.

The other consideration which gave the charterer pause was it could not get pay for its grain in the way in which it and all other American grain exporters had been wont to get it. When the grain was stowed on the vessel and the bills of lading for it signed, it was the custom to attach them, with insurance policies and other necessary or convenient shipping documents, to a draft upon the European consignees, and to sell the drafts to bankers in this country. The war closed the market for such paper. The European buyers were not, at short notice, able to arrange to make payment on this side. The charterer and other persons in like line of business did not want to ship their grain and take the chance of having it paid for when it reached the other side, and many, if not most, of them had not the capital to do so, even if they had the disposition.

Nevertheless some grain was shipped from Baltimore to Antwerp in the first two weeks of August, and from and after August 15th such shipments were many and large. None of the ports to which the charterer had the right to send the grain were blockaded. The traffic was as legal in August as it had been in May. It is true that the charterer, by no fault of its own, found in its way many difficulties which had not been foreseen when the charter was made. These difficulties do not appear, however, to have been of a character which would excuse performance. Carnegie Steel Company v. United States, 240 U. S. 156, 36 Sup. Ct. 342, 60 L. Ed. —.

How much was the owner damaged? It lost the difference between the freight it would have received and what it would have had to pay out to earn it, less any other net earnings the ship actually made in the time which would otherwise have been occupied in discharging her charter obligations. In dollars and cents much depends on the port to which the charterer would have sent the ship. The charterer says that the owner's recovery cannot exceed the net profit the latter would have made had it been required to discharge at the port most costly to itself. The owner's view is that the damages should be calculated upon the assumption that the cargo would have been sent to the port which the court shall find the charterer would have chosen had it selected any. It is unnecessary to decide which is right. The charterer says, if it had been able to make arrangements to ship at all, it would have sent the ship to Havre. I believe it. That is the port which would

have been most expensive to the shipowner. It is true that the freight to Havre would have been greater than to any of the ports in England or the Low Countries named in the charter. Nevertheless the port charges and cost of unloading would also have been heavier, and, more important than all, the length of time during which the ship would have been detained would have been much greater. To unload at Havre, even in ordinary times, is a much slower process than at Rotterdam. In the conditions which prevailed there in early September of 1914—that is, just before, during, and immediately after the battle of the Marne—the delays would have been far more serious than under other circumstances. I am satisfied that, if the ship had taken the cargo to Havre, at least 41 days would have elapsed between the beginning of the lay days at Baltimore and the earliest date on which it could have entered upon another venture. Every day of this time in a sense counts double. It not only increases the cost to the ship of performing the original contract, but swells the portion of her net earnings under a new charter, which must be applied to a reduction of the first charterer's liability.

When the latter finally announced its refusal to perform, the owner sought a new charter, and three days later obtained one to carry coal from Norfolk to Rio. On the 11th of September, when the ship was within 500 miles of the latter port, it was stopped by the British cruiser Bristol. Its captain and crew were taken off and sent to Rio. The ship itself was put in charge of a prize master, and it was not until 45 days later, on October 26th, that it was again delivered to its own captain at the Brazilian capital. This prolongation of the voyage greatly reduced its average daily earnings, which nevertheless still remain substantial. The account between the owner and the charterer may be summarized as follows:

Freight, if the full cargo of grain had been sent to Havre	$20,201.62
Cost of earning it	13,632.24
Net earnings, if charter voyage had been made	$ 6,569.38
From which deduct the daily net earnings under the substituted charter, for the time during which the ship was earning money thereunder, but would, if the charterer had furnished the cargo, been engaged in earning the charter freight	5,666.71
Leaving net loss to owner	$ 902.67

For the last-named sum the owner must have a decree.

FURNESS, WITHY & CO., Limited, v. FAHEY et al.

(District Court, D. Maryland. March 29, 1916.)

In Admiralty. Suit by Furness, Withy & Co., Limited, a corporation, against John T. Fahey, J. Frank Reilly, and Edgar F. Richards, copartners trading as John T. Fahey & Co. Decree for libelant.

Whitelock, Deming & Kemp and John B. Deming, all of Baltimore, Md., for libelant.

Venable, Baetjer & Howard and Charles McHenry Howard, all of Baltimore, Md., for respondent.

ROSE, District Judge. Here, as in the case of Furness, Withy & Co., Limited, v. Louis Muller & Co., 232 Fed. 186, the shipowner seeks damages for the failure of charterer to furnish a cargo and pay freight. The same defense, in that case held insufficient, is, along with another, here relied upon. It has even less support in the facts. In the instant case the lay days did not expire until August 26th. Within the 11 days next preceding that date, three grain ships sailed from Baltimore to French ports. The charterer now before the court says, even so, the owner cannot recover because of its own refusal to carry out its contract.

When, on the 19th of August, the ship reported itself ready to receive cargo, it added that such tender was without prejudice to its right to demand extra compensation to cover war risk insurance, etc. Apparently this was nothing more than a notice that if, under the conditions existing, the charter gave the right to such higher pay, the owner did not waive it. It is, however, unnecessary so to decide. The next day the condition was withdrawn altogether. It is true that a member of the charterer's firm, in immediate charge of this transaction, denies that he ever heard of its withdrawal. After hearing him and the other witnesses I am satisfied that he is mistaken. It is certain that the charterers, for days after the notice and its withdrawal, acted as if the ship was at their command, if they wanted it. The contention that the owner had previously ended the charter was clearly an afterthought.

The charterers here had the same choice of ports as existed in the other cases. Here, as there, the charterers say they would have selected Havre. There is nothing to show that they would not. The damages will be calculated upon the assumption that they would. So figuring, and giving the charterers credit to the expiration of the period the ship would otherwise have been engaged in performing its original charter for its daily earnings under a time charter effective from September 8th, it appears that the owner is entitled to a decree for $5,592.57.

CLARK v. GRIMES.

(District Court, D. Maryland. April 15, 1916.)

CHATTEL MORTGAGES ⟸18—VALIDITY—AFTER-ACQUIRED PROPERTY.

Under the laws of Maryland, a chattel mortgage on a stock of goods, which covered, not only the stock then owned, but that which was subsequently purchased, is not valid as to the property acquired after its execution to replace that sold by the mortgagor, the proceeds of which he, with permission of the mortgagee, applied to his own use, though the mortgage required him to account therefor, even where the mortgagee took possession before the levy of an execution thereon, and therefore such mortgage does not entitle the mortgagee to seize and sell the after-acquired property, after the insolvency of the mortgagor, and within four months of the filing of a petition in bankruptcy against him.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 61–66; Dec. Dig. ⟸18.]

In Bankruptcy. On demurrer of James Clark, as trustee in bankruptcy, to the plea of J. Hamilton Grimes to the trustee's petition to recover the amount of a preference. Demurrer sustained.

Edward M. Hammond and Charles C. Wallace, both of Baltimore, Md., for plaintiff.

Richard S. Culbreth, of Baltimore, Md., for defendant.

ROSE, District Judge. The plaintiff, who is trustee in bankruptcy, seeks to recover $1,040.22, the amount of a preference which he says defendant obtained. From defendant's plea it appears that in November, 1911, the bankrupt wanted to purchase a stock in trade. The defendant lent him $1,300 to be used in paying for one. This sum was to be repaid in one year, with legal interest. Its repayment was secured by a mortgage on the stock purchased, and also on the "stock in trade, trade fixtures, and personal effects which shall or may at any time or times hereafter," during the continuance of the mortgage, "be brought into the said store or warehouse or other buildings connected therewith or attached thereto in any way, or be appropriated to the use of said business, either in addition to or substitution of the stock in trade, trade fixtures, and effects now being therein or belonging thereto."

By the mortgage, power was given to the mortgagee, upon default, to enter upon the bankrupt's premises, and to take and carry away the mortgaged property, and to sell the same at public auction. It was especially stipulated that the right so to seize and sell was to include "any and all goods that may have been brought into said store or appropriated to the use of said business, either in addition to or substitution for the said stock in trade, trade fixtures, and effects now being therein or belonging thereto, and therein or thereabout at the time of the seizure." Until default the bankrupt was to remain in possession, and was to be allowed, as agent for the defendant, to sell in the usual and regular course of business, at retail, such articles in the said store or buildings as customers might desire to buy, the bankrupt rendering to the defendant monthly accounts of the articles sold and the

prices thereof, and paying to him, whenever required, all moneys received by him from such sales, to be applied to the payment of the indebtedness under the mortgage.

The mortgage was not paid at maturity, but up until the 17th of November, 1913, interest was. The monthly accounts provided for were never rendered nor demanded, nor were the proceeds of any sales ever turned over by the bankrupt to defendant. At the time the mortgage was made the bankrupt was solvent, but before the 11th day of September, 1914, the defendant had reason to believe that he had become insolvent. Practically all of the stock in the store at the time the mortgage was executed had been sold and replaced by other goods, and the new was so mingled with the old that it was impossible to separate or distinguish them. On the date last mentioned, defendant, acting, as he claimed, under the terms of the mortgage, took possession of everything in the store. He subsequently sold it and realized the amount of money which the plaintiff claims. On the 17th of September, 1914, the mortgagor was adjudicated an involuntary bankrupt.

To defendant's plea the plaintiff demurred. The legal question thus raised is whether, under the law of Maryland, a judgment creditor of the bankrupt could, on the 17th of September, have levied on the stock in trade then in the hands of the defendant, and maintained such levy as against defendant's claim under the mortgage. There is no question that in this state such a levy, made at any time before the mortgagee took possession, would have been good. Hamilton v. Rogers, 8 Md. 301; Crocker v. Hopps, 78 Md. 260, 28 Atl. 99. Nor is defendant's case in any wise helped by the declaration in the mortgage that the mortgagor should act as the agent of the mortgagee. He never did so. The actual intent of the parties is shown by their uniform practice. The mortgagor sold the goods for his own benefit and lived out of the proceeds.

While defendant admits that when he took possession of the goods he knew the bankrupt was insolvent, he says he was then exercising the right acquired when the bankrupt was solvent. He relies upon Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577, and the cases which have followed it. That case holds that the extent, if at all, to which such a mortgage is valid, is a local question, upon which the decisions of the state courts will be followed. In Vermont such a mortgage is good. The title of the mortgagee, who under it takes possession of after-acquired property, relates back to the date of his mortgage, and is good even as against an assignee in insolvency. Such is not the Maryland doctrine. The two states are one in holding that a judgment creditor who levies upon such property before the mortgagee takes possession of it acquires a right superior to his. They differ as to the effect of the filing of a petition in insolvency before the mortgagee takes possession. Under such circumstances, in Vermont the mortgagee's title is better, in Maryland the trustee's.

The Court of Appeals of Maryland does not appear ever to have had occasion to decide what are the relative rights of the mortgagee

and a judgment creditor when the former takes possession of the property shortly before the latter levies upon it. It has said that such a mortgage is as to after-acquired property void, and has decided that it is ineffectual at law to create a lien. First National Bank v. Lindenstruth, 79 Md. 137, 28 Atl. 807, 47 Am. St. Rep. 366. In Vermont, the mortgage creates a lien, which may, it is true, be defeated by an execution levied before the mortgagee takes possession, but which, under other circumstances, is good. In Maryland, the mortgage is powerless to create a lien upon after-acquired property. Furthermore, in the latter state a mortgage in which the mortgagor reserves the right to sell for his own benefit the property mortgaged is void, as tending to delay, hinder, or defraud creditors. Edelhoff v. Horner-Miller Manufacturing Company, 86 Md. 595, 39 Atl. 314. There is no such a covenant in the mortgage before the court, but for years the parties acted as if there had been. What they did is at least as important as what they said.

The plea says some things which appear to be conclusions of law, rather than allegations of fact. If it shall turn out at the trial that the facts in evidence sustain some of them, the defendant may obtain the benefit by proper prayers for instructions to the jury.

The demurrer to his plea should be sustained. He will not be precluded from offering at the trial any prayers to which, upon the facts then shown, he may think himself entitled.

UNITED STATES v. SCOTT et al. (two cases). SAME v. JACOBS et al. (four cases). SAME v. HANTON.

(District Court, D. Rhode Island. April 26, 1916.)

Nos. 122, 130, 132–134, 136, 138.

1. CRIMINAL LAW ⊜280(2)—PLEA IN ABATEMENT—QUALIFICATION OF GRAND JURORS.

A plea in abatement to an indictment, on the ground that a grand juror was disqualified under Gen. Laws R. I. 1909, c. 279, § 1, providing that all persons over 25 years of age, qualified to vote in the election of the city council or upon any proposition to impose a tax for the expenditure of money in any town or city, shall be liable to serve as jurors, and amended Const. R. I. art. 2, § 2, providing that no person shall vote in the election of the city council or upon any proposition to impose a tax for the expenditure of money in any town or city unless he shall within the year next preceding have paid a tax assessed upon his property therein valued at least at $134, which alleged that the juror had not within the year next preceding the time he was summoned for service paid a tax, was insufficient, as not showing whether the calendar year or the 12 months preceding summoning was meant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 647, 648; Dec. Dig. ⊜280(2).]

2. CRIMINAL LAW ⊜280(1)—PLEA IN ABATEMENT—CONSTRUCTION AGAINST PLEADER.

An equivocal expression used in the plea in abatement to an indictment is to be taken against the pleader.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 645, 646; Dec. Dig. ⊜280(1).]

Seven separate indictments against William B. Scott, Forrest R. Jacobs, and Thomas R. Hanton. On demurrers by the United States to pleas in abatement in each case. Demurrers sustained.

Harvey A. Baker, U. S. Atty., of Providence, R. I.

Waterman & Greenlaw, of Providence, R. I., and Max Levy, of Newport, R. I., for defendants.

BROWN, District Judge. [1] The United States, in each of the above-entitled cases, demurs to a plea in abatement alleging the disqualification of a grand juror.

Chapter 279, section 1, General Laws of Rhode Island, provides for the qualification of jurors, as follows:

"All persons over twenty-five years of age who are qualified to vote in the election of the city council of any city or upon any proposition to impose a tax for the expenditure of money in any town or city, shall be liable to serve as jurors, except as is hereinafter provided."

To determine what persons are so qualified it is necessary to refer to sections 1 and 2 of the amended Constitution of Rhode Island (General Laws of Rhode Island 1909, p. 46).

Section 2 of article 2 contains the following:

"* * * Provided, that no person shall at any time be allowed to vote in the election of the city council of any city, or upon any proposition to impose a tax for the expenditure of money in any town or city, unless he shall within the year next preceding have paid a tax assessed upon his property therein, valued at least at one hundred and thirty-four dollars."

In attempting to negative the qualification of the grand juror to vote through payment of a tax, each of the pleas uses the following language:

"Nor had he, within the year next preceding the time he was so summoned for service as a grand juror in the District Court of the United States for the District of Rhode Island, paid a tax," etc.

As was pointed out in United States v. Gradwell (D. C.) 227 Fed. 243, 246, the expression "within the year next preceding," used in the provision of the Constitution, gave rise to much controversy as to whether the payment of the tax was required to be within the preceding calendar year or within the 12 months immediately preceding the time of voting. In a statute relating to taxation it is essential to distinguish clearly between a calendar year and a year, meaning merely 12 months or a term of 365 or 366 days prior to a given date. Such distinction is made, for example, in the United States statute providing for an income tax, which uses the term "the preceding calendar year" to indicate the income period for which the tax is to be assessed.

In Re Providence Voters, 13 R. I. 737, the Supreme Court of Rhode Island said upon the question whether the period meant was the calendar year or the 12 months period:

"There is in fact, if we consider merely the letter of the Constitution, no decisive reason for preferring either construction to the other."

[2] If the expression used in a plea in abatement is equivocal it is to be taken against the pleader. The opinion in Re Providence Vot-

ers shows that the language was of such uncertainty as to give rise to different interpretations in respect to matters of great practical importance.

This point was decided in United States v. Gradwell (D. C.) 227 Fed. 243, 246. Counsel urge that what was said upon this point in that opinion was obiter dictum. Although the plea was held bad on another ground, the opinion also decided the point now in question, saying:

"It follows that the pleas are bad for uncertainty in this particular."

The following clause:

"Irrespective of the question what day the plea refers to as the end of 'the year next preceding'"

—does not modify or relate to the express finding on the point, but referred to and waived consideration of another distinct contention; i. e., that the plea was bad, in that it was uncertain whether it referred to the date of impaneling the jury, the date of actual service as a juror, or the date of the return of the indictment.

Following the decision in United States v. Gradwell, I am of the opinion that the demurrer of the United States to each plea in abatement must be sustained.

Demurrers sustained.

In re GOLDBERG & SAGMAN.

Ex parte TEITELBAUM.

(District Court, S. D. New York. April 27, 1916.)

1. BANKRUPTCY ⟸293(1)—TITLE OF TRUSTEE—PROCEEDINGS.

A court of bankruptcy can entertain a petition by a judgment creditor of the corporation of which the bankrupt was an officer, and which turned its assets over to the bankrupt, to have those assets applied to the payment of the judgment, under the ordinary power of any court which has jurisdiction of a fund for distribution to draw to itself the disposition of all questions arising in its distribution; the determination of whether such proceeding shall be by plenary suit in that court, or by petition in the bankruptcy proceedings, being one merely of convenience.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 411; Dec. Dig. ⟸293(1).]

2. BANKRUPTCY ⟸288(1)—TITLE OF TRUSTEE—"SUMMARY PROCEEDINGS."

Such proceedings are not strictly "summary proceedings," which term is technically applicable only to proceedings to reduce to the possession of the court property held by others.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. ⟸288(1).

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

3. BANKRUPTCY ⟸302(1)—TITLE OF TRUSTEE—PROCEEDINGS—PETITION.

A petition by a judgment creditor of a corporation in bankruptcy proceedings against an officer of that corporation, to have applied to the payment of the judgment assets which the corporation turned over to

the bankrupt, which did not allege that the execution against the corporation was returned nulla bona, is insufficient.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 456; Dec. Dig. ⟸302(1).]

In Bankruptcy. In the matter of Goldberg & Sagman, bankrupts. Petition by Samuel Teitelbaum to review an order of the referee dismissing a petition to apply assets in the hands of the trustee to the payment of petitioner's judgment. Referee's order reversed, and cause remanded.

This is a petition to review an order of a referee in bankruptcy dismissing the petition of the petitioner below. The petition dismissed alleged that the petitioner's firm was the holder of notes executed by the Superior Jewelry Company, Incorporated, which fell due after the bankruptcy, and upon which the firm sued the maker. Judgment was taken upon one note, and execution issued against the Superior Jewelry Company, Incorporated, which had not been returned at the time the petition was issued. The bankrupt, Sagman, before the bankruptcy, had been an officer of the Superior Jewelry Company, Incorporated, and on August, 1914, took over all its assets, which consisted of various pieces of jewelry and diamonds, without consideration; the bankrupts assuming the liabilities of the corporation. The assets are now in the possession of the trustee, and the petitioner demands that they be applied in payment of his judgment against the Superior Jewelry Company, Incorporated. On objection by the trustee, the referee held that the case must be prosecuted by "plenary suit," and that he had no "summary jurisdiction" to consider the claim of the petitioner. On this account he dismissed the petition.

David Haar, of New York City, for petitioner.
Blumberg & Immergluck, of New York City, for respondent.

LEARNED HAND, District Judge (after stating the facts as above). [1] Any court, whether or not it be one of bankruptcy, having acquired jurisdiction of a fund for distribution, will prevent suits elsewhere, and draw to itself the decision of all questions arising in its disposition. Indeed, it cannot discharge its own duties otherwise, for it must know how much it has to distribute. The method of determining the claims rests ordinarily in its discretion, though our Circuit Court of Appeals has held that, when a bankruptcy court enjoins a third party's suit elsewhere, it should secure him a jury trial, if he would have had such, had he been allowed to pursue his remedies. In re Russell, 101 Fed. 248, 41 C. C. A. 323. When the petitioner has no such rights, and especially when he comes in voluntarily and files a petition in the bankruptcy court, his claim should be entertained; there can ordinarily be no convenience in having a "plenary suit," as is suggested here.

[2] The jurisdiction of this court is unquestionable; and it is confusing to regard the proceedings here as "summary"—a phrase more technically applicable to proceedings to reduce to the possession of this court property held by others. This is a proceeding strictly analogous to ancillary dependent bills in equity, arising where the court has sequestered corporate assets for distribution. Such bills do not, for example, rest upon an independent diversity of citizenship; they rest upon the custody of the fund. That is the case here; convenience, and that alone, determines whether they shall proceed by petition entitled

in the bankruptcy suit, or by "plenary suit" under the hand of the court. In such a case as this there is no convenience in a "plenary suit." Therefore the case will proceed on this petition.

[3] The frame of the petition is somewhat ambiguous, and in any aspect it is bad as it lies; but it may be made good by amendment. Its vice rests in the fact that there is no allegation that the execution has been returned nulla bona, and without that a judgment creditor of the Superior Jewelry Company, Incorporated, would have no power to assert its rights. If, however, the execution is returned, perhaps the bill will lie as a judgment creditors' bill alleging that there are assets of the corporation which are not subject to execution, but which ought nevertheless to be applied to the judgment of the petitioner; or it may be that it will lie as a bill to set aside a fraudulent conveyance, upon the theory that there was an actual conveyance by the Superior Jewelry Company, Incorporated, without adequate consideration. All these matters, however, rest wholly within the powers of the referee when he passes on the case; I mean to express no intimation as to whether the petitioner can eventually succeed. The petition is, within the competence of the referee, to be disposed of on the merits, precisely as though it were an original bill in equity before a court of competent jurisdiction.

The order is reversed, and the cause remanded for further proceedings in accordance with this opinion.

UNITED STATES v. ATCHISON, T. & S. F. RY. CO.

(District Court, D. New Mexico. February 21, 1916.)

No. 349.

MASTER AND SERVANT ⊜13—STATUTORY REGULATION—HOURS OF SERVICE—NOON HOUR.

Under the Hours of Service Act (Act March 4, 1907, c. 2939, 34 Stat. 1415 [Comp. St. 1913, §§ 8677–8680]), the period of one hour at noon, given by a railroad company to its telegraph operator, during which he was required to leave the office and was not subject to call, except for emergencies, is not to be counted as part of the time he is engaged.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. ⊜13.]

At Law. Action by the United States against the Atchison, Topeka & Santa Fé Railway Company to recover penalties under the Hours of Service Act. On stipulation as to the facts, judgment ordered for the defendant.

Summers Burkhart, U. S. Atty., of Albuquerque, N. M.
W. C. Reid, of Roswell, N. M., for defendant.

POLLOCK, District Judge. Action brought by the government to recover penalties imposed under what is commonly known as the Hours of Service Act. The petition contains eight grounds. The

parties have stipulated the facts. Hence there remains for determination only the law of the case.

The first count charges a violation of the act by defendant in permitting its telegraph operator, H. H. Edwards, to remain on duty from 8 a. m. to 6 p. m. at the station of Las Cruces, this state, on April 1, 1915, or a period of one hour in excess of that provided by the statute. The stipulation, admitting formal and jurisdictional facts relating to said count, reads:

"That defendant, during the 24-hour period, beginning at the hour of 8 o'clock a. m. on April 1, 1915, at its office and station at Las Cruces, in the state of New Mexico, within the jurisdiction of this court, required and permitted its certain telegraph operator and employé, to wit, H. H. Edwards, to be and remain on duty in said 24-hour period as follows: From the hour of 8 o'clock a. m., on said date, to the hour of 12 o'clock noon, on said date, and from the hour of 1 o'clock p. m. to the hour of 6 o'clock p. m., on said date, said employé was required to use said telegraph or telephone for the purposes mentioned in paragraph 3 hereof. That during the one-hour period from 12 o'clock noon, on said date, to the hour of 1 o'clock p. m., on said date, said telegraph operator and employé was permitted and required to and did leave said office and station. That during said one-hour period said operator and employé was not subject to call by defendant company, except in case of emergency. That said time was absolutely his own, to do with as he saw fit, and that all or a part of said one-hour period was spent by said operator and employé in eating one of his regular meals."

It is thus seen the question presented is this: Did the break of one hour, from 12 m. to 1 p. m., at which time the employé of defendant was off duty and not subject to call, unless in case of an emergency, relieve defendant from liability for the penalty imposed by the act? The government contends to the contrary, and, in support of its position, relies upon United States v. Chicago & N. W. Ry. Co. (D. C.) 219 Fed. 342; United States v. Northern Pac. R. Co. (D. C.) 213 Fed. 539; Id. (in the appellate court) 220 Fed. 108, —— C. C. A. ——. On the other hand, defendant contends it is not liable under the stipulated facts, and relies upon United States v. Atchison, Topeka & S. F. Ry. Co., 220 U. S. 37, 31 Sup. Ct. 362, 55 L. Ed. 361, affirming 177 Fed. 114, 100 C. C. A. 534.

From a reading of the above-cited cases it appears, in those relied upon by the plaintiff, the release of the employé from duty was but temporary, he all the while remained subject to recall; whereas, in the case relied upon by defendant, the release from duty was absolute, except in case an emergency arose. Under the stipulated facts, although the station of Las Cruces was one continuously operated day and night, yet, as the operator was not by the company permitted to remain on duty more than 9 hours out of the 24, constituting a day, I am of the opinion that the principle involved and determined in the case of United States v. Atchison, T. & S. F. Ry. Co., supra, is not only determinable of the case at bar, but, having in mind the purpose of Congress in the enactment of the law, that purpose is better subserved by permitting an operator to work 9 hours out of 10, with 1 hour absolutely his own, except in cases of emergency, that he may take his meals, relax, and have recreation, than would be the case where he is permitted to work 9 continuous consecutive hours.

It follows, as the question presented as to each of the counts in the petition under the agreed facts is the same, judgment must go on each of the counts for defendant company. It is so ordered.

FRANCO-AMERICAN CHEMICAL CO. v. McKEE GLASS CO.

(District Court, S. D. New York. April 10, 1916.)

CORPORATIONS ⟸668(5) — FOREIGN CORPORATIONS — PROCESS — "MANAGING AGENT."

The agent of a foreign corporation, who had a New York office where he received orders, which he transmitted to the corporation, but who had no authority to close any contracts, was not a "managing agent," within Code Civ. Proc. N. Y. § 432, on whom process could be served.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2611; Dec. Dig. ⟸668(5).

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

At Law. Action by the Franco-American Chemical Company against the McKee Glass Company, which was removed to the federal court. On defendant's motion to set aside the service of the summons. Service of summons quashed.

Motion to set aside the service of a summons in a removed case upon a Pennsylvania corporation, making glassware and sending it in part to sell in New York. The New York orders were procured by one Jones, who could close no contracts, but who had an office here, the rent being paid by the defendant, and who advised customers when the goods arrived. The cause was sent to a master, on whose report the cause came on for disposition. The facts appear more fully in his report. He reported against the jurisdiction.

Sherman & Sterling, of New York City, for plaintiff.
Saul Gordon, of New York City, for defendant.

LEARNED HAND, District Judge. I think that Jones was not a "managing agent" under the New York decisions. Some doubtful cases occur when the agent has the power to close contracts. Fontana v. Post Printing & Pub. Co., 87 App. Div. 234, 84 N. Y. Supp. 308, is such a case, and the court thought that even the power to close advertising contracts was not enough; to the same effect is Vitolo v. Bee Publishing Co., 66 App. Div. 582, 73 N. Y. Supp. 273. Palmer v. Chicago Evening Post, 85 Hun, 403, 32 N. Y. Supp. 992, must be considered overruled by these cases. In Beck v. North Packing & Provision Co., 159 App. Div. 418, 144 N. Y. Supp. 602, Snow had no power to close contracts and the case was clearer, though there was a dissent. I can find no case holding that where the agent has no power to close a contract he has that superior position which the New York Code of Civil Procedure, § 432, means by "managing agent," as construed by the language used in Taylor v. G. P. Ass'n, 136 N. Y. 343, 32 N. E. 992, 32 Am. St. Rep. 749, and Coler v. Pittsburgh Bridge

Co., 146 N. Y. 281, 40 N. E. 779. In this aspect the question is not unlike the question which generally arises in a federal court, and which is whether the corporation is "doing business" within the state, and so subject to local process. Generally that question also turns upon whether it has an agent with power to close contracts locally (Irons v. S. L. & G. H. Rogers [C. C.] 166 Fed. 781); but the case at bar does not present it, at least not until the service of process be made as required by the Code.

Jones had no power to do anything but receive and transmit orders, and notify customers. Calling him a "representative" means nothing; his settlement of small matters he was willing to guarantee personally shows the limits rather than the extent of his authority. The learned master was clearly right in finding that he was not a "managing agent," and his report will be confirmed, with costs.

Report confirmed; service of process quashed.

In re GRAND LODGE A. O. U. W.

(District Court, N. D. California, First Division. March 29, 1916.)

No. 9785.

BANKRUPTCY ⊂=43—CORPORATIONS ENTITLED TO BENEFITS—"INSURANCE CORPORATION."

A corporation which merely collects from such of its members as are willing to contribute funds which it thereafter distributes to the beneficiaries of deceased members, which was not an insurance company under the laws of the state where and when it was organized, and which belonged to a class of corporations well known at the time the Bankruptcy Act was passed as fraternal benefit associations, is not an "insurance corporation," within the provision of the Bankruptcy Act excepting such corporations from the benefits thereof.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 38; Dec. Dig. ⊂=43.

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

In Bankruptcy. In the matter of the Grand Lodge Ancient Order of United Workmen, bankrupt. On motion of Pauline Stanton to set aside the order of adjudication. Conclusion of the master affirmed, and motion denied.

L. P. Dunkley and G. F. Owens, both of San Francisco, Cal., for petitioners.

R. G. Hunt, of San Francisco, Cal., for trustee.

Snook & Church, of Oakland, Cal., for bankrupt.

DOOLING, District Judge. The conclusion of the special master on the petition of Pauline Stanton to set aside the order of adjudication herein must be affirmed. The bankrupt is not, in my opinion, an insurance corporation within the meaning of the bankrupt law. As a matter of fact it did not insure. Its only obligation was to collect, from such of its members as were willing to contribute, funds with

which, if and when collected, it would pay certain amounts to the beneficiaries of deceased members. There was no other obligation on the bankrupt than that of a collector. There was no obligation on the part of any of the members to pay unless they were willing to do so, and a failure on the part of a member to pay at a fixed date released him from any claim, legal or moral, for such payment. This is not insurance. The laws of this state have always recognized the difference between this and insurance, and specifically provided at the time that the bankrupt was incorporated that corporations of this character were not insurance corporations. Besides, corporations of this character had been in existence very many years at the time of the enactment of the bankrupt law, and of the provision excepting insurance corporations from its benefits, and were technically known as fraternal benevolent societies or associations, and not as insurance corporations. If Congress intended to place them among the excepted corporations, there was a well-known name by which they could have been designated. I do not think it was intended to embrace them in the term "insurance corporations."

The conclusion of the master is affirmed, and the motion to set aside the order of adjudication is denied.

In re SAN JOSE BAKING CO.

(District Court, N. D. California, First Division. March 31, 1916.)

No. 9887.

BANKRUPTCY ⟸92—INVOLUNTARY PROCEEDINGS—PETITION—WITHDRAWAL OF PETITIONERS.

The withdrawal of any number of creditors who in good faith filed a petition in bankruptcy against the debtor does not prevent the court from proceeding with the adjudication so long as one or more of the petitioning creditors, though less than the number required to institute the proceedings, desires it, since any other rule would permit the alleged bankrupt to bargain with part of the creditors to induce them to withdraw and thereby defeat the proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 107, 108, 133–136; Dec. Dig. ⟸92.]

In Bankruptcy. In the matter of the San Jose Baking Company, alleged bankrupt. On motion by one of the petitioning creditors that the respondent be adjudged a bankrupt upon the pleadings and record. Motion granted.

Lloyd S. Ackerman, of San Francisco, Cal., for Henry F. Allen.

Goodfellow, Eells, Moore & Orrick, of San Francisco, Cal., for Sperry Flour Co., Hammond Milling Co., and Western Meat Co.

DOOLING, District Judge. On January 28, 1916, Henry F. Allen, Sam Martin, and Fred Welborn, three creditors of the San Jose Baking Company, a corporation, filed their petition in this court praying that said corporation be adjudged a bankrupt. On February 11, 1916,

M. Getz & Co. and Fred B. Bain, Incorporated, two other creditors, filed their petition in intervention and joined in the prayer of the original petition.

The alleged bankrupt has not appeared, but certain of its creditors have filed answers to the original petition and the petition in intervention, which do not deny the commission of the act of bankruptcy alleged. The answer to the original petition relies upon the fact that Sam Martin and Fred Welborn, two of the original petitioners, had withdrawn from said petition. The answer to the petition in intervention relies upon the fact that the two petitioners therein had withdrawn therefrom.

Henry F. Allen, one of the original petitioners, now moves the court that upon the pleadings and record the respondent company be adjudged a bankrupt. The motion is based on the proposition that after a petition has been properly filed, and the court has acquired jurisdiction, no withdrawal by any of the petitioning creditors can affect the right of any of the other creditors to have the matter proceed to adjudication. The motion must be granted.

It is not within the power of a creditor who joins in good faith in a petition to have his debtor adjudged a bankrupt thereafter to withdraw from such petition, and prevent the matter from proceeding, so long as any of the petitioning creditors insist that the matter do proceed. It is doubtful whether such petitioning creditor may withdraw in any event without leave of court so to do. Any other rule would leave the door open for the perpetration of fraud, and the surreptitious bargaining between the debtor and petitioning creditors in an effort to procure the withdrawal of a sufficient number of the latter to reduce the amount of claims or the number of creditors below the requirements of the statute. The court cannot inquire into the good faith of every attempted withdrawal, nor indeed is there any way to prove the secret bargainings between debtor and creditors, and the only way to prevent them is to hold such attempted withdrawals to be ineffectual so long as any of the petitioning creditors desire in good faith to prosecute their petition to an adjudication.

As the only defense to the petition here is the attempted withdrawal of some of the petitioners, the motion for adjudication will be granted. Counsel will prepare the order.

GRANT v. NATIONAL BANK OF AUBURN.

In re CAYUGA CONST. CO.

(District Court, N. D. New York. April 12, 1916.)

1. STIPULATIONS ⇐⇒18(8)—EFFECT—AUTHORITY OF COURT.

Where, in an action by a trustee in bankruptcy to recover property on the ground that it was obtained by defendant as a preference, the parties stipulated that the case should be tried out before a referee of their own selection, and that, upon filing the report, judgment might be entered by the clerk in conformity therewith, the court adding the provision that judgment should not be entered until after 10 days' notice of

the filing of the report and of the proposed judgment, the court has no authority to review the findings of fact by the referee, the stipulation of the parties not so providing, and hence must uphold the judgment warranted by the conclusions of law, if they be justified by the findings of fact.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. § 52; Dec. Dig. ⊂⊃18(8).]

2. REFERENCE ⊂⊃99(4)—STIPULATIONS—POWER OF TRIAL COURT—TRIAL TO REFEREE.

Where, in an action to recover property on the ground that it was delivered as a preference, the parties, though there was no authority by statute, stipulated for trial to a referee, the trial court cannot review the referee's findings of fact, any more than an appellate court can review findings of fact in an action at law tried without a jury, where there is no statutory authority for the waiver of a jury and reservation of exceptions.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 153, 154; Dec. Dig. ⊂⊃99(4).]

3. REFERENCE ⊂⊃99(4)—RULES OF COURT—EFFECT.

A rule of court cannot confer jurisdiction on a District Court; therefore the District Court cannot, in an action by a trustee in bankruptcy to recover property on the ground that it was delivered as a preference, review under rule of court the findings of fact by the referee, where the parties stipulated for that mode of trial.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 153, 154; Dec. Dig. ⊂⊃99(4).]

4. BANKRUPTCY ⊂⊃162—"PREFERENCE"—WHAT CONSTITUTES.

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), declaring 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 adjudication, procured or suffered a judgment to be entered against himself in favor of any person, and the effect of the enforcement of such judgment will enable one of his creditors to obtain a greater per cent. of his debt than others, an insolvent corporation, which confessed judgment in favor of a bank two months before filing of a petition in bankruptcy against it, under which the bank was enabled to secure payment of its claim to the exclusion of other creditors of the same class, gave a "preference" which may be avoided.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 278–281; Dec. Dig. ⊂⊃162.

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

5. BANKRUPTCY ⊂⊃166(4)—PREFERENCE—INTENT.

Under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562, as amended by Act June 25, 1910, c. 412, § 11, 36 Stat. 842 (Comp. St. 1913, § 9644), providing that if a bankrupt shall suffer judgment to be entered against him in favor of any person, and if at the time of entry of judgment, it being within four months of the filing of the petition in bankruptcy, or after the filing thereof and before adjudication, the bankrupt be insolvent, and the judgment then operate as a preference, and the person receiving it shall have reasonable cause to believe that enforcement would effect a preference, it shall be voidable by the trustee, the confession, within such time, of a judgment by an insolvent in favor of one of its creditors, whereby such creditor was enabled to obtain payment to the exclusion of other creditors, constitutes the receipt of a preference, regardless of any intent on the part of the insolvent or the creditor, where the creditor

has reasonable cause to believe that the enforcement of such judgment would effect a preference, though it had no actual knowledge to that effect.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250, 251; Dec. Dig. ⊂⊃166(4).]

6. BANKRUPTCY ⊂⊃304—PREFERENCE—FINDINGS OF FACT.

In an action to recover property seized under judgment by confession, on the ground that such judgment constituted a preference within Bankr. Act, § 60b, as amended in 1910, a finding of fact that at the time the judgment was rendered the creditor, which had urged the bankrupt to pay it to the exclusion of other creditors, had reasonable cause to believe that the enforcement of the judgment would have that effect, is sufficient to show that the confession of the judgment worked a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 463; Dec. Dig. ⊂⊃304.]

7. BANKRUPTCY ⊂⊃168—PROCEEDINGS—PREFERENCE.

Where, through the medium of confession of a judgment, a creditor received a preference, buying in the bankrupt's property on execution sale, the creditor, on the preference being set aside, is, under the direct provisions of Bankr. Act, § 60b, as amended in 1910, liable for the value of the property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 234; Dec. Dig. ⊂⊃168.]

8. BANKRUPTCY ⊂⊃203—PREFERENCES—PURCHASE ON EXECUTION SALE—RECOVERY OF PROPERTY.

Bankr. Act, § 67c (Comp. St. 1910, § 9651), provides that any lien, obtained under a judgment by confession against a person within four months before the filing of a petition in bankruptcy by or against such person, shall be dissolved by the adjudication of such person as a bankrupt, if the lien was obtained while such person was insolvent, and its existence will work a preference, or the parties to be benefited had reasonable cause to believe such person was insolvent, or such lien was sought and permitted in fraud of the provisions of the act, but that nothing shall destroy or impair the title obtained by such levy, judgment, or lien of a bona fide purchaser who shall have acquired the property without notice or reasonable cause for inquiry. Within two months of the filing of the petition in bankruptcy against it, an insolvent corporation confessed judgment in favor of a bank. The bank bought in its property at execution sale, paying much less than the value of the property, and satisfying only two small judgments, which were prior liens; the debt due the bank being set off against the purchase price. *Held* that, as the transaction was a preference, the bank could not claim the property as a bona fide purchaser without notice.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⊂⊃203.]

9. BANKRUPTCY ⊂⊃178(1)—PREFERENCES—"TRANSFER"—WHAT CONSTITUTES.

Bankr. Act, § 1 (25) (Comp. St. 1913, § 9585), declares that a transfer shall include a sale and every other different mode of disposing or parting with property. Section 67e provides that all conveyances, transfers, assignments, or incumbrances made or given by a person adjudged a bankrupt within four months prior to the filing of the petition, with intent to hinder, delay, or defraud his creditors, shall be void as against such creditors. *Held* that, in such case, as the transaction was intended to give the bank a preference over other creditors, it constituted a voidable transfer.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 264–266, 268–274; Dec. Dig. ⊂⊃178(1).]

At Law. Action by J. Lewis Grant, as trustee in bankruptcy of the Cayuga Construction Company, against the National Bank of Auburn, tried by a referee on stipulation of parties. Application for an order vacating and setting aside report of referee, and for a new trial and an order directing judgment for defendant. Motion to set aside reports and findings, and for new trial, denied.

See, also, 197 Fed. 581.

This is an application to this court for an order vacating and setting aside the report of the referee herein, to whom this action was referred on stipulation of the parties to hear, try, and determine, and for a new trial and an order directing a judgment for the defendant. This court is asked to go behind the report and decision of the referee, and pass upon the correctness of rulings made on the trial, the sufficiency of the evidence to sustain the findings, and also the question whether or not the findings of fact are sufficient to sustain the conclusions of law and warrant the judgment for the plaintiff directed by the referee.

G. Earle Treat, of Auburn, N. Y. (Hull Greenfield, of Auburn, N. Y., of counsel), for plaintiff.

Chas. I. Avery, of Auburn, N. Y. (Frederic E. Storke, of Auburn, N. Y., of counsel), for defendant.

RAY, District Judge (after stating the facts as above). This action was brought to recover a preference received of the Cayuga Construction Company, and, being at issue, the parties voluntarily and without any suggestion from or direction of the court, entered into the following stipulation, referring the case to a referee selected by them, viz.:

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

"J. Lewis Grant, as Trustee in Bankruptcy of Cayuga Construction Company, Plaintiff, against The National Bank of Auburn, Defendant.

"It is hereby stipulated that the above-entitled cause and the issues of law and of fact therein be referred to Walter E. Woodin, Esq., of Auburn, New York, counselor at law, as sole referee to hear, try, and determine, and that upon filing his report judgment may be entered by the clerk in conformity therewith, without further notice. Either party may enter an order to the foregoing effect without further notice.

"Dated September 30, 1912.

G. Earle Treat,
"Attorney for Plaintiff.
"Chas. I. Avery,
"Attorney for Defendant."

Thereupon this court on such stipulation entered the following order:

"At a stated term of the District Court of the United States for the Northern District of New York, held in the city of Auburn, New York, at the United States courthouse on the 1st day of October, 1912. Present: Hon. George W. Ray, Judge Presiding.

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

"J. Lewis Grant, as Trustee in Bankruptcy of Cayuga Construction Company, Plaintiff, against The National Bank of Auburn, Defendant.

"The above-entitled action, presenting an issue of fact, having been placed on the calendar of causes for the above term, and the parties thereto having

by their attorneys filed a stipulation consenting that the issues therein be referred to Walter E. Woodin, Esq., counselor at law, of the city of Auburn, New York, to hear, try, and determine: Now, on motion of Charles I. Avery, Esq., it is hereby ordered that this cause and all the issues of law and fact therein are hereby referred to Walter E. Woodin, Esq., of Auburn, New York, as referee, to hear, try, and determine the same. Judgment shall not be entered until after ten days' notice of the filing of the report of the referee, and of the judgment proposed to be entered thereon.

"Geo. W. Ray, U. S. Judge."

The last clause of this order reading as follows:

"Judgment shall not be entered until after ten days' notice of the filing of the report of the referee, and of the judgment proposed to be entered thereon"

—was added by the judge signing the order and was not authorized by the terms of the stipulation. It was done by the court to safeguard the rights of the parties and enable the one defeated to see that the judgment was in accordance with the findings and directions of the referee. The case was then duly tried before the referee selected by the parties, and evidence taken, and thereupon such referee made his report, in which he finds:

I. That May 19, 1911, a petition in bankruptcy against the Cayuga Construction Company was filed; that June 6, 1911, adjudication followed; that July 19, 1911, the plaintiff here, J. Lewis Grant, was duly appointed trustee in bankruptcy of the estate and property of said bankrupt; and that he duly qualified and has since acted as such.

II. That April 13, 1911, less than two months prior to the filing of such petition in bankruptcy, the said Cayuga Construction Company confessed a judgment in the Supreme Court of the state of New York in favor of the National Bank of Auburn, N. Y., this defendant, for the sum of $4,756.86 on certain notes held by said bank and made by said Construction Company, and that on the 19th day of April, 1911, judgment was entered and docketed on said confession and pursuant thereto in Cayuga county clerk's office for the sum of $4,772.11, damages and costs, and that on the same day execution thereon was duly issued and delivered to the sheriff of said county, who levied, pursuant to direction of the defendant here, the plaintiff in such judgment and execution, upon all the personal property of said Cayuga Construction Company.

III. That at the time last mentioned the sheriff had two other executions against said Construction Company, issued on judgments for $58.39 in favor of Auburn Light, Heat & Power Company, and $169.44 in favor of Wood Glass Company, both entered and docketed April 14, 1911, within the four months preceding the filing of the petition in bankruptcy, and by virtue of which the said judgment creditors had issued executions, and levied upon and advertised for sale the property of said Construction Company.

IV. That the defendant here, the National Bank of Auburn, knew of such last-mentioned judgments and of such levy, etc., when it docketed its judgment and issued execution.

V. That on the 28th day of April, 1911, the sheriff of Cayuga county sold all of the personal property of said Cayuga Construction Company, with the exception of some book accounts of no value, on such three executions, to the said National Bank of Auburn, for the sum of $3,500, which bank paid him that sum therefor, and May 11, 1911, returned said smaller executions wholly satisfied, and the execution in favor of this defendant, said bank, satisfied as to $3,196.51 and unsatisfied as to the balance. The sheriff returned said sum of $3,196.51 to the bank to apply on the execution and judgment.

VI. That such property so levied on, and sold and purchased by the defendant bank, was reasonably worth $9,457.54.

VII. That all of such property was sold by the sheriff at the plant of the said Cayuga Construction Company, and remained there until sold and disposed of. The defendant, the National Bank of Auburn, after such sale,

employed one Byrnes, and he, with the president and secretary of said Construction Company, sold off and disposed of the lumber, working up some of it, and using the machinery for that purpose.

VIII. That at the time of the filing of the petition in bankruptcy, and at the time of the adjudication, and also at the time said judgment was confessed to the bank, and the levy and sale made by the said sheriff, all the property, real and personal, of said Cayuga Construction Company, was worth and of the value of only $13,712.54, of which $4,255 was real estate, $3,500 machinery, $5,731.79 unmanufactured lumber, and $225.75 interior furnishings in process of manufacture. The real estate was subject to a mortgage of $3,000 and interest thereon for six months. The said company was then owing, including said mortgage, $23,228.38; all of such indebtedness except that being unsecured. This includes $476.42 due for labor and taxes. Aside from such labor, taxes, and the mortgage, such claims were of the same class. At the time such judgment was confessed to the bank, and the levy and sale made, the said Cayuga Construction Company was largely insolvent.

IX. This Cayuga Construction Company was organized February 29, 1908, with an issued and paid-up stock of $2,600, all that was ever paid in, and the said defendant bank was then or soon thereafter informed that all of this stock had been acquired by John T. West, its president, George F. West, its secretary, Fred J. Wells, its treasurer, and Fred C. Almutt, a director; each owning at that time seven shares. In 1909 the said company purchased the real estate before mentioned for $5,800. This was all the real estate it ever owned, except a vacant lot used as a lumber yard. The company's business was the manufacture of interior woodwork for houses, etc. Soon after commencing business it commenced transacting its banking business with this defendant, the National Bank of Auburn, and up to February 11, 1909, had borrowed of it $1,500 on notes indorsed by said officers of the company. Under date of February 11, 1909, the company made a statement to the bank, giving its total resources as $6,800, and October 10, 1910, it gave to the bank a statement of its resources without new capital as $35,700, and its indebtedness as less than $4,500. March 5, 1911, about five months thereafter, it stated to the bank its resources as $25,000, without change of capital, a falling off or loss of over $10,000 in resources, and its debts and liabilities as $10,800, an increase in indebtedness in about six months of some $6,300. Of this indebtedness the bank then held $4,550 in notes of the company indorsed by the two Wests and by its attorney to the extent of $3,000. This attorney for the bank was the one with whom the officers of the bank consulted in arranging for said confession of judgment. These statements were in writing and held by the bank. The statement of March 5, 1911, was in response to a suggestion from Mr. Keeler, cashier of the bank, to the president of such company, Mr. West, that he, West, was becoming careless about his obligations, and Mr. West then informed Mr. Keeler that the company had been speculating in lumber and was owing the officers of the company considerable sums of money loaned to the company and *for wages*, all of which information was communicated to the president of the bank.

That on or about March 5, 1911, the time when this information was acquired, the defendant bank, through its said officers, began to negotiate with said company, through its president and its said attorney, for a confession of judgment by the company to the bank "for the purpose of obtaining an advantage over the other creditors of said company," and that "said bank had reasonable cause to believe when said confession was finally obtained that the said Construction Company was insolvent, and that the enforcement of said judgment would work a preference in favor of said bank (defendant here) over the other creditors of said bankrupt (company) of the same class, and enable said bank to obtain a greater percentage of its said debt than other creditors of said company of the same class."

The referee also finds:

"That the enforcement of said judgment as aforesaid did work the preference above mentioned, and did hinder, delay, and deprive the other creditors

of said bankrupt of their lawful shares in the property of said bankrupt, *and both parties to said judgment intended to bring about said results when said confession of judgment was made.*"

The referee also finds a demand was made of the bank by the trustee for a return of the property and and its proceeds, etc. The conclusions of law, somewhat mixed with findings of fact, are as follows:

"That said confessed judgment filed in Cayuga county clerk's office April 19, 1911, in favor of said defendant bank and against said Construction Company for $4,773.11, damages and costs, was void, because made while said company was insolvent, and at a time when the defendant had reasonable cause to believe plaintiff to be insolvent, and reasonable cause to believe that the enforcement of said judgment would work a preference in favor of said bank, and enable said bank to obtain a greater percentage of its debts against said Construction Company than other creditors of said company of the same class.

"II. That said confessed judgment and all proceedings thereunder was and are void, because said judgment and the sale was made and consented to by both the parties thereto with intent to hinder and delay the other creditors of said bankrupt, and with intent to deprive the other creditors of said bankrupt of their rights to share equally, as provided by the bankruptcy law of the United States, in the property of said bankrupt.

"III. That said confessed judgment was and is void, because it did hinder, delay, and deprive the creditors of said bankrupt of their rights in the property of said bankrupt and was so intended by the parties thereto.

"IV. That said confessed judgment is void, because made, entered, and enforced against the property of said bankrupt within four months prior to its adjudication in bankruptcy, and while said company was insolvent.

"V. That the plaintiff and trustee in bankruptcy of the Cayuga Construction Company is entitled to recover of the National Bank of Auburn, defendant, the sum of $9,154.05, being the value of the property taken from said company under said confessed judgment and sale, with interest thereon since July 26, 1911, less the sum of $303.49 retained by the sheriff as aforesaid; such interest amounting at the date of this report to the sum of $1,727.05, the total amount to be recovered by the plaintiff against the defendant being the sum of $10,881.10, for which sum judgment is hereby directed to be entered, with the costs of this action."

It would seem clear that the facts found justify the conclusions of law, or some of them, and sufficient of them to authorize and justify the judgment directed for $10,881.10, including $1,727.05 interest, and being the value of the property taken by the bank less the $303.49 retained by the sheriff and paid on the small judgments and executions.

[1] The trial and determination of the issues involved in the pleadings were voluntarily taken from the court by the act and stipulation of the parties themselves. They stipulated and agreed that the case should be tried by and before Mr. Woodin, as referee, they selecting and naming him, and that he should hear, try, and determine same; and more, the parties stipulated and agreed that "upon filing his report judgment may be entered by the clerk in conformity therewith without further notice," and also that "either party may enter an order to the foregoing effect without further notice." This reserved nothing for the court, but eliminated it entirely, and made little, if anything, more than an arbitration of it. This stipulation cannot be disregarded or varied. It was the solemn deliberate act of the parties. It was the authority for all that was done; the court having sanctioned that disposition of the case. Nothing was reserved to the court or for the

court. The only restriction on this stipulation imposed by the court was that:

"Judgment shall not be entered until after ten days' notice of the filing of the report of the referee, and of the judgment proposed to be entered."

But for this provision imposed by the court, the successful party, on the filing of the report, could have entered his judgment and issued execution before the other party was aware of what the decision of the referee was. I do not see that this court has any power or right to examine the evidence, or the correctness of the rulings of the referee in the admission or rejection of evidence, or in refusing requests to find facts, or in making findings of fact. If conclusions of law sufficient to support the judgment directed are supported and justified by the findings of fact, then judgment as directed may and must be entered on the stipulation and findings of fact and conclusions of law and pursuant thereto. David Lupton Sons v. Auto Club of America, 225 U. S. 489, 494, 495, 32 Sup. Ct. 711, 56 L. Ed. 1177, Ann. Cas. 1914A, 599, and cases there cited.

[2] The reasons are twofold: First, the parties have stipulated that a referee named by themselves should hear, try and *determine* the case and that judgment be entered on his decision; second, there is no law of Congress authorizing such a reference, or preserving to, or in, or conferring on, the court any power to review the findings of fact made by the referee, when such a reference is agreed upon by the parties or to review his rulings on the admission or rejection of evidence. For this reason the court itself originally had only the common-law powers in such cases, and could exercise no other unless expressly reserved to the court by the stipulation, if indeed such reservation could have been made, inasmuch as judicial power cannot be conferred by stipulation or agreement of the parties. "Where the parties *agree* that the *court* shall decide questions both of law and fact, none of the questions decided, either of fact or law, can be reviewed by this court (the Supreme Court) on a writ of error." Campbell v. Boyreau, 21 How. 223, 225, 226, 16 L. Ed. 96. In so deciding, and the case has been steadily followed since the decision was rendered, the court after stating that, in the absence of statutory authority of Congress, the courts of the United States, so far as questions of law are concerned, are regulated in their modes of proceeding according to the rules and principles of the common law, said:

"The finding of issues of fact by the court upon the evidence is altogether unknown to a common-law court, and *cannot be recognized as a judicial act.* Such questions are exclusively within the province of the jury; and if, by agreement of parties, the questions of fact in dispute are submitted for decision to the judge upon the evidence, *he does not exercise judicial authority in deciding, but acts rather in the character of arbitrator.* And this court, therefore, cannot regard the facts so found as judicially determined in the court below, nor examine the questions of law as if these facts had been conclusively determined by a jury or settled by the admission of the parties. Nor can any exception be taken to an opinion of the court upon the admission or rejection of testimony, or upon any other question of law which may grow out of the evidence, unless a jury was actually impaneled and the exception reserved while they were still at the bar. The statute which gives the exception in a trial at common law gives it only in such cases."

Later statutory provision was made whereby the parties may *in writing waive a trial by jury* and try the case before *the court* itself, and when *this is done* the case may be reviewed on exceptions taken in the usual manner. But no provision by law has been made for referring by stipulation of the parties an action at law to a referee selected by the parties to hear, *try, and determine,* especially when it is also stipulated that judgment is to be entered on the decision of such referee. Hence such a reference takes on the character of *an arbitration,* or of a mere trial before the judge as arbitrator, *in the absence of a written stipulation waiving a jury trial and consenting to a trial before the court without a jury.* The result is that this court is without power to examine the evidence in this case, to ascertain whether it is sufficient to sustain the findings of fact, or to review the rulings on the admission or rejection of evidence, or the refusal of the referee to find certain facts as requested or to grant a new trial.

This is now established by a long line of authority. In New York & Cumberland R. R. Co. v. Myers, 18 How. 246, 250, 253, 15 L. Ed. 380, the parties before trial, as here, agreed upon a reference, and the court held:

"This conclusion of his (the referee) is a *final* decision on the question, for this court cannot revise his mistakes, either of law or of fact, if such had been established. Burchell v. Marsh, 17 How. 344 [15 L. Ed. 96]; Kleine v. Catara, 2 Gall. 61 [Fed. Cas. No. 7,869]."

In Bond v. Dustin, 112 U. S. 604, 5 Sup. Ct. 296, 28 L. Ed. 835, the question was up again, and Mr. Justice Gray went more or less into the common-law doctrine and the change or modification made by Act March 3, 1865, c. 86, § 4, and carried into the Revised Statutes of the United States (13 Stat. 501; Rev. St. §§ 649, 700; 1 U. S. Comp. St. 1913, § 1587), and quoted from Campbell v. Boyreau, supra, and which statute provides for the *waiver in writing* of a trial by jury, and there said:

"Since the passage of this statute it is *equally well settled* by a series of decisions that this court cannot consider the correctness of rulings at the trial of an action by the Circuit Court without a jury, *unless the record shows such a waiver of a jury as the statute requires, by stipulation in writing, signed by the parties or their attorneys,* and filed with the clerk" (citing the cases).

The learned justice then says:

"The only evidence of a waiver of a jury is the statement in the record that when the case came on for trial the issue joined by consent is tried by the court, a jury being waived," and in the recital at the beginning of the bill of exceptions, "The above cause coming on for trial by agreement of parties was tried by the court, without the intervention of a jury."

The court then held this insufficient to comply with the statute providing for the waiver of a trial by jury *in writing* and said:

"The necessary conclusion is that this court has no authority to consider the exceptions to the admission of evidence at the trial."

The statute referred to reads as follows:

"Sec. 1587. (R. S. § 649.) *Trial of Issues of Fact by the Court.* Issues of fact in civil cases in any Circuit Court may be tried and determined by

the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

By section 700, R. S. U. S. (section 1668, 1 Comp. St. U. S. 1913), the Supreme Court may consider the exceptions when the reference has been made as provided by section 1587, supra. The latest case of which I am aware is David Lupton Sons v. Auto Club of America, 225 U. S. 480, 494, 495, 32 Sup. Ct. 711, 712 [56 L. Ed. 1177, Ann. Cas. 1914A, 699], where Mr. Justice Hughes, in giving the opinion of the court, says:

"*Upon written stipulation the action was referred to a referee to hear and determine the issues.* The referee reported his findings of fact and conclusions of law, holding that the contract was void under the statute and that the complaint should be dismissed. * * * As the trial was had before the referee pursuant to the stipulation, the only question presented here is whether there is any error of law in the judgment rendered by the court upon the facts found by the referee. The *findings of fact are conclusive in this court.* We cannot review any of the exceptions to those findings or to the refusal of the referee to find facts as requested"—citing several cases.

When we consider the foundation for and reason of this rule and line of decisions, we see that when a stipulation is made by the parties, or their attorneys, agreeing upon a referee and submitting the case to him to "hear, try, and determine," and especially when the stipulation provides for the entry of judgment accordingly on his report, the court itself has nothing to do, no judicial power in the premises, except to see that judgment is entered according to the findings and the directions made by such referee. The District Court has no greater judicial power than the Supreme Court of the United States, or the Circuit Court of Appeals, and cannot review or correct errors of such referee, if any, in the admission or rejection of evidence, his holding as to the sufficiency of the evidence to sustain the findings, or his refusals to find as requested. This court can only look to the pleadings to see if the findings are within the issues framed and to the facts found, to ascertain whether the facts found sustain the conclusions of law, or sufficient of them to sustain the judgment directed and entered. Such a trial before a referee is little more than an arbitration, as has been more than once decided in this, the Second circuit, and other circuits. Steel et al. v. Lord, 93 Fed. 728, 35 C. C. A. 555; Parker et al. v. Ogdensburg & L. C. R. Co., 79 Fed. 817, 25 C. C. A. 205; Chicago, M. & St. P. R. Co. v. Clark, 92 Fed. 968, 35 C. C. A. 120; Hudson River Pulp & Paper Co. v. H. H. Warner & Co., 99 Fed. 187, 39 C. C. A. 452; J. G. White & Co. v. Ball Eng. Co., 223 Fed. 618, 139 C. C. A. 286; Edenborn v. Sim, 206 Fed. 275, 124 C. C. A. 339. In J. G. White & Co. v. Ball Eng. Co., supra, the Circuit Court of Appeals in this, the Second, circuit, said:

"The trial was before a referee, called in Connecticut a 'committee,' and therefore the only question before us for consideration is whether his findings of fact sustain the judgment. We can look only at the pleadings, order of reference, findings of fact, conclusions of law, and judgment of the court. We cannot consider the testimony, the exhibits (except so far as included in the findings of fact), or the refusals of the committee to find."

As seen, the powers of the District Court in these respects are no broader or greater then are those of the Circuit Court of Appeals or Supreme Court. See, also, Alder v. Edenborn (D. C.) 198 Fed. 930, and Del. L. & W. R. Co. v. Caboni, 223 Fed. 631, 139 C. C. A. 177. It was not an agreement or stipulation to take the evidence out of court, and then submit it with recommended findings of fact to the court, a jury trial being waived by written stipulation, for its review and decision, but a transfer of the case to the referee for trial before and by him, and for his decision, and for a judgment thereon.

[3] The learned counsel for the defendant urges old rule 22 (Blatchford's Rules [Ed. 1884] 622), but it requires no argument to show that a rule of court cannot confer judicial power on a District Court, or any other court, unless such rule is expressly authorized by some law of Congress, and there is no such statute. This court has no power to set aside or disregard the findings of fact of the referee, or disregard his conclusions of law, if authorized by the facts found, or to grant a new trial, or to disregard or modify the stipulation of the parties. The appointment of arbitrators or referees at common law, and common-law arbitrators, were well known; but such arbitrators neither possessed nor exercised judicial powers, and were not even required to report and return the facts found. See Hecker v. Fowler, 2 Wall. 123, 17 L. Ed. 759.

[4] By section 60a of the Bankruptcy Act a person, and this includes a corporation, is deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition in bankruptcy, either procured or suffered a judgment to be entered against himself in favor of any person, and the effect of the enforcement of such judgment 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. This Construction Company was heavily insolvent, and knew it, and not only suffered, but procured, this large judgment to be procured and entered against itself. The effect of the enforcement of the judgment would be, as it well knew, to give to the bank substantially everything it owned, and a greater percentage of its claim than any other creditor of the same class. It is clear, therefore, that the Cayuga Construction Company gave a preference to each of the judgment creditors named.

[5,6] By section 60b of the same act it is provided that, if a bankrupt shall have suffered a judgment to be entered against him in favor of any person, and if at the time of the entry of the judgment, it being within four months before the filing of the petition in bankruptcy, the bankrupt be insolvent, and the judgment then operate as a preference, and the person, including a bank, shall then *have reasonable cause to believe* that the enforcement of such judgment would effect a preference, such judgment is voidable by the trustee and he may recover the property *or its value* from the person or bank receiving the preference. That these judgments and the sales thereunder, and the transfer of the property to the bank by a sale thereunder, operated as a preference, cannot be questioned. The referee has found on the evidence given and produced before him that the bank *did have*

reasonable cause to believe that the enforcement of the judgment would effect a preference. The referee finds, not only that the bank knew of large indebtedness to other persons and of the two other judgments, but that the bank by its officers consulted as to steps and means to obtain the property of its debtor in preference to other creditors. The bank, by issuing execution, and selling, or causing to be sold, and purchasing this property, perfected the payment to itself of a preference. This court cannot, and no appellate court in the face of the stipulation can, go behind that finding of the referee, and examine the evidence, to ascertain and determine whether such evidence sustains this finding of fact. That is not within the power of this court, or of any appellate court.

Since the amendment to the bankruptcy law of 1910, if the bank knew, or had reasonable cause to believe, that its debt would be satisfied in whole or in part by the confession of the judgment, and its filing and docket, and the issuing of an execution thereon, and a levy and sale thereunder of all the personal property of the Cayuga Construction Company, to the exclusion of other creditors of such company of the same class, it constituted the receipt of a preference regardless of any *intent* on the part of the company or of the bank, and the trustee may recover the property received under and through such sale, *or its value.* To establish reasonable cause to believe it is not necessary to prove either *actual knowledge or actual belief,* but such circumstances and conditions, within the knowledge of the party receiving the preference, as naturally would lead a man of ordinary prudence and intelligence, had he been the creditor receiving the preference, to arrive at the conclusion that the judgment, levy, and sale would result in a preference, and the creditor must have such knowledge of facts and circumstances as would reasonably induce the belief that his debtor was insolvent. Aronin v. Security Bank of New York, 228 Fed. 888, 890, — C. C. A. —, where the Circuit Court of Appeals said that reasonable cause to believe is shown when it appears that:

"The bank received the accounts under such circumstances as naturally would have caused an ordinary person, * * * receiving the preference to have believed that thereby a preference would be effected."

See also to the same precise effect Pratt v. Columbia Bank (D. C.) 157 Fed. 137, 18 Am. Bankr. R. 406, 415; In re Neill-Pinckney-Maxwell Co. (D. C.) 170 Fed. 481, 22 Am. Bankr. R. 401.

It is sufficient if the facts brought to the knowledge of the person to be affected are such as would produce action and inquiry on the part of an ordinarily intelligent man (Grant v. Bank, 97 U. S. 80, 24 L. Ed. 971), or a prudent business man (Bank v. Cook, 95 U. S. 343, 24 L. Ed. 412; Toof v. Martin, 13 Wall. 40, 20 L. Ed. 481), or a person of ordinary prudence and discretion (Wager v. Hall, 16 Wall. 584, 21 L. Ed. 504). Facts which would put an intelligent business man upon inquiry constitute reasonable cause to believe, if purpose or intent to prefer would be discovered by making and following up the inquiry. Stern v. Paper (D. C.) 183 Fed. 228, 25 Am. Bankr. R. 451; Tilt v. Citizens' Trust Co. (D. C.) 191 Fed. 441, 27 Am. Bankr.

R. 320. In this case the defendant was not only put on inquiry, but made inquiry, and as a result secured the judgment by confession speedily and made a speedy sale thereunder.

On the question of preference, therefore, the inquiry is: Do the findings of fact make out the necessary "reasonable cause to believe" on the part of the defendant, the National Bank of Auburn? The finding of fact is that the bank did have at the time mentioned such reasonable cause to believe that the enforcement of the judgment would effect a preference. I think this is a sufficient finding. The findings of fact are not to embrace a statement of the evidence, or of all the minor facts proved which together establish the main fact. The fact necessary to be established by evidence was that the National Bank of Auburn, at the time it received or obtained and filed this confession of judgment, docketed same, and issued execution thereon, and sold the property thereunder, or had it sold, and took possession of such property, then had reasonable cause to believe that such enforcement of such judgment and transfer of property to itself would effect a preference; that is, enable the bank to obtain a greater percentage of its debt than any other of such creditors of the same class. Proof or establishment of this fact was necessarily made up of proof of many facts and circumstances established to the satisfaction of the referee, such as proof of insolvency, the existence of other creditors, and actual knowledge on the part of the bank, or knowledge of such facts and circumstances as gave it knowledge of such facts as satisfied the referee that the bank had, or was chargeable with, the knowledge of conditions required by the law. It must be assumed that the evidence was sufficient to sustain and warrant this finding of fact.

[7] It is claimed by the defendant that the bank cannot be charged with more than the sum bid and paid for the property on the execution sale made by the sheriff, in the absence of proof that the sale was a sham or unfairly conducted. But the law says that the trustee in bankruptcy may recover from the one who has received the preference either the property or *its value*. The language is:

"It [the preference] shall be voidable by the trustee and he may recover the property [received] or its value from such person."

Here the property was seized by the sheriff under this defendant's execution and sold, and the defendant bank bid it in and took possession and disposed of it, and on demand *refused* to give it up, or its proceeds. The trustee gave to the bank an opportunity to surrender the property, which it did not do. When property is fairly and openly sold at public sale on due notice, the amount for which sold is some evidence of its value, but not final, conclusive, or determinative of that question of value. When this property was levied on and sold by the sheriff under this execution (and the two smaller ones) there was no trustee; the Construction Company was insolvent and had confessed the judgment, and there is neither proof nor pretense that the general creditors had any information as to the judgment or sale. Therefore the price for which this property sold on the execution sale is not determinative of its value. The referee found its value as above

stated, and the assumption is that this finding was based on evidence, and, as seen, this court cannot go behind that finding.

[8] Inasmuch as the findings of the referee as to a preference fully support the conclusions of law based thereon and support the judgment directed, it is not necessary for this court to consider or pass upon the question of actual fraud, etc., under other sections and provisions of the Bankruptcy Act, and the sufficiency of the findings of fact to sustain the conclusions of law on that subject. The facts found present a case where the creditor, the defendant bank, having reasonable cause to believe that its debtor, the Cayuga Construction Company, was insolvent and unable to pay its unsecured creditors in full, and intending and designing to obtain payment of its claim in full through a confession of judgment in its favor, issue of execution, and levy and sale of the property of such debtor, and payment of its judgment and debt thereby in preference to such other creditors of the same class, negotiated with its debtor to secure from it such a confession of judgment in its favor, intending to file and docket such judgment, issue execution thereon, levy on the property of the debtor, and sell same, and either purchase the property or receive the proceeds of such sale to apply on its debt, to the exclusion of the other creditors of said Construction Company, and to obtain an advantage over them and secure its payment in full before they should receive anything. These negotiations were actually had, and both the debtor and the creditor agreed upon such course of procedure for the purpose indicated and stated, and both had the intent and object stated and indicated. Pursuant thereto, and in execution of such arrangement, the judgment was confessed by the debtor, the confession was received and filed by the creditor, and judgment docketed. Then, in pursuance and in execution of the same purpose, execution was issued and placed in the hands of the sheriff, and the creditor directed a levy and sale. The levy and sale were made; the creditor became the purchaser, received the property, and paid over the purchase price to the sheriff, and then received same back to apply on its debt against the Construction Company, less the amount necessary to pay the two prior judgments, amounting to about $300, all of which was done in execution of the said purpose and understanding.

The intent and purpose of both parties was to hinder and delay the other creditors *and "deprive"* them of their share in such property on the basis of an equal distribution to creditors of the same class in the case of actual insolvency, and which equal distribution in such cases is the policy and purpose of the Bankruptcy Act. If this was not a fraud upon the act, it is hard to conceive what would be. If a trustee in bankruptcy cannot recover in such a case, it is difficult to conceive of a case where a trustee in bankruptcy may recover. If the trustee in bankruptcy may not recover from the creditor, who became the purchaser and who parted with no new consideration, the proceeds of such a sale of the insolvent debtor's property, why should he recover the property by use of injunction to stay the sale before actual sale? In one view a preference has been effected, and the property or its value may be recovered. In the other view, a fraud on the

Bankruptcy Act has been consummated, and the proceeds may be recovered from the party thereto having same in his or its possession.

The referee has found that at the time of the confession of judgment to the bank the Construction Company was indebted to various persons, including the defendant, in the sum of $23,228.38, all unsecured except $3,000 and interest, which was secured by a mortgage on the real estate of the company. He has also found that the total value of all the property of the Construction Company was $13,712.54. In addition to these figures found by him, the referee finds:

"That at the time of said confession of judgment to defendant bank, and at the time of its entry and enforcement as aforesaid [referring to the sale and purchase by the bank], the said Cayuga Construction Company was insolvent."

The referee has found that certain written statements were made to the bank, one of which, just before the confession of judgment, showed a large falling off in assets and a large increase in liabilities, and that information was given the bank that the company had been speculating in lumber and was owing its officers considerable sums of money loaned to the company and also wages, and also that the bank knew that the president of the company was getting careless about its obligations, etc. The referee has also found that about March 5, 1911, the defendant bank, through its said officers, began to negotiate with said bankrupt (the company), through its said president and Mr. Whelan, for a confession of judgment by the bankrupt to the defendant bank, for the purpose of obtaining an advantage over the other creditors of said bankrupt, and that the bank then had reasonable cause to believe, when the confession was obtained, that the Construction Company was insolvent, and that the enforcement of the judgment confessed would work a preference in favor of the bank over the other creditors of the said bankrupt of the same class, and enable the said bank to obtain a greater percentage of its debt than other creditors of the company of the same class. The referee also finds that:

"The enforcement of said judgment as aforesaid did work the preference above mentioned, and did hinder, delay, and deprive the other creditors of said bankrupt of their lawful shares in the property of said bankrupt, and both parties to said judgment [referring to the judgment confessed to the bank] intended to bring about said results when said confession of judgment was made."

All this was within the four months period. As matter of law the referee finds:

"That said confessed judgment was and is void, because it did hinder, delay, and deprive the creditors of said bankrupt of their rights in the property of said bankrupt, and was so intended by the parties thereto."

This judgment confessed by the company to the bank was almost immediately filed, and judgment docketed pursuant thereto, and execution thereon was placed in the hands of the sheriff, and the property was sold and bid in and taken possession of by the bankrupt. By issuing the execution and making the levy the bank within the four months period secured a lien on the personal property, and through it took the property and appropriated the proceeds of the sale thereof

to its own use and in payment of its own debt, so far as it would go; the sheriff applying a small portion to the payment of the two small judgments referred to. By section 67e of the Bankruptcy Act it is provided that:

"A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if (1) it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this act."

The same section provides:

"That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless," etc.

It is also provided in the same section as follows:

"That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

There can be no pretense here that the defendant bank was a bona fide purchaser for value, who acquired the property without notice or reasonable cause for inquiry. The defendant bank purchased this property at the execution sale and took possession of it. It was purchased under a sale made by virtue of the two smaller judgments and this large judgment. There was no necessity for selling but a small part of the lumber to satisfy the two smaller judgments. The sheriff was acting under the directions of the bank, and under the facts found it cannot be doubted that the bank intended, by obtaining the judgment, issuing the execution, procuring the sale, and purchasing the property, to hinder and delay the other creditors of the company, and prevent the other creditors from obtaining any part of the property or its proceeds. It cannot be doubted that the defendant bank also intended to deprive the other unsecured creditors of any remedy against the property, and to secure the property for itself before bankruptcy proceedings could be instituted.

In Clarke v. Larremore, 188 U. S. 486, 23 Sup. Ct. 363, 47 L. Ed. 555, judgment was obtained within the four months period, execution issued, levy and a sale thereunder made, but the sheriff, before paying the money over to the judgment creditor, was enjoined in a state court by another creditor from paying the money over. Immediately thereafter the state court vacated the injunction, but while the money was still in the hands of the sheriff, and before the time to return the exe-

cution had expired, a petition in bankruptcy was filed against the judgment debtor. It was held that the money accruing from the sale under the execution and levy did not belong to the judgment creditor, but went under section 67f of the Bankruptcy Act to the trustee in bankruptcy. The court said:

"A different question might have arisen if the writ had been fully executed by payment to the execution creditor. Whether the bankruptcy proceedings would then so far affect the judgment and execution and that which was done under them as to justify a recovery by the trustee in bankruptcy from the execution creditor, is a question not before us, and may depend on many other considerations."

Here, as seen, the money was paid over to the bank by the sheriff before the institution of bankruptcy proceedings.

In Re Resnek et al. (D. C.) 167 Fed. 574, it was held that where, within four months before the filing of a petition in bankruptcy against an insolvent debtor, an execution has been issued, and a levy and sale made, and the proceeds paid over to the judgment creditor before the filing of the petition in bankruptcy, the case does not fall within the provisions of section 67f of the Bankruptcy Act, and the lien created by the judgment and levy is not rendered void by the adjudication. The court said:

"The remedy, if any, the trustee has against the creditor, is under the provisions of section 60a and 60b of the Bankrupt Act in a plenary action, where it will be necessary to allege and show that the creditor had reasonable cause to believe that the bankrupt, by suffering judgment to be taken against him, intended to give a preference."

The court cited In re Blair (D. C.) 102 Fed. 987; In re Bailey (D. C.) 144 Fed. 214; In re Knickerbocker (D. C.) 121 Fed. 1004.

[9] Section 1(25) provides:

"Transfer shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security."

Section 67e of the Bankruptcy Act provides:

"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."

It may be that a mere confession of judgment, followed by judgment entered, execution issued, levy, and sale, is not to be regarded as a conveyance within this section; but when the insolvent debtor and the creditor (bankrupt) *agree,* for the purpose of securing an advantage to this one creditor over other creditors, on *this mode* of disposing

of the property, and the judgment is confessed, and the execution is issued, and levy and sale made, and the creditor becomes the purchaser and holds the property, first paying the sum bid and then receiving it back from the sheriff on his debt, and the intent of both was to transfer the property or its proceeds to the said creditor to the exclusion of others, what is the transaction but a "transfer" as defined in section 1, to the creditor? It is but a mode adopted by the parties of disposing of the property of the debtor in payment to his creditor. Here that is exactly what was accomplished. It will be noted that all through section 67 the language is "hinder, delay *or* defraud," *not* "hinder, delay *and* defraud." I am of opinion that this sale of this property of the Construction Company under the execution and levy all of which was within the understanding between the bank and such company, and all of which was done to hinder and delay the other creditors of the company and deprive them of a share in the proceeds of the property, and which sale *transferred the property to the bank* and resulted in a payment of the proceeds to it on its pre-existing debt, was a "transfer" within the meaning of section 67e, and, the property having been demanded of the bank, the trustee may recover its value on that ground. I am aware that it is not necessary to so hold in this case, as under the facts found by the referee there was clearly a preference, which the trustee may recover, and the plaintiff is entitled to the judgment directed by the referee.

I find no irregularities in the mode of procedure, and the motion to set aside the report and findings and for a new trial is denied.

There will be an order accordingly.

UNITED STATES v. JONES.

(District Court, D. Oregon. March 31, 1916.)

No. 5606.

1. PUBLIC LANDS ⇐123—DISPOSAL BY UNITED STATES—FINAL PROOF—FRAUD—MATERIALITY.

Act Aug. 15, 1894, c. 290, § 15, 28 Stat. 326, providing for the disposition of certain ceded Indian lands, required actual residence thereon, and did not permit time spent in military service to be deducted, as permitted by Rev. St. §§ 2304, 2305 (Comp. St. 1913, §§ 4592, 4593), and Act Jan. 26, 1901, c. 180, 31 Stat. 740 (Comp. St. 1913, § 5014). An entryman made fraudulent misrepresentations in final proof of a homestead claim to such land, which proof showed that he claimed the right to deduct his time of military service. This deduction was allowed by the government through mistake of law. *Held*, that the misrepresentations were not as to a material fact, and did not authorize recovery of damages by the United States.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. ⇐123.]

2. PUBLIC LANDS ⇐123—DISPOSAL BY UNITED STATES—FINAL PROOF—FRAUD—MATERIALITY—ESTOPPEL.

The rule that a party who has effected his purpose through a misrepresentation cannot deny its materiality does not affect the case, since

estoppel cannot go so far as to make material that which is absolutely not material, and so appears by the transaction and the law governing it.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. ⊂⊃123.]

3. PUBLIC LANDS ⊂⊃123—DISPOSAL BY UNITED STATES—REMEDY FOR FRAUD —QUESTION FOR JURY.

The question whether fraudulent representations, by which the entryman obtained patent to homestead, were material, is a question for the court, not the jury.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. ⊂⊃123.]

4. PUBLIC LANDS ⊂⊃123—DISPOSAL BY UNITED STATES—FINAL PROOF—FRAUD—MATERIALITY.

Fraudulent misrepresentations by a homestead entryman in making an application for commutation, which showed that he had not resided on the entry for the period required by Rev. St. § 2301 (Comp. St. 1913, § 4589), were not misrepresentations as to a material fact, and do not give the government the right to recover damages, though it allowed the commutation through a mistake of law.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. ⊂⊃123.]

5. PUBLIC LANDS ⊂⊃123—DAMAGES—MEASURE—DETERMINATION—DEMURRER TO ANSWER.

The question of the damages recoverable for fraud by homestead entryman will not be determined on demurrer to answer relating wholly to the measure of damages.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. ⊂⊃123.]

At Law. Action for damages by the United States against Willard N. Jones. On demurrers to special answers of the defendant. Demurrer sustained as to the second defense, and overruled as to the third.

See, also, 218 Fed. 973.

This is an action to recover damages, based upon fraud and deceit. By Act Aug. 15, 1894, c. 290, § 15, 28 Stat. 286, 326, provision was made for disposition of certain ceded lands, formerly a part of the Siletz reservation, in language following: "The mineral lands shall be disposed of under the laws applicable thereto, and the balance of the land so ceded shall be disposed of until further provided by law under the townsite law and under the provisions of the homestead law: Provided, however, that each settler, under and in accordance with the provisions of said homestead laws shall, at the time of making his original entry, pay the sum of fifty cents per acre in addition to the fees now required by law, and at the time of making final proof shall pay the further sum of one dollar per acre, final proof to be made within five years from the date of entry, and three years' actual residence on the land shall be established by such evidence as is now required in homestead proofs as a prerequisite to title or patent." Subsequently, by Act May 17, 1900, c. 479, 31 Stat. 179 (Comp. St. 1913, § 5013), the Congress provided in effect that, upon payment to the local land officers of the usual and customary fees, no other or further charge of any kind whatsoever should be required from such settler to entitle him to a patent to the lands covered by his entry. This was designed as an amendment of the act of August 15, 1894, and relieved the entryman from payment of $1.50 per acre as a prerequisite to obtaining his patent from the government.

In general, the complaint avers that the defendant, Jones, with the view of acquiring title in himself and persons associated with him to lands subject to disposition under the act of August 15, 1894, entered into fraudulent arrangements with certain persons, nine in number, whereby each of such persons should make application to homestead a certain tract of the lands subject to entry under said act, and that each should make fraudulent and false

proofs as to settlement, residence, improvements, cultivation, etc., at the time of making final proofs, so as to entitle him to patent; that said persons accordingly pretended to make settlement upon the lands selected as their homesteads, and offered and made homestead proofs, and submitted the same to the proper officers of the United States land office at Oregon City; "that in and by said homestead proof each of said entrymen by himself and two witnesses falsely and fraudulently represented that he had, as required by law, established a residence upon and resided upon the land embraced in his said entry continuously after the alleged establishment of residence thereon until the time of said proofs, and had made substantial improvements thereon as set forth in said proof; that he had been only temporarily absent from said lands for a short time for the purpose of earning money to improve the same. And those entrymen having families each further falsely gave proof by himself and witnesses that his family resided on the claim in the absence of the entryman; that he had cultivated that portion of said lands specifically set out in his said proof, and that he had not conveyed any part of said lands and had not made any contract, directly or indirectly, whereby the title which 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; and that he was acting in good faith in perfecting the entry, when in truth and in fact, as each of said entrymen and his witnesses then and there well knew at the time of making said proofs, had not established a residence upon said lands, and had never resided thereon, and had no improvements thereon, and none of the said entrymen, as they and their witnesses well knew, had cultivated that part of his said entry set forth in his homestead proof, or any part thereof, for the time set forth in said proof, or at any time; but, if any part of any of said homestead entries was cultivated, the same was done by the defendant, Willard N. Jones, and all improvement made thereon was made by the defendant, Willard N. Jones, and not by any of said entrymen. And plaintiff alleges that none of said entrymen had acted in good faith, or was acting in good faith, in perfecting said entry, but was making the same upon speculation, and not for the purpose of making or securing for himself or his family a home; that in truth and in fact all of said entrymen, after the making of their respective entries as aforesaid, continued at all times during the life of their respective entries to reside at Portland, Or., except Benjamin S. Hunter, who resided at all said times at Dundee, Or., as aforesaid; that no improvements were made upon any of said lands during the life of said homestead entries, with the exception that the said defendant, Willard N. Jones, for the purpose of falsely and fraudulently making it appear that each of said entrymen resided upon his respective entry, had a house thereon built, a small, flimsy, uninhabitable shack upon the lands within each of said entries, shortly before said proofs were made. And the said Willard N. Jones, also in furtherance of said fraudulent and collusive purpose, caused a small tract upon each of said entries, in extent less than an acre, to be scratched over in order to give a semblance of a foundation for the statements of the entrymen and their witnesses that a portion of their respective entries had been cultivated." By further averment it appears that, relying upon the false and fraudulent representations thus made by the entrymen, the officers of the government were induced to issue final certificates to them, and eventually patents covering the lands comprised by the homesteads thus entered. The prayer is for damages in the sum of $133,000.

The defendant, for a second further and separate answer, has set up the statute of limitations of 6 years. For a third further and separate answer it is averred in effect that, as to eight of the entrymen, none of them, either by himself or by his final or homestead proof witnesses, or any witness produced by him, claimed, represented, or testified that he had resided upon said land by him entered for a period of 3 years, or for any other or greater period than as set out at length; the proofs showing that length of residence ranged from 13 to 20 months after entry, supplemented by proof of service in the Army or Navy of the United States for the remaining period of the 3 years. Thereupon it is alleged: "That the plaintiff and its agents and officers, in considering and passing on said final proofs, well knew that each of

said entrymen and his final proof witnesses had therein testified, stated, and claimed less than 2 years' actual residence on the part of such entryman, and neither the said plaintiff nor any of its agents or officers, in considering said final proofs, believed or understood, or had any reason to believe or understand, that any of said entrymen had represented or claimed to have resided upon said lands, or any thereof, for 3 years, but, on the contrary, the plaintiff and each and all of its agents and officers, by mistake of law, gave and allowed to each of said entrymen credit for military service as aforesaid, as a major part of the 3 years' actual residence required by law, and by reason of such mistake of law, and not otherwise, issued the final certificates and patents mentioned and referred to in the complaint." As to Wells, the remaining one of the nine entrymen, it is alleged that he commuted, but that his proofs show on their face that he was not an actual resident on his pretended homestead to exceed 10 weeks. And in this relation defendant further avers, in effect, that the plaintiff and its officers and agents, in considering said final proof, and in issuing the final certificate and patent referred to in the complaint to the said Wells, fully and well knew and understood that Wells had not resided upon said land to exceed 10 weeks, and, notwithstanding this knowledge and understanding, issued such certificate and patent to Wells. A fourth further and separate answer is interposed, which relates wholly to the measure of damages that should be applied, if recovery be had.

The plaintiff demurred to each of these three further and separate answers, on the ground that the facts stated are insufficient in law to constitute a defense.

Clarence L. Reames, U. S. Atty., and E. A. Johnson, Asst. U. S. Atty., both of Portland, Or.

Fulton & Bowerman and Schwartz & Saunders, all of Portland, Or., for defendant.

WOLVERTON, District Judge (after stating the facts as above). As to the second further and separate answer, the demurrer must be sustained, for the reason that the same question has been previously decided adversely to defendant in this cause. United States v. Jones (D. C.) 218 Fed. 973.

[1] The vital question presented by the third further and separate answer is whether a cause for deceit will lie where the alleged deceit practiced is concerning a matter not material to the subject of negotiation. The situation in brief is this: Under the general Homestead Act and other provisions of law having relation to specific territory or localities, and by virtue of sections 2304, 2305, R. S. (Comp. St. 1913, §§ 4592, 4593), and Act Jan. 26, 1901, c. 180, 31 Stat. 740 (Comp. St. 1913, § 5014), relating to the commutation of homestead entries in certain cases, honorably discharged soldiers who have made homestead entries are entitled to have the time of their military service deducted from the time of residence and cultivation required to entitle the homesteader to patent; one year's residence being required notwithstanding military service. To illustrate: The time of residence under the general homestead law being 5 years, if an honorably discharged soldier had performed military service for 3 years, he would be entitled to have the time of that service deducted from the 5 years, and would be entitled to patent after having resided upon his homestead for the period of 2 years. Now, this regulation was applied by the government as to eight of the persons alleged to have made false and fraudulent final proofs respecting their homesteads. The proofs were of residence of from 13 to 20 months, and of military service to supple-

ment the same to make out 3 years' residence on the land, as required by the act of August 15, 1894. The final receipts were all issued prior to the expiration of the 3 years subsequent to entry upon the lands.

Properly construed, the act of August 15, 1894, does not admit of any such application. This is conceded, and the Interior Department has so construed the act as applied to the Siletz Indian reservation lands. See letter of Assistant Commissioner to Register and Receiver, Oregon City, Or., of date July 2, 1902, In re Hattie C. Allebach, H. E. No. 12949. The act of August 15, 1894, as it applies to the Siletz reservation lands, requires that 3 years' actual residence on the land shall be established "by such evidence as is now required in homestead proofs" as a prerequisite to title or patent. This means actual residence for the term, not for a portion thereof supplemented by time of military or other service, and manifestly it should have been required of these eight homesteaders before final certificates were issued or patents granted to the lands comprised by their homesteads. In issuing the certificates and granting the patents, the Land Department acted under a clear mistake of law, and, even if it be conceded that the proofs submitted were true in every respect, and made in entire good faith, the entrymen were not entitled to title to the lands or to the patents.

Now, having gotten their patents on false proofs, which proofs, if true, would not have entitled them thereto, will the fraud and deceit thus practiced, if it may be so termed, afford grounds upon which the government may have relief in damages against the participants in the fraud? The proofs made were in no wise material to any inquiry pertinent to the establishment of the entrymen's right to their patents. They were wholly irrelevant to the inquiry that might properly have been made; that is, an inquiry with a view to ascertaining whether 3 years' actual residence had been made, with cultivation, improvements, etc., as required by the act of August 15, 1894. The general rule on the subject is tersely stated in American and English Enc. of Law, vol. 14, p. 59, as follows:

"To constitute fraud, a representation must be as to a material fact. With respect to this rule, there is no conflict of opinion, except sometimes in its application. A representation in relation to a fact that is not material to a contract, though it may be false and known to be false by the person making it, and though it may be acted upon by the other party, is not fraud, either for the purpose of an action of deceit, or for the purpose of rescinding the contract."

Then again, at page 62:

"It has been said that fraud is material to a contract, if the contract would probably not have been made if the fraud had not been practiced. This, however, is not always true. If a representation is not material, a person has no right to act upon it, and, if he does, he is not entitled to relief or redress on the ground of fraud. The question is not whether the person to whom the representation was made deemed it material, but whether it was in fact material."

The rule that the false representations must be of a fact material to the contract or inquiry has the approval of the United States Su-

preme Court. See Marshall v. Hubbard, 117 U. S. 415, 6 Sup. Ct. 806, 29 L. Ed. 919. The Circuit Court in that case instructed the jury, among other things, that:

"Not only must the representations be made, not only must they be fraudulent, and not only must it appear that the party relied, and had a right to rely, upon them, but it must also be shown that the representations were material to the contract or transaction which took place between the parties."

Then, after so instructing the court said:

"I think, therefore, that upon the proofs the case is within the rule laid down by the Supreme Court of the United States, namely: The court can now see, upon the evidence that bears upon the question of materiality of the representations, and alleged injury to the defendant, that if the jury were to render a verdict against the plaintiff it would have to set that verdict aside."

The court thereupon directed a verdict for the plaintiff, the fraud having been set up by the answer as a defense. On appeal to the Supreme Court, the action of the Circuit Court was affirmed, thus approving the holding of the Circuit Court. Other cases hold to the same principle, that the false representations must be of a fact material to the contract or transaction to constitute actionable deceit. Saxby and Wife v. Southern Land Co., 109 Va. 196, 63 S. E. 423; Hall v. Johnson, 41 Mich. 286, 2 N. W. 55. In the latter case the court says:

"False representations, no matter how acted upon, will not be sufficient to set aside an agreement otherwise valid, unless they were material."

See Missouri Lincoln Trust Company v. Third National Bank of St. Louis, 154 Mo. App. 89, 133 S. W. 357; Furneaux v. Webb, 33 Tex. Civ. App. 560, 77 S. W. 828; Anderson v. Adams, 43 Or. 621, 627, 74 Pac. 215.

The rule is further extended to comprise alleged false representations as to a fact of which the opposing party had knowledge, or which was patent to him, or of a fact upon which he had no right to rely. In either of such cases the action of deceit will not lie. Prince v. Overholser, 75 Wis. 646, 44 N. W. 775 (citing Slaughter's Adm'r v. Gerson, 13 Wall. 385, 20 L. Ed. 627); Robins v. Hope, 57 Cal. 493. No misrepresentation concerning the state of a party's own title to land can be treated as misleading to him. Russell v. Branham, 8 Blackf. (Ind.) 277. A party is not responsible for a misrepresentation of the legal effect of a contract. First National Bank of Elkhart v. Osborne et al., 18 Ind. App. 442, 48 N. E. 256.

Now, applying the doctrine as thus established by the authorities, it is perfectly manifest that the alleged false representations made by the proofs of the eight entrymen and their witnesses were wholly immaterial to the inquiry and to the transactions of the entrymen with the government; and not only this, the representations were of facts upon which the government had no right to rely. The government knew the law and was cognizant of the proper interpretation thereof, and, having such knowledge, it could not be deceived by proofs that had relation to acts that could not in any way be construed as a compliance therewith.

[2] The government seeks to meet this objection to the right of recovery by invoking the doctrine that a party who has effected his purpose through a misrepresentation cannot deny its materiality. Bigelow on Fraud, 497, citing also Fargo Gaslight & Coke Co. v. Fargo Gas & Electric Co., 4 N. D. 219, 59 N. W. 1066, 37 L. R. A. 593, and note. But the law cannot make that material which is absolutely not material, and so appears by the very transaction itself and the law governing the case. The law of estoppel cannot go so far as to make false representations made in one transaction binding in another and a totally distinct transaction.

[3] It is further suggested that the matter of materiality is for the jury, and not for the court.

"Concerning the elements which go to make up a case of fraud, it is for the court and not for the jury to determine whether, e. g., an inducement held out by one party to another, which the latter professes to have acted upon, is material or not. * * * Generally speaking it is also for the court to interpret language of a perfectly plain nature, unaffected by external facts such as the particular circumstances in which it was used; when so modified, it is for the jury to declare its meaning. But when, as we have just said, the language is plain, and not subject to modification aliunde, the case is for the court; and this is true in principle, whether the language be written or oral. There is no question of the truth of this proposition when applied to written language; and there ought to be none in regard to oral statement, for no sound distinction can be drawn between the two cases." Bigelow on Fraud, p. 139.

This quotation from Bigelow answers the objection. As it relates to the eight entrymen, I am impelled to the conclusion that the answer states a good defense.

[4] The case of Wells presents the question in a different aspect. Wells made application October 1, 1900, and commuted May 26, 1902. Under the statute (section 2301, R. S. [Comp. St. 1913, § 4589]) Wells was entitled to commute, if so entitled at all, upon making proof of settlement and of residence and cultivation for a period of 14 months. The act of August 15, 1894, requires actual residence. Adams v. Coates, 38 Land Dec. Dept. Int. 179. Wells by his own testimony shows that he had not actually resided on his homestead anywhere near 14 months. He was asked, "How much time since entry have you actually lived upon the land?" to which he answered, "Between the time of entry, viz., October 1, 1900, and the present time I have been there five times, remaining there each time from one to two weeks."

The government knew from this testimony that Wells had not complied with the law. Notwithstanding, it issued to him the final receipt and later the patent. Being fully aware of the situation, the government could not have been deceived by the proofs made. Even if true, the proofs did not entitle Wells to his final receipt or patent. So that, in either aspect, the government could not have been defrauded of the land. If it be argued that the government relied upon the proofs, the natural and pertinent answer is that, knowing the law and the requirements of Congress in such a case, it had no right to rely upon them, whether true or false, to the extent of approving the claim and issuing final receipt and patent. Such being the situation, the government is not entitled to an action in deceit.

The demurrer will be sustained as to the second further and separate defense, and overruled as to the third.

[5] As to the fourth, I am still of the opinion that this is not the time to pass upon the question involved.

Judgment accordingly.

GIBSON v. VICTOR TALKING MACH. CO.

(District Court, D. New Jersey. March 21, 1916.)

1. PRINCIPAL AND AGENT ⟸145(2)—BREACH OF CONTRACT UNDER SEAL—RIGHT OF ACTION AGAINST THIRD PERSON.

Parol evidence is not admissible to show that one of the parties to a contract under seal acted as agent for another, for the purpose of charging the latter or permitting him to sue and a defendant sought to be so charged may raise the same question by demurrer, where a copy of the contract is made a part of the declaration.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 514, 516, 517; Dec. Dig. ⟸145(2).]

2. COURTS ⟸372(4)—FEDERAL COURTS—STATE LAW AS RULE OF DECISION.

Whether or not an action at law may be maintained in a federal court by a party to a contract against one who has assumed the obligations of the other party thereto is to be determined by the law of the state where the action is brought.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 979; Dec. Dig. ⟸372(4).]

3. CONTRACTS ⟸187(1)—ACTION FOR BREACH—RIGHT OF ACTION AGAINST PERSON ASSUMING CONTRACT.

Under the law of New Jersey such an action may be maintained at law, where it is alleged and shown that the contract of assumption by defendant was made for the benefit of plaintiff.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 798, 799, 801-804, 806, 807; Dec. Dig. ⟸187(1).]

At Law. Action by Robert L. Gibson against the Victor Talking Machine Company. On demurrer to second amended declaration. Overruled.

Ernest Howard Hunter, of Philadelphia, Pa., for plaintiff.
French & Richards, of Camden, N. J., for defendant.

HAIGHT, District Judge. This matter is before the court upon a demurrer to the plaintiff's second amended declaration. Twenty-nine grounds of demurrer are assigned. All of them, except those hereinafter specially referred to, are the result, I think, of a misconception on the part of defendant's counsel of the nature and purpose of this action. This, however, is not surprising, in view of some of the allegations of the declaration and the attitude which plaintiff's counsel took upon a previous demurrer regarding the nature of the action. He then argued that the action was one in tort, and now that it is one on contract. The cause of action set forth in the present declaration, as in those preceding, is essentially one to recover damages for a breach of a contract. It is in no sense an action in tort. The plaintiff does

not sue for an infringement, or seek to recover damages therefor. He sues because, as it is alleged, the defendant has failed to prosecute suits to prevent infringements which, it is claimed, it was bound by contract to do. He does not seek to recover any damages from the American Graphophone Company for infringement or otherwise, but he claims that the American Graphophone Company has infringed the patents mentioned in the contract; that it was the duty of the defendant, by virtue of the contract, to have instituted and prosecuted suits to prevent such infringements; and that it not only failed to do so in good faith, but it entered into a contract with the American Graphophone Company whereby it licensed that Company, in effect, to use the subject-matter of the patents mentioned in the agreement, and thus precluded itself from instituting suits for such infringements. Hence the question as to whether the agreement, which it is alleged that the defendant has broken, is an assignment of the patents therein mentioned, or merely a license, is immaterial.

I think that the declaration clearly alleges that the defendant has failed to institute suits which were *necessary* to enjoin material infringements. It alleges that the agreement was to institute any and all suits necessary for enjoining any and all infringements, and then alleges that the "defendant has not performed its duty in that regard, and has neglected to institute and prosecute *such suits* to prevent any and all infringements." This is clearly an allegation that suits were necessary, and that the defendant has not instituted them. I see no merit in the contention that the declaration is faulty because it fails to allege that the patents mentioned in the contract do not infringe certain other patents, which, in the agreement, were stated to be owned by the assignee or licensee. If, as alleged in the declaration, it was agreed that suits should be instituted to prevent infringements of the patents assigned or licensed, it is immaterial whether those patents infringed any others, because the agreement on behalf of the licensee or assignee was to institute suits to prevent infringement of the former. It is readily conceivable why the clause of the agreement upon which this suit is based was inserted, and that a failure to perform it could cause the plaintiff substantial damages. These damages may be nominal or substantial, depending upon the proof in the case.

As a consideration for the assignment of the patents or the granting of licenses thereunder, as the case may be, the plaintiff and the party to whose rights he has succeeded were to receive royalties on the number of patented articles sold by the assignee or licensee. The number of such sales, and consequently the amount of the royalties which the plaintiff was entitled to receive under the contract, would undoubtedly be affected by the extent to which the assignee or licensee maintained exclusive control of the right to manufacture and sell the patented articles. If he alone could place the patented article upon the market, the sales would undoubtedly be greater than if there were a number of other people selling the same, or a similar article. I am persuaded that the plaintiff's damages would be limited in this respect, and confined to what he could show, with reasonable certainty, he

had lost in royalties in the manner before mentioned. It therefore by no means follows that the specification of damages mentioned in the declaration is the proper measure. But this allegation, as well as some others in the declaration, may be treated as surplusage, and therefore as unbailable to the defendant on demurrer.

It is also urged that if the contract sued upon was not an assignment of the patents, but merely a license, that then the requirement thereof—that suits be brought for infringements by the licensee—is invalid, because a licensee has no right to bring an action for infringement in his own name. Without considering other answers, which suggest themselves, to this objection, it is sufficient to say that the agreement provides that the plaintiff shall be joined as cocomplainant.

It is also urged that the agreement merely calls for the *institution* of suits, and that the declaration proceeds on the theory that the defendant failed to *institute* and *prosecute*. I think this objection is frivolous. When the parties used the word "institute," it is entirely clear that they intended that the suits to be instituted should be prosecuted. The important grounds of demurrer are those which have to do with the allegations of the declaration which connect the defendant with the contract upon which this suit is brought. This contract was originally entered into between the plaintiff and another on one side, and one Eldridge R. Johnson on the other. The defendant was not a party thereto. The declaration alleges that, when the contract was made, Johnson was engaged in promoting the organization of the defendant corporation for the purpose of conducting the business of manufacturing and selling, among others, the articles covered by the patents mentioned in the agreement, and that it was the understanding of the parties to the agreement, at the time it was entered into, that the license was not to be exercised by Johnson personally, but was to be assumed and exercised by the defendant corporation as soon as it was organized, and that thereafter, upon the organization of the defendant, in pursuance of such understanding, the defendant took over the said license and assumed all of the obligations thereof. The agreement was in writing and under seal. There is no mention therein of the defendant's proposed connection with the contract, or of Johnson's agency. Nor is the contract, on its face, ambiguous, or in any way uncertain. It purports to be made between Johnson on one side, and the plaintiff and one Jones on the other. The averments of the declaration also make it evident that the defendant corporation was not an undisclosed principal.

[1] It is insisted on behalf of the defendant that the averments of the declaration just mentioned, respecting the understanding of the parties, will not support an action against the defendant because they call for parol contemporaneous evidence, which would be inadmissible to vary the written contract, and further that the allegations regarding the assuming of the contract by the defendant will not support an action *at law* against it, but that the plaintiff's remedy, if any, against the defendant, on account of the latter's assuming the obligations of the contract, is in equity. The fact that the corporation was not in existence at the time the contract was made is, I think, not material in

view of the later allegations of the declaration, which sufficiently indicate a ratification of the action of the agent, if agency can be shown. The important question is whether an action can be maintained on a sealed instrument against one not a party thereto, and who can only be shown to be a party (that is, that the contract was made on his behalf by an agent) by parol evidence. Whatever conflict there may be in the cases regarding the right to show, by parol evidence, that one of the parties to a written contract, not under seal, acted as an agent for another (whether disclosed or undisclosed as principal) for the purpose of charging or permitting the latter to sue, there is no doubt that such evidence cannot be received where the contract sued upon is under seal. New Jersey Steam Navigation Co. v. Merchants Bank, 6 How. 343, 380, 12 L. Ed. 465; Whitney v. Wyman, 101 U. S. 392, 395, 25 L. Ed. 1050; Borcherling v. Katz, 37 N. J. Eq. 150; Schenck v. Spring Lake Beach Improvement Co., 47 N. J. Eq. 45, 19 Atl. 881; cases cited 31 Cyc. 1576 and 1658.

Nor do I perceive any reason why this question cannot be raised and disposed of on demurrer by the party who could object to the admission of the evidence, when a copy of the contract is attached to and made a part of the declaration, as in this case, for, in such cases, the declaration shows, on its face, that there is no enforceable cause of action. It has been so raised in Le Grand Co. v. Richman, 82 N. J. Eq. 481, 91 Atl. 723, and Schenck v. Spring Lake Beach Improvement Co., supra. If, therefore, there were no further averments in the declaration upon which to connect the defendant with the obligations of the contract, it would follow that the demurrer should be sustained. But the declaration contains the additional allegations before mentioned that the defendant has assumed all of the obligations of the contract.

[2] It is urged, however, on behalf of the demurrant that an action *at law* cannot be maintained in a federal court by one in his own name, against another whose obligations, if any, arise simply from the assuming of the contract made between the plaintiff and third person. The decision of the Circuit Court of Appeals of the Second Circuit in Goodyear Shoe Machinery Co. v. Dancel, 119 Fed. 692, 56 C. C. A. 300, is cited in support of this contention. That was an action at law to recover certain unpaid license fees alleged to be due to plaintiff's intestate under a contract made between the latter and defendant's assignor, the defendant having agreed to assume all of the obligations of the assignor to pay such license fee. It was held that the action was not maintainable at law, upon the theory that the effect of the agreement between the defendant and its assignor was merely to create the relation of principal and surety between them, but no direct obligation of the defendant (the assignee) to the plaintiffs' intestate, and that "according to the decisions in Second National Bank of St. Louis v. Grand Lodge of Free & Accepted Masons of Missouri, 98 U. S. 123 [25 L. Ed. 75], Cragin v. Lowell, 109 U. S. 194 [3 Sup. Ct. 132, 27 L. Ed. 903], and Keller v. Ashford, 133 U. S. 610 [10 Sup. Ct. 494, 33 L. Ed. 667], the plaintiffs could not maintain an action at law against the defendant upon the covenant." It was held, however, that the plaintiff would have been entitled to enforce in equity the

agreement of the defendant with its assignor, upon the equitable doctrine that a creditor may have the benefit of any obligation or security given by the principal to the surety for the satisfaction of the debt.

It was evidently urged in that case (although not so stated in the opinion) that by the law of New York, where the federal court in which the action was brought was located, an action could be maintained at law by the plaintiffs against the defendant on such an agreement, for Judge Wallace, who wrote the opinion of the court, said:

"It is hardly necessary to state that the law of the remedy is not to be determined by the decisions of the courts of the state in which the action was brought, and that neither the decisions of its courts nor the statutes of New York can confer authority upon the federal courts sitting within that state to exercise equitable jurisdictions in actions at law. State Legislatures cannot abolish in the federal courts the distinctions in actions at law and in equity by abolishing such distinctions in their own courts."

Undoubtedly the general proposition thus enunciated is correct. But if the point above mentioned regarding the law of New York was urged in that case, I do not think that the court, in relying upon the general rule, gave due effect to what I conceive to be the rule laid down for such cases by the Supreme Court in Willard v. Wood, 135 U. S. 309, 313, 10 Sup. Ct. 831, 34 L. Ed. 210, Id., 164 U. S. 502, 518, 17 Sup. Ct. 176, 41 L. Ed. 531, and Union Life Ins. Co. v. Hanford, 143 U. S. 187, 190, 12 Sup. Ct. 437, 36 L. Ed. 118. Willard v. Wood was originally an action at law brought in the District of Columbia by an administrator of an assignee of a mortgage against the executrix of a grantee of the mortgaged premises, who had assumed, in the conveyance from the mortgagor, the payment of the plaintiff's mortgage. The land covered by the mortgage was located, and all the instruments were executed, in the state of New York. In discussing what law was to be applied, Mr. Justice Gray, who delivered the opinion of the Supreme Court, said (135 U. S. 312, 10 Sup. Ct. 832, 34 L. Ed. 210):

"Assuming that the mortgagee has acquired by the law of New York a right to enforce such an agreement against a grantee of the mortgagor, the form of his remedy, whether it must be in covenant or in assumpsit, at law or in equity, is governed by the lex fori, the law of the District of Columbia, where the action was brought."

It might be considered, in view of the general rule prevailing in the federal courts regarding the distinction between actions at law and in equity, that by this reference to the lex fori the court did not mean that the question of whether a case such as that is to be brought in equity or at law is to be governed by the law of the state in which a federal court is held, but rather by the law pertaining generally to federal courts, when that differs from the state law, were it not for the subsequent decision in Union Life Ins. Co. v. Hanford. It was there said by Mr. Justice Gray, referring to Willard v. Wood, that the remedy of the mortgagee is to be determined by the law "of the place where the suit is brought." The suit in that case was brought in the Circuit Court of the United States for the Northern District of Illinois. He then proceeded to examine the law of Illinois, and found that under it the mortgagee might sue at law a grantee who, by the terms of an absolute conveyance from the mortgagor, had assumed the payment

of the mortgage debt. It was then said by Mr. Justice Gray (143 U. S. 190, 12 Sup. Ct. 438 [36 L. Ed. 118]):

"According to that view, the grantee, as soon as the mortgagee knows of the arrangement, becomes directly and primarily liable to the mortgagee for the debt for which the mortgagor was already liable to the latter, and the relation of the grantee and the grantor towards the mortgagee, as well as between themselves, is thenceforth that of principal and surety for the payment of the mortgage debt."

It was held that, as the mortgagee had extended the time for the grantee to pay the mortgage debt, the original mortgagors were relieved from any liability on their bond; Justice Gray saying, at the conclusion of the opinion:

"Under the law of Illinois, *which governs this case*, the mortgagors were thereby discharged from all liability on the notes, and the Circuit Court rightfully refused to enter a deficiency decree against them."

If it was meant by the Supreme Court, when it used in Willard v. Wood the words "lex fori," and in Union Ins. Co. v. Hanford "the law of the place where the suit is brought," that the law of the federal courts, as distinguished from the law of the state in which a federal court is held, is to govern, it is difficult to understand why it was found necessary in the Hanford Case to ascertain what the law of Illinois was, and to apply that law, so far as it determined the legal relations between the parties in that suit. It was stated in the Hanford Case that it was the settled law of the Supreme Court that the grantee is not directly liable to the mortgagee at law or in equity, and that the only remedy of the mortgagee against the grantee is by bill in equity in *the right of the mortgagor and grantor,* by virtue of the right in equity of a creditor to avail himself of any security which his debtor holds from a third person for the payment of the debt. And it was also said that, in view of that rule, it would be difficult to hold that the granting of an extension of time to the grantee would release the mortgagor, "but the case at bar does not present itself in that aspect." There then followed the above-mentioned statement of the rule regarding the law of the place where the suit is brought, and a discussion of the law of Illinois. It thus appears that the Supreme Court considered the law of the federal courts inapplicable, but determined the rights of the parties according to the laws of the state where the federal court, in which the suit was brought, was located.

This view of the effect of those two decisions of the Supreme Court, and of the later one in Willard v. Wood, was entertained by the Circuit Court of Appeals of the Seventh Circuit in Adams v. Shirk, 105 Fed. 659, 663, 44 C. C. A. 652, and in Central Electric Co. v. Sprague Electric Co., 120 Fed. 925, 57 C. C. A. 197. In the latter of these cases it was held that an action at law might be maintained in a federal court sitting in Illinois by a creditor of a concern directly against another concern which had assumed the payment of the debts of the original debtor. To the same effect is Bethlehem Iron Co. v. Hoadley, 152 Fed. 735. (C. C. D. R. I.). See also Rea v. Barker, 135 Fed. 890. (C. C. D. Or.). In Pittsburg, C. & St. L. R. Co. v. Keokuk & H. Bridge Co., 68 Fed. 19, 15 C. C. A. 184 (C. C. A. 7th Cir), in which

the opinion was written by the same judge who wrote the opinion in the Central Electric Co. Case, Union Ins. Co. v. Hanford and Willard v. Wood were examined and discussed, and it was held, while recognizing the above-mentioned effect of those cases, that even though, by the law of the state in which the federal court was located, an action might be maintained at law, yet, as the subject-matter of the action was within the cognizance of equity, the state rule was only concurrent and could not exclude the ancient jurisdiction of equity. The suit in that case was in equity, and it was urged that, because the local law permitted a suit at law, the suit in equity in the federal court would not lie.

The rule which I thus conceive to have been laid down by the Supreme Court, in the cases before mentioned, for suits of this kind, is quite readily reconcilable with the general rule that the state practice will not be followed in the federal courts, so as to permit a suit founded upon a right that is purely equitable, to be tried at law (which is referred to in the Goodyear Shoe Machinery Case, supra). Where the right is given to one to sue at law on a contract made between others to which he is not a party, as where the person sued has assumed the performance of an obligation due from one party to a contract to the person suing, it is upon the theory that there exists a direct liability in his own right and not in the right of another. Therefore, if in any given state the substantive rights of the parties are so fixed, and such rights can ordinarily and according to the course of the common law, as where there is a direct contractual liability, be enforced in an action at law, a federal court, in entertaining such an action, would not be exercising purely equitable jurisdiction in an action at law. It is not the same as a case where the state statute or practice gives the right to enforce a purely equitable right in an action at law.

[3] I think, therefore, that if by the law of New Jersey the plaintiff might maintain an action *at law* against this defendant on its agreement to assume the obligations of the contract made between the plaintiff and Johnson, such an action may be maintained in this court. It is the rule in New Jersey, settled by a long line of decisions, that in cases of simple contracts, if one person makes a contract with another for the benefit of a third, the latter may maintain an action *at law* upon it, although the consideration did not move from him. Joslin v. New Jersey Car Spring Co., 36 N. J. Law, 141 (Sup. Ct.); Jordan v. Laverty, 53 N. J. Law, 15, 20 Atl. 832 (Sup. Ct.); Styles v. Long Co., 67 N. J. Law, 413, 417, 51 Atl. 710 (Sup. Ct.); Id., 70 N. J. Law, 301, 57 Atl. 448 (Ct. E. & A.); Holt v. United Security Life Ins. Co., 76 N. J. Law, 585, 589, 72 Atl. 301, 21 L. R. A. (N. S.) 691 (Ct. E. & A.); Fleming v. Reed, 77 N. J. Law, 563, 567, 72 Atl. 299 (Ct. E. & A.); Chambers v. Philadelphia Pickling Co., 79 N. J. Law, 1, 75 Atl. 159 (Sup. Ct.), affirmed 83 N. J. Law, 543, 83 Atl. 890 (Ct. E. & A.); Collier v. De Brigard, 80 N. J. Law, 94, 77 Atl. 513 (Sup. Ct.). This rule has been extended by statute to contracts under seal. P. L. 1903, p. 541, § 28.

Crowell v. Hospital of Saint Barnabas, 27 N. J. Eq. 650, which is cited by defendant, is not opposed to this rule, but, on the other hand,

the rule was recognized, but held inapplicable, both because the contract was under seal and because an agreement by the grantee to assume the payment of a mortgage was held not to have been made for the benefit of the mortgagee. See Styles v. Long Co., 67 N. J. Law, 413, 51 Atl. 710, supra. Nor do I think this rule is opposed to the doctrine of the Supreme Court of the United States, to be deduced from Hendrick v. Lindsay, 93 U. S. 143, 23 L. Ed. 855, National Bank v. Grand Lodge, 98 U. S. 123, 25 L. Ed. 75, Savings Bank v. Ward, 100 U. S. 195, 25 L. Ed. 621, Cragin v. Lovell, 109 U. S. 194, 3 Sup. Ct. 132, 27 L. Ed. 903, Keller v. Ashford, 133 U. S. 610, 10 Sup. Ct. 494, 33 L. Ed. 667, and German Alliance Ins. Co. v. Home Water Co., 226 U. S. 220, 33 Sup. Ct. 32, 57 L. Ed. 195, 42 L. R. A. (N. S.) 1000. It is not sufficient under the New Jersey rule that the plaintiff have an indirect interest in the performance of the contract which he sues upon and to which he is not a party, or that he may be benefited by the performance of the contract, but he can only maintain an action when the contract is made for his direct benefit. Styles v. Long Co., 70 N. J. Law, 305, 57 Atl. 448. This is the doctrine, as I understand it, of the United States Supreme Court. Its decisions recognize the right of a third party to sue on a contract in which he is given a direct interest, or which was made for his direct benefit. The divergence of view, if any, exists rather, I think, regarding the application of the rule than the rule itself.

The remaining question, therefore, is whether the assumption agreement (which must be relied upon to entitle the plaintiff in this suit to recover) is one which was made for the benefit of the plaintiff. The averments of the declaration sufficiently set forth a consideration, as between Johnson and the defendant, for the making of the contract. Without attempting to review the cases in which it has been held that the assumption or agreement to pay a debt due to the plaintiff from one of the parties to the agreement, or all of the debts and liabilities of one of the parties to the contract (among which class that of a plaintiff is included), is a contract made for the benefit of such plaintiff and entitled him to sue thereon (a number of the New Jersey cases above cited so hold), and those cases which hold the contrary (among the latter are some of the cases in the United States Supreme Court above cited), I think it sufficient to say that the assumption agreement set forth in the declaration in this case, taken in connection with the other averments of the declaration, in my judgment indicates that it was made for the sole benefit of the plaintiff in this action and entitles him to sue at law thereon. Of course, this view may be subject to change when the actual proofs are submitted.

It follows, therefore, that the demurrer must be overruled, with costs. The order shall provide that the defendant may plead within 20 days.

DE FRIECE v. BRYANT et al.

(District Court, E. D. Kentucky. April 12, 1916.)

1. BANKRUPTCY ⟸205—PREFERENCES—REMEDY BY TRUSTEE.
The fact that creditors of a bankrupt obtained a preference by attaching in another state notes due the bankrupt and selling them under the order of the court does not entitle the trustee in bankruptcy to recover the notes from the purchasers, but only to recover from the creditors the amount they received.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 234, 303; Dec. Dig. ⟸205.]

2. BANKRUPTCY ⟸162—"PREFERENCE"—SALE BY COURT.
A sale in attachment proceedings in another state of notes given to a bankrupt is not a "preference," where there was no transfer by the bankrupt, and he did not procure or suffer the judgment to be rendered.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 278–281; Dec. Dig. ⟸162.
For other definitions, see Words and Phrases, First and Second Series, Preference.]

3. BANKRUPTCY ⟸200(3)—ATTACHMENT—JUDGMENT OF SALE.
A judgment rendered by a state court, directing the sale of notes of a bankrupt which had been attached, is void, where neither the bankrupt nor his trustee were before the court when it was rendered, and the bankrupt was insolvent when the attachment suit was begun, so that the attachment was void under Bankr. Act July 1, 1898, c. 541, § 67f, 30 Stat. 564 (Comp. St. 1913, § 9651).
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 296–300; Dec. Dig. ⟸200(3).]

4. BANKRUPTCY ⟸293(1)—JURISDICTION OF COURTS—SUIT TO RECOVER DEBT.
Bankr. Act, § 23b, as amended by Act June 25, 1910, c. 412, § 7 (Comp. St. 1913, § 9607), providing that suits by a trustee in bankruptcy shall be brought in the courts where the bankrupt might have brought them, unless by consent of the proposed defendant, except suits for the recovery of property under the sections forbidding preferences by procuring or suffering judgments and fraudulent conveyances, does not give the United States courts jurisdiction over a plenary suit by the trustee to recover a debt due the bankrupt, where the amount was insufficient to give jurisdiction because of diversity of citizenship.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 411; Dec. Dig. ⟸293(1).]

5. BANKRUPTCY ⟸293(1)—JURISDICTION OF COURTS—RECOVERY OF DEBT.
Bankr. Act, § 2, cl. 20 (Comp. St. 1913, § 9586), giving courts of bankruptcy ancillary jurisdiction over persons and property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceeding pending in any other court of bankruptcy, gives such ancillary jurisdiction only over summary proceedings which would have been within the jurisdiction of the court appointing the trustee if within its territorial limits, and does not give it jurisdiction over a plenary suit by a trustee in bankruptcy appointed in another district to recover a debt due the bankrupt from a debtor residing there.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 411; Dec. Dig. ⟸293(1).]

6. BANKRUPTCY ⟸293(1)—JURISDICTION OF COURTS—INJUNCTION AGAINST CLAIM TO PROPERTY.
A court of bankruptcy has summary jurisdiction to enjoin the assertion of a claim to notes in the possession of the trustee based on a sale on at-

tachment thereof, which was void under the Bankruptcy Act, where because of such claim the debtor refused to pay the notes and the trustee could not sell them to others, and therefore a court of another district has ancillary jurisdiction over a suit for such injunction under Bankr. Act, § 2, cl. 20.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 411; Dec. Dig. ⊙=293(1).]

In Equity. Suit by Frank W. De Friece, as trustee in bankruptcy, against A. W. Bryant and others. On motion to dismiss for want of jurisdiction. Motion overruled.

James H. Jeffries, of Pineville, Ky., for plaintiff.
Patterson & Ingram, of Pineville, Ky., for defendants.

COCHRAN, District Judge. This cause is before me on motion to dismiss for want of jurisdiction. It is a suit in equity, and was brought August 16, 1915. The bankruptcy proceeding in which plaintiff was appointed trustee of the bankrupt is pending in the United States District Court for the Western District of Virginia and is a voluntary proceeding. It was brought May 29, 1915, adjudication was had May 31, 1915, and plaintiff was appointed trustee June 11, 1915. The plaintiff and the bankrupt are citizens of Virginia, and the defendants are citizens of Kentucky and reside within this district.

The bill contains two paragraphs. The first alleges that the defendant Bryant on October 25, 1913, executed to Grant Mason a note for the sum of $600, payable 12 months after date, and bearing 6 per cent. interest, as part of the purchase price of certain real estate in Bell county, in this district, that day sold and conveyed to him by Mason; that Mason on November 13, 1913, assigned the note to the First State Bank of Pineville, Ky.; that the bank on December 17, 1914, assigned it to the bankrupt, and same came into plaintiff's possession upon his appointment as trustee as part of the estate of the bankrupt, no part of which had ever been paid; and that a few days before bringing the suit the defendant Bryant conveyed the real estate to the defendant Stanley. The plaintiff seeks therein a personal judgment against the defendant Bryant for the amount of the note and enforcement of the vendor's lien to secure same, retained in the deed by a sale of the real estate and application of its proceeds to the payment of the note.

The second paragraph alleges that on June 25, 1914, Lee Bowman executed to the bankrupt his nine notes for the sum of $76.50 each, amounting in the aggregate to the sum of $688.50, each payable in monthly installments, one after the other, the first installment June 15, 1914, and the last June 15, 1923, and bearing 6 per cent. interest, and at the same time executed a mortgage on certain real estate in Bell county to secure their payment; that the first eight installments due on the first note were paid to the bankrupt, and this note subject to these payments, and the other eight notes upon plaintiff's appointment, also came into his possession as part of the estate of the bankrupt; that on June 17, 1915, a special master of the circuit court of Bell county, acting under a judgment of that court entered June 1,

1915, in an ordinary action brought April 26, 1915, by L. E. Loder against the bankrupt attempted to sell these notes at public auction and at the sale the defendant Bryant became the purchaser thereof; that he was claiming to be the owner of the notes by virtue thereof and Bowman, the obligor, because of such claim was refusing to make any further payment on them to plaintiff; and that plaintiff was not a party to the action, and the bankrupt, though a party, was not before the court therein, either by service of process, actual or constructive, or by appearance. The plaintiff seeks therein to obtain a decree that the defendant Bryant does not own these notes and that plaintiff is the owner thereof.

Pending the motion plaintiff tenders an amended bill, in which he alleges that the ordinary action referred to in the second paragraph of the bill was a consolidation of seven of such actions brought by creditors of the bankrupt against it; that in each of these actions, when brought, an attachment was sued out against the bankrupt, which was thereupon levied upon the $600 note of the defendant Bryant and the $688.50 Bowman notes, by summoning Bowman and Bryant to answer as garnishees therein; that the appearance of the bankrupt to the consolidated action was attempted to be entered on June 1, 1915, by its former president, who had resigned his position as such on May 1, 1915, and who then had no authority to act for the bankrupt; that the judgment of June 1, 1915, decreed the sale of both the Bryant $600 note and the Bowman $688.50 notes in furtherance of the attachment; that at the sale the defendant Bryant purchased his own note, as well as the Bowman notes, the purchase price thereof being $224 and for the Bowman notes $206; that all the notes were worth what they called for; and that after the bringing of this suit the defendant Bryant paid the purchase price of the notes to his attorney, who was also the attorney for the plaintiff in the consolidated action, to hold for the special master.

The plaintiff seeks therein for judgment and decree as prayed for in the original bill and any other relief which it may appear that he is entitled to. He claims therein that the effect of the proceedings in the Bell circuit court was to give to the plaintiffs in the consolidated actions a preference, and that, therefore, this court has jurisdiction to grant him relief under sections 23b, 60b, and 67e of the Bankrupt Act (Comp. St. 1913, §§ 9607, 9644, 9651).

[1-4] The right of the plaintiff to relief at the hands of this court is not aided by the claim that by reason of those proceedings a preference was given to the plaintiff in the consolidated actions. If this claim were sound, the only relief to which plaintiff would be entitled would be to recover the proceeds of the sale in those proceedings, which is all that it is possible to say that the plaintiffs thereby obtained, and they are not defendants herein, and no relief is sought against them. But the claim is not sound. The bankrupt has made no transfer of those notes, and it did not suffer or procure the judgment made in those proceedings to be made. That judgment is void, not only because neither the plaintiff nor the bankrupt were before the court when it was rendered, but because, further, if the bankrupt was insolvent

when those consolidated actions were brought, which would seem to be the case, though perhaps it is not distinctly alleged, the attachments sued out therein were rendered null and void by the bankruptcy proceedings under section 67f of the Bankruptcy Act. It is therefore essential to rest the court's jurisdiction on some other ground than this, if it is to be maintained.

And it would seem to be clear that the court has no jurisdiction of the case presented by the first paragraph of the bill or to grant the relief therein sought. What it presents is a suit to recover the amount due the bankrupt's estate on the $600 note of the defendant Bryant through a personal judgment against him and a decree enforcing the vendor's lien to secure same. Such a suit does not come within section 23b of the Bankrupt Act, where grant of jurisdiction is to be found, if it exists anywhere. It could not have been brought by the bankrupt, if proceedings in bankruptcy had not been instituted, for, though the requisite diversity of citizenship existed, the amount in controversy between the parties was not sufficient. The defendant has not consented to the jurisdiction, and, if it had, his consent would have been of no avail. Lovell v. Newman, 227 U. S. 412, 426, 33 Sup. Ct. 375, 57 L. Ed. 577. And the suit does not come within any of the exceptions contained in the section as it stands since the 1910 amendment.

That this court has no jurisdiction of plenary suit by the trustee in bankruptcy against an adverse claimant, save as provided in section 23b was determined by the Supreme Court in the cases of Bardes v. Hawarden Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, Mitchell v. McClure, 178 U. S. 539, 20 Sup. Ct. 1000, 44 L. Ed. 1182, and Hicks v. Knost, 178 U. S. 541, 20 Sup. Ct. 1006, 44 L. Ed. 1183, which arose before any of the amendments to that section. That a debtor is regarded as an adverse claimant is evidenced by the answer which the Supreme Court gave to the first of the three questions answered in the Bardes Case. That answer was:

"The provisions of the second clause of section 23 of the Bankrupt Act of 1898 control and limit the jurisdiction of all courts, including the several District Courts of the United States, over suits brought by trustees in bankruptcy to recover or collect debts due from third parties, or to set aside transfers of property to third parties, alleged to be fraudulent as against creditors, including payments in money or property to preferred creditors."

The suit involved in the case of Bush v. Elliott, 202 U. S. 477, 26 Sup. Ct. 668, 50 L. Ed. 1114, was one to collect a debt due the bankrupt estate. Jurisdiction of the suit by the United States Circuit Court in which it was brought was upheld, because, if bankruptcy proceedings had not been instituted, it might have been brought there by the bankrupt, in that the requisite diversity of citizenship existed between him and the defendant and the amount in controversy was sufficient. Mr. Justice Day said:

"The suit concerns the right to recover a money debt which is property (Pirie v. Chicago Title & Guarantee Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171) and, in the sense of the law, is with an adverse claimant 'concerning property acquired or claimed by the trustee' and is a controversy of which

the Circuit Court had jurisdiction, as between the bankrupt and the claimant, but for the bankruptcy proceedings."

That the jurisdiction of a plenary suit by a trustee to recover a debt due from the bankrupt's estate as it stood before the amendments of 1903 and 1910 (Act Feb. 5, 1903, c. 487, 32 Stat. 797; Act June 25, 1910, c. 412, 36 Stat. 838) has been unaffected by those amendments has been determined in the case of Harris v. First National Bank, 216 U. S. 382, 30 Sup. Ct. 296, 54 L. Ed. 528, and recognized in the case of Lovell v. Newman, supra. I so held in the case of In re Ballou (D. C.) 215 Fed. 810.

[5] But plaintiff does not undertake to rest jurisdiction of the first paragraph of the bill on section 23b. He rests it on section 2 (20), by which it is provided that courts of bankruptcy are invested with such jurisdiction at law and in equity as will enable them to—

"exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy."

As the first paragraph is a suit by the trustee appointed in bankruptcy proceeding pending in Virginia to collect a debt due the bankrupt from a debtor in this district, he claims it is authorized by this provision. This subdivision was added by the amendment of 1910. It has been held that it is but declaratory of the law as it existed before its enactment. Babbitt v. Dutcher, 216 U. S. 102, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969; In re Elkus, 216 U. S. 115, 30 Sup. Ct. 377, 54 L. Ed. 407; Lazarus v. Prentice, 234 U. S. 263, 34 Sup. Ct. 851, 58 L. Ed. 1305. The ancillary jurisdiction exercised and upheld in these cases was by a summary proceeding, and the right to exercise it was limited to cases where the bankruptcy court of original jurisdiction could have acted summarily if the persons or property affected thereby was within its territorial jurisdiction. In Babbitt v. Dutcher, Mr. Chief Justice Fuller, said:

"The precise question before us on the present appeal is whether in a case in which the original court of bankruptcy could act summarily, another court of bankruptcy, sitting in another district, can do so in aid of the court of original jurisdiction."

And in Lazarus v. Prentice, Mr. Justice Day said:

"Prior to the amendment of June 25, 1910, * * * this court had held that in cases where the bankruptcy court of original jurisdiction could itself make a summary order for the delivery of property to the trustee or receiver the court of ancillary jurisdiction could do so (Babbitt v. Dutcher, 216 U. S. 102, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969), and by clause 20, added to section 2 by the amendment of June 25, 1910, the bankruptcy courts were specifically given ancillary jurisdiction over persons or property within their respective territorial limits in aid of a trustee or receiver appointed by any court of bankruptcy."

Here the relief sought is not by summary proceedings. It is sought by a plenary or independent suit. This is the only way in which it is obtainable in any court. It is not obtainable anywhere by proceedings of a summary character. Furthermore, if the District Court of the Western District of Virginia, in which the bankruptcy proceeding in

which plaintiff was appointed trustee is pending, had territorial jurisdiction of this suit it would not have had ancillary jurisdiction thereof in aid of plaintiff appointed trustee in the bankruptcy proceeding pending therein. And what amounts to the same thing, if the bankruptcy proceeding were pending here, this court would not have ancillary jurisdiction of this suit in aid of plaintiff appointed trustee in that proceeding. This being so, it is not open to claim that this court has ancillary jurisdiction of this suit in aid of the plaintiff appointed trustee in the bankruptcy proceeding pending in the Western district of Virginia. The ancillary jurisdiction intended to be conferred by subdivision 20 of section 2, and which existed before its enactment, can only have been such as the court of original jurisdiction would have had if it had had territorial jurisdiction, or such as the court appealed to would have had if the bankruptcy proceeding were pending therein.

According to this view of the matter the ancillary jurisdiction so conferred of proceedings of a summary character is limited to cases in which the court in which the bankruptcy proceeding is pending could act summarily, if it had territorial jurisdiction and of plenary or independent suits to such as come within section 23b. Under the act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517), in the case of Lathrop v. Drake, 91 U. S. 516, 23 L. Ed. 414, Mr. Justice Bradley said:

"Proceedings ancillary to and in aid of the proceeding in bankruptcy may be necessary in other districts where the principal courts cannot exercise jurisdiction; and it may be necessary for the assignee to institute suits in other districts for the recovery of assets of the bankrupt. That the courts of such other districts may exercise such jurisdiction in such cases would seem to be the necessary result of the general jurisdiction conferred upon them, and is in harmony with the scope and design of the act."

But under the act of 1867 the "principal courts" had essential jurisdiction of all suits by assignees in bankruptcy for the recovery of assets of the bankrupt, and in no case was ancillary jurisdiction for the recovery of such assets exercised by the federal courts of other districts, save where the principal courts would have had such jurisdiction if they had had territorial jurisdiction.

In the case of Knauth, Nachod & Kuhne v. Latham & Co., 219 Fed. 721, 135 C. C. A. 419, suit was brought by the trustee appointed in a bankruptcy proceeding pending in the Northern district of Alabama in the Southern district thereof to set aside a preferential transfer. This was a plenary suit against an adverse claimant. It was, however, an ancillary suit; i. e., in aid of the trustee and of the bankruptcy proceeding pending in the other district. But it came within section 23b. Judge Maxey said therein:

"The adjudication of bankruptcy in the latter court brought the property of the bankrupts, wherever situated, into custodia legis, and that court thus acquired the full right to administer the estate."

And it was held therein, under the decision in the case of Lazarus v. Prentice, supra, that a third claimant of the property sought to be recovered had no right to intervene. It may be questioned whether the property there involved was in custodia legis, as it was in the posses-

sion of an adverse claimant, and possibly the doctrine of the case of Lazarus v. Prentice, where the ancillary jurisdiction exercised was of a summary character, does not apply where it is by a plenary or independent suit.

The case of Breit v. Moore, 220 Fed. 97, 135 C. C. A. 573, cited and relied on by plaintiff, was a plenary suit brought by the trustee. The amount in controversy was $250, and there seems to have been no diversity of citizenship. It may be said that it was an ancillary suit, but it was brought in the court where the bankruptcy proceeding was pending, and was to set aside a preferential transfer. It thus came within section 23b as amended, and the right to maintain it should be based thereon, rather than on the cases of Bardes v. Bank and Hicks v. Knost, on which it was based.

[6] So it is that I reach the conclusion that this court is without jurisdiction to grant plaintiff the relief sought in the first paragraph of his bill. How, then, is it as to the relief sought in the second paragraph? Under its allegations plaintiff is in possession of the Bowman notes, and the defendant Bryant is asserting an unfounded claim thereto. Because of this claim Bowman is refusing to pay him according to the terms of his notes; and by reason thereof, further, plaintiff no doubt is unable to sell them advantageously, which, practically, owing to the long time they have to run, is the only way in which they can be handled to the advantage of the estate. The relief sought by this paragraph of the bill is a removal of the cloud on plaintiff's title to these notes growing out of the claim of defendant. It presents the question whether plaintiff was entitled to have proceeded summarily against such defendant to have him enjoined from asserting his claim, and, if so, also to proceed by plenary suit to obtain the same relief. If such relief can be made the subject of summary proceedings, then the court in which the bankruptcy proceeding is pending would have been entitled to so proceed if the defendant Bryant had been within its territorial jurisdiction and, if so, this court has ancillary jurisdiction to proceed against him in like manner, as he is within its territorial jurisdiction. The question, then, comes to this: Can such relief be made the subject of a summary proceeding? It is well settled that delivery of possession of property of the bankrupt not held by an adverse claimant, and hence in custodia legis, to the trustee, can be enforced by summary proceeding. White v. Schloerb, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183; Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814; Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; Babbitt v. Dutcher, supra; Lazarus v. Prentice, supra. It would seem to follow from this that, in case the trustee has possession of such property, his possession thereof can be protected from physical invasion by such proceedings. And, if so, no reason occurs to me why it cannot in like manner be protected from moral invasion as here; e. g., from an unfounded claim of ownership, which prevents the trustee from handling the property of the bankrupt advantageously, and which may be said to amount potentially to a physical invasion. He can neither obtain payment of the notes from the debtor nor sell them to others for their real value.

If, then, plaintiff had proceeded summarily against the defendant Bryant as to these notes, I would have to uphold the proceeding. This he has not done. He has proceeded against him by plenary suit. But it was decided in the case of Whitney v. Wenman, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157, that where the court has the right to act summarily in such cases as we have here it has the right to act by a plenary suit. Mr. Justice Day there said:

"Nor can we perceive that it makes any difference that the jurisdiction is not sought to be asserted in a summary proceeding, but resort is had to an action in the nature of a plenary suit, wherein the parties can be fully heard after the due course of equitable procedure."

This court, therefore, has jurisdiction of the cause of action presented by the second paragraph of the bill. And, as the motion to dismiss for want of jurisdiction goes to the whole bill, it will have to be overruled. The motion to file the amended bill is overruled also. It proceeds on the wrong theory of plaintiff's right to relief. It appears from the amended bill tendered that the defendant Bryant is claiming his own note, as well the Bryant notes, under his purchase at the judicial sale in the state court. No reason is perceived why plaintiff should not be entitled to the same relief against him as to this claim as to his claim to the Bowman notes.

Leave is granted plaintiff to file an amended bill, seeking relief as to this note also. It should set up the proceeding in the state court fully, as is done in the amended bill tendered, and seek specifically an injunction against defendant's claim.

KLEIN et al. v. BEACH et al.

(District Court, S. D. New York. February 23, 1916.)

1. COPYRIGHTS ⇐50—CONTRACT RELATING TO DRAMATIC RIGHTS IN COPYRIGHTED BOOK—CONSTRUCTION—"PRESENTATION ON THE STAGE."

The writer of a novel, who owned all rights therein, a dramatic writer, and a theatrical producer entered into a contract in 1911 by which the novelist granted to the dramatist the exclusive right to dramatize the book "for presentation on the stage," and both granted to the producer, on terms stated, the exclusive right to "produce, perform, and represent the said play * * * on the stage," for which it was to pay a royalty, to be divided equally between them. The contract further provided that in case of failure of the producer to comply with its terms, or on its termination otherwise, all rights in the play granted to it should revert to the other two parties. *Held*, that the phrase "presentation on the stage," construed in connection with other provisions respecting production of the play by stock companies, stage scenery, etc., had reference only to the production of the spoken play in theaters, and that as, at the time the contract was made, the production of moving picture plays was a well-known business, it was not intended that the contract should carry the exclusive right to dramatize the novel for that purpose, but that such right remained in the author.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 47, 49; Dec. Dig. ⇐50.]

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2. COPYRIGHTS ⟸50—CONTRACT RELATING TO DRAMATIC RIGHTS IN COPYRIGHTED BOOK—EFFECT OF AMENDMENT OF STATUTE.

The rights of the parties under such contract were in no way affected by the subsequent amendment of the Copyright Law (Act March 4, 1909, c. 320, § 5, 35 Stat. 1076) by Act Aug. 24, 1912, c. 365, 37 Stat. 488 (Comp. St. 1913, § 9521), so as to permit the separate copyrighting of motion picture plays.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 47, 49; Dec. Dig. ⟸50.]

3. COPYRIGHTS ⟸50—CONTRACT RELATING TO DRAMATIC RIGHTS IN COPYRIGHTED BOOK—CONSTRUCTION.

On the subsequent termination of the contract with the producer for its default, all rights in the play written by the dramatist reverted to him and the author of the book as tenants in common, and either had the right to license its use, subject to the obligation to account to the other for one-half the profits.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 47, 49; Dec. Dig. ⟸50.]

In Equity. Suit by Philip Klein, as executor, and Lillian Klein, as executrix, of the will of Charles Klein, deceased, against Rex Beach and the Selig Polyscope Company, Incorporated. On motion to dismiss bill. Denied as to defendant Beach, and granted as to defendant corporation.

This is a joint motion on behalf of the defendants to dismiss the complaint, on the ground that it does not allege facts sufficient to constitute a cause of action. The complaint sets forth that Charles Klein, deceased, was a dramatic author and playwright, who had achieved great fame and had composed many successful and notable plays and dramatic compositions; that the defendant Rex Beach was the author of a novel entitled "The Ne'er Do Well"; that the defendant the Selig Polyscope Company, Incorporated, is a manufacturer and distributor of motion pictures; that on November 17, 1911, Klein and Beach entered into a written contract, a copy of which is hereinafter set forth.

The complaint further shows that thereafter Klein devised and completed a dramatic version of the novel, and performed all the terms of the contract on his part to be performed; that the dramatization was produced with success throughout the United States, was a work of great literary merit, and of great value to the plaintiffs; that thereafter the Authors' Producing Company failed to give 70 performances during one season, and all rights in the Klein version reverted to Klein and Beach; that later Beach, disregarding the rights of Klein, and in derogation thereof, made an agreement with the defendant Selig Polyscope Company whereby he assumed to grant to said defendant the right and license to dramatize the novel and to make and exhibit cinematographic films thereof and of the dramatic composition of Klein bearing the same name based on the novel; that the defendants, with full knowledge of Klein's rights, for the purpose of making cinematographic films dramatizing the novel and to reproduce the play, gave a pantomimic representation of the novel and play, and during that representation negative moving picture films were taken, and thereafter positive films were made for exhibition from such negative film; that the defendant Selig Company has advertised the films for release and booked them throughout the United States against the protest of plaintiffs; that the film is identical with the novel, and with the Klein play as produced by the Authors' Producing Company, except that it has been elaborated to make it suitable for moving picture exhibitions; and that the film is a dramatization of the novel.

After setting forth other allegations to give the court jurisdiction and to bring plaintiffs properly in equity, the complaint alleges that the film is being

booked throughout the United States and Canada in cheap and inferior theaters, to which small admission fees are charged, and that the use of the film in moving pictures will make it impossible to secure the production of any dramatization by living actors, either in first-class theaters or by stock or repertoire companies, and will destroy the value of any such dramatization, and plaintiffs' rights therein; and that both the defendants have refused to pay to plaintiffs any part of the profits or royalties derived from the use and exhibition of the film based upon the novel and the dramatic composition. Plaintiffs ask for an injunction, an accounting, the surrender of the films, and damages.

On the argument all counsel stated that, as no questions of fact were involved, they requested a decision on the whole controversy, and to that end it was agreed that the contract between Beach and the Selig Company should be read by the court as part of the papers on the motion to dismiss. For the convenience of counsel, in cases of this character, I have extracted the essential features and language of both contracts:

Agreement Between Authors' Producing Company, Beach, and Klein.

Agreement made * * * November 17, 1911, by * * * the Authors' Producing Company, a domestic corporation, * * * hereinafter referred to as the manager; Rex Beach, * * * hereinafter referred to as the novelist; Charles Klein, * * * hereinafter referred to as the author, witnesseth:

Whereas, the novelist is the sole owner of the dramatic rights of a certain original novel entitled "The Ne'er Do Well"; and

Whereas, the manager wishes to engage the services of the author to dramatize the said book for presentation on the stage; and

Whereas, the novelist wishes the author to make the said dramatization of the said book (which said dramatization shall hereinafter be referred to as "the play"); and

Whereas, the manager desires to obtain the exclusive right, liberty, and license to produce, perform, and represent the said play in the United States of America and the Dominion of Canada; and

Whereas, the said novelist and author are willing to grant to the said manager the exclusive rights to produce the said play in the said territory under certain terms, provisions, and conditions, etc.

First. The novelist hereby grants to the author the sole and exclusive right to dramatize the said book for presentation on the stage, and agrees that the author shall receive one-half of all moneys paid as royalty for the said play, except as provided in clause seventh.

Second. The author and the novelist hereby agree to grant, and by these presents hereby do grant, to the manager, subject to the terms, conditions, and limitations hereinafter expressed, the sole and exclusive license and liberty to produce, perform, and represent the said play or dramatic composition on the stage in the United States of America and the Dominion of Canada.

Third. The manager in consideration of such grant, hereby pays to the novelist, the sum of one thousand dollars ($1,000.00) upon the signing and execution of this agreement, etc.

Fourth. The manager further agrees to pay the author and the novelist, as royalty for the said play, * * * a sum equal to, etc.

Fifth. In case the manager shall desire after the first representation of the said play under this contract, to represent or produce the said play by more than one company, it shall be at liberty to do so; and in that case each company shall be treated, for the purpose of computing the royalties hereunder, as a separate undertaking, etc.

Sixth. It is expressly understood and agreed that neither this contract nor the rights granted to the manager herein shall be assigned or assignable by it, nor shall the said play be sublet by the manager without its first having received the consent in writing, of the author and the novelist so to do.

Seventh. If the said play is ever produced in stock theaters or by small touring companies under other management, the royalty received from any and all such productions shall be divided, etc.

Eighth. The manager expressly agrees that it will produce, exhibit, and represent the said play only in first-class theaters and in a first-class manner, with a competent cast to be selected or approved by the author and the novelist, and a properly qualified stage director, as all these terms are generally understood in the theatrical profession, and in a manner satisfactory to the said author and novelist. The author shall also have full and entire control of the stage and entire choice of scene models and scenery and the selection of all costumes, properties, and accessories for the production for the first company. The author shall also stage the play for the production by the first company.

Ninth. The said manager further agrees to produce the said play for a consecutive run in an evening bill in a first-class theater on or before the 17th day of November, 1912. And it is further agreed that, if the said play is not produced and presented by the said manager on or before the said 17th day of November, 1912, the said manager will return to the author all manuscripts and parts of the said play in its possession or under its control, and further agrees that all rights of whatsoever name, kind, or nature in and to the said play and all rights granted by this contract shall forthwith cease and determine and shall revert to the said author and the novelist to be disposed of as may seem best to them. * * * If the said play is then not produced on or before the said 17th day of February, 1913, then the manager agrees forthwith to return to the author all manuscripts and parts of the said play in its possession or under its control, and shall lose all rights of whatsoever name, nature, or description in and to the said play and all rights granted to him by this contract and all rights shall revert to the author and the novelist forthwith.

Tenth. The said manager expressly agrees to announce in appropriate type on all * * * advertising matter * * * that the said play is a dramatization by Charles Klein of Rex Beach's novel, "The Ne'er Do Well."

Eleventh. The said manager agrees that no alterations, eliminations, emendations, changes, or additions of any sort whatsoever shall be made in the text of the said play without the consent of the author first obtained in writing, and the said author agrees that he will make such reasonable, proper, and necessary changes or modifications in the said play as may be mutually considered by the author and the manager to be necessary or advisable during rehearsals or within a reasonable time after the first production of the said play.

Twelfth. The said manager further agrees that if, during any one theatrical year, * * * the said play has not been produced and presented by it with a traveling road company for seventy (70) performances, all the rights of the said manager in and to the said play shall cease and determine and shall immediately revert to the said author and novelist.

Thirteenth. The author and the novelist hereby grant an option to the manager to acquire the acting and producing rights in the said play for the Kingdom of Great Britain and Ireland and its colonies (Canada excepted), etc.

Fourteenth. If the said manager shall at any time, in any way fail to fulfill any of the terms and conditions in this contract contained, * * * the said author and the novelist or their duly authorized agent, may thereupon * * * give notice terminating this agreement absolutely, and any and all rights granted or assigned by the author and the novelist to the manager herein, shall thereupon immediately cease and determine and shall thereupon immediately revert to the author and the novelist. * * *

Fifteenth. It is further agreed that upon the termination of this agreement for whatsoever cause, the manager will forthwith return to the author all manuscripts and parts of the said play in its possession and under its control, together with all additions to or alterations in the same, all of which shall always definitely belong to the said author and the novelist.

Sixteenth. It is understood that Selwyn & Co., play brokers, are the agents who have procured the execution of this contract, and that as such agents are entitled to receive an amount equal to, etc.: Provided, however, that if and when the play shall be produced in stock, or by small touring companies un-

der other management, the said brokers shall be entitled to receive an amount equal to, etc.

Agreement Between Beach and Selig Company.

Agreement made * * * March 3, 1914, * * * between Rex Beach, * * * hereinafter called the author, and the Selig Polyscope Company, incorporated, * * * hereinafter called the producer, witnesseth:

Whereas, the author is the sole author and owner of all right, title, and interest in and to a certain copyrighted novel entitled "The Ne'er Do Well"; and

Whereas, the producer desires to secure and to acquire from the author the sole and exclusive right, license, and privilege to produce the said novel "The Ne'er Do Well" as a motion picture film, and to manufacture sell, lease, and otherwise exploit the same as such throughout all countries of the world:

Now, therefore, in consideration, etc., the author and the producer agree as follows:

First. The author hereby grants the producer the sole and exclusive right, license, and privilege to reproduce the novel, "The Ne'er Do Well" in motion pictures, and to manufacture, sell, lease, and otherwise exploit films from said reproduction.

Second. The producer agrees to pay the author, for said exclusive rights, licenses, and privileges, one-half of all net profits from every source accruing to the producer from the manufacture, sale, leasing of, or otherwise exploiting said reproduction. * * *

Ernst & Cane, of New York City (Bernard M. L. Ernst, of New York City, of counsel), for complainants.

Weadock & Miner, of New York City (Karl R. Miner, of New York City, of counsel), for defendant Beach.

Nathan Burkan, of New York City, for defendant Selig Polyscope Co.

MAYER, District Judge (after stating the facts as above). At the outset, it is desirable to clear away immaterial or untenable contentions.

First. The relations of the parties must be determined by the written agreements between them, and not by those allegations of the complaint which plead conclusions of law. Thus the complaint alleges inter alia:

"That in and by said agreement the defendant Rex Beach gave to the said Charles Klein the sole and exclusive right to dramatize the book"

—while in the agreement are the added words "for presentation on the stage." Therefore what the right was must be determined by the contract, and not by the interpretation of the pleader.

[1, 2] Second. The amendment of the Copyright Law, effective on August 24, 1912, is irrelevant to the controversy. That amendment, so far as here concerned, merely provided, among other things, for the copyrighting of motion picture plays. The contract here was dated November 17, 1911, and the contractual relations between Beach and Klein were fixed as of that date. The subsequent agreement (with notice, according to the complaint) between Beach and the Selig Company gains nothing, because now, under the statute, the motion picture rights may be separately dealt with and separately copyrighted.

We thus come to the fundamental questions in the case. It may be assumed that in November, 1911, the time of the contract, the motion

picture play was well known. This knowledge is judicially obtained from the files of the court and from reported decisions, notably the Kalem Case, 222 U. S. 55, 32 Sup. Ct. 20, 56 L. Ed. 92, Ann. Cas. 1913A, 1285; Id., 169 Fed. 61, 94 C. C. A. 429.

With the knowledge that a play might be produced on the stage with the spoken word or exhibited on the screen, Authors' Producing Company (the manager) was looking for a new play. Beach owned the novel, "The Ne'er Do Well." Klein was a playwright of recognized ability and experience. The manager wished Klein to make a play out of the novel and to obtain the exclusive right to produce, perform, and represent that play on the stage in the United States and elsewhere.

Throughout, it is apparent that the manager was to produce and present the play on what we understand as the stage as distinguished from the screen. Vide "stock theaters;" "small touring companies;" Klein shall have full control of "the stage" and "entire choice of scene models and scenery and the selection of all costumes * * * for the production for the first company"; the manager cannot make changes "in the text" without Klein's consent; certain arrangements with the play brokers as to compensation, if the play is produced "in *stock* or by small *touring* companies *under other* management."

The manager, therefore, being concerned only with a play with speaking actors, the parties whereased and agreed as follows:

"Whereas, the manager wishes to engage the services of the author to dramatize the said book *for presentation on the stage:* * * *

"First. The novelist hereby grants to the author the sole and exclusive right to dramatize the said book *for presentation on the stage.* * * *

"Second. The author and the novelist hereby agree to grant and * * * do grant to the manager * * * the sole and exclusive license and liberty to produce, perform, and represent the said play or dramatic composition *on the stage.* * * *"

Not a word was written about motion pictures. It is argued that, if it was intended to exclude motion pictures, such exclusion would have been expressed. It may be urged with equal force that, if it was intended to include them, the inclusion should have been definitely stated. Klein, as the complaint points out, had achieved great fame as a dramatic author, and the product of his talent applied to the story of the novel was what Beach, Klein, and the manager proposed to present on the stage; but it does not follow that the contracting parties intended that there should be no grant by Beach of the motion picture rights to any one and that only stage performances with speaking actors could be given. By virtue of paragraph twelfth the manager's rights "reverted" to Beach and Klein, and under paragraph fifteenth all manuscripts and parts of the play, with all additions and alterations thereafter, were to "definitely belong" to Beach and Klein. Thus, at the commencement of this suit, Beach and Klein's estate were the co-owners, or, as some cases say, the tenants in common, of the Klein play, freed from any license.

It is urged that Klein became the sole owner of the Klein dramatization, to do with it as he pleased, obligated only to account to Beach for profits. That argument flies in the face of the intent of the agree-

ment when read as a whole. It thus becomes necessary to determine what the grant from Beach to Klein was.

The "exclusive right to dramatize" the novel "for presentation on the stage" merely meant that no one else was to be permitted to dramatize for the stage, but did not comprehend that Beach could not grant the right to another independently to dramatize the novel for the screen. Of course, "stage" is a comprehensive term. College commencements, public meetings, motion picture exhibitions take place on the physical structure called "a stage"; but "presentation on the stage" in this contract surely means the spoken play.

It is suggested that to hold that Beach retained the motion picture rights would violate the intent of the parties, because the motion picture would destroy or impair the commercial value of Klein's dramatic version, and that Klein and the others could not have contemplated such a result. I am far from satisfied that every motion picture interferes with the box office receipts from the same play on the dramatic or the operatic stage. I imagine that the motion picture "Carmen" will not outlast the living opera.

Then it is quite understandable that a novel may be presented to a theater audience in a way quite different from that shown to a motion picture audience and for reasons which are obvious to those who attend both. Arnold Bennett's "Buried Alive," when transformed into "The Great Adventure," was neither more nor less than a character study of Farll and Alice Challice. No one could satisfactorily portray in a picture the study which Ainley or Harding acted on the stage; but "Buried Alive" on the screen would probably show the scene in Westminster Abbey, omitted by the playwright.

And so it may well be, as I think was the case here, that the right to dramatize a novel for presentation on the stage does not necessarily carry with it all the motion picture rights. There is nothing in the reported cases to lead to any other conclusion.

In the Kalem Case, supra, a contract was not being construed, but the court was dealing with the question as to whether one without authority could appropriate the essential features of a copyrighted work and produce them in a motion picture. The court held that such a production was dramatized within the meaning of the statute. No one now questions that the moving picture may show a dramatization, and in the case at bar the presentation on the screen is a dramatization; but we are not dealing with definitions, but with the intent of the parties.

In Frohman v. Fitch, 164 App. Div. 232, 149 N. Y. Supp. 633, Fitch, who had agreed to write and deliver a play, had sold his original work to Frohman under a broad grant which clearly comprehended the ownership of Fitch's work by Frohman for all purposes. The language there was:

"Whereas, the said party of the first part [Fitch] agrees to write and deliver a play on or before January 1, 1901; and

"Whereas, the said party of the second part [Frohman] desires the exclusive right to produce or to have produced the said play in the United States of America and in Canada:

"Now, therefore, * * * the said party of the first part agrees to sell, assign, and transfer, and hereby does sell, assign, and transfer to the said

party of the second part the exclusive right to produce the said play in the United States of America and in Canada, for which sale, assignment and transfer the said party of the second part agrees to pay to the said party of the first part or his authorized agent, as follows. * * *"

In Harper Brothers v. Klaw & Erlanger, 232 Fed. 609, decided by Judge Hough on January 6, 1916, the agreement was made at a time (1899) when motion picture plays were not in the contemplation of either party, and he held, on the facts in that case, therefore, that neither party could produce motion pictures. He was considering a contract made at a time when conditions were radically different from those which existed in 1911; but, in so far as he construed the language used in that contract (which, in substance, resembles that in the case at bar), he held that the grant did not pass the motion picture rights.

[3] This case, however, differs from Harper v. Klaw in at least one respect which becomes important. Here both Beach and Klein became the owners of Klein's drama, and each could then do with it what he pleased, with the duty of accounting over. Beach could license Klein's dramatic version for the screen, and Klein could do the same thing; and, of course, they each could license others to produce the Klein play on the stage. But in all these instances one would be obliged to account to the other. Millson v. Lawrence, 148 App. Div. 678, 133 N. Y. Supp. 293; Lalance & Grosjean Mfg. Co. v. Nat. Enameling & Stamping Co. (C. C.) 108 Fed. 77.

As Beach, therefore, could license another either to produce an independent dramatization for the motion pictures, or to produce the Klein version for the motion pictures, the defendant Selig Company was at liberty to contract with Beach, and is not concerned with the controversy between Beach and the Klein estate. It follows, therefore, that neither Beach nor the Selig Company can be enjoined as prayed for.

But there is enough left in the complaint to set forth a cause of action for an accounting (see paragraphs XXI and XXII) for profits already derived. If it appeared as a fact that the Selig production is an independent dramatization, then, in view of what has been pointed out, the plaintiffs would not have a cause of action; but it is alleged (paragraph X) that Klein "originated, devised, created" a play based upon the novel, and further (paragraph XVI) that the "said film [made by Selig Company] * * * is identical with the said novel * * * *and with the said play,* * * * except that the same has been elaborated to make it suitable for motion picture exhibitions."

Of course, with a common source, two dramatizations must have much in common; but it is alleged that Klein's work is "of great literary merit, woven with keen dramatic skill and artistic finish." And it is well known that skill is required to select from the mass of material in a novel, so much as may be necessary and then properly arrange the acts, scenes, sequence, climax, and the rest.

Whether, therefore, Klein's dramatization has been used by the Selig Company, or an independent motion picture has been devised from the novel, is a question of fact, which can be determined only after a

trial. As it is alleged that Klein's version has been used, the complaint states a cause of action against Beach for an accounting.

For the reasons stated, the motion to dismiss made on behalf of Beach must be denied, and that made on behalf of Selig Company must be granted. Settle on two days' notice.

In re SMITH.

(District Court, N. D. New York. April 24, 1916.)

1. BANKRUPTCY ⟸407(5)—GROUNDS FOR DISCHARGE—FALSE STATEMENT.

A statement made by the bankrupt on a printed blank, which stated at the beginning that it was a true and complete statement of his resources and liabilities, followed by two columns of items for each, some of which were filled in by the bankrupt and some left blank, at the bottom of which columns was a space for the total resources and total liabilities, which were filled in by the bankrupt, with the totals of the items listed above, was a statement in writing that it represented all his liabilities, and where the value of the assets as therein stated was exaggerated, and a number of large items of liabilities omitted, so that it showed his assets as nine times his liabilities, when in fact they were about the same, the statement was materially false, within Bankr. Act July 1, 1898, c. 541, § 14b, 30 Stat. 550, as amended by Act June 25, 1910, c. 412, § 6, 36 Stat. 839 (Comp. St. 1913, § 9598), providing that a bankrupt shall be discharged unless he has obtained money or property on credit on a materially false statement in writing.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 760, 761; Dec. Dig. ⟸407(5).]

2. BANKRUPTCY ⟸407(5)—GROUNDS FOR DISCHARGE—FALSE STATEMENT—"MATERIALLY FALSE."

To authorize denial of discharge of a bankrupt, a statement must be "materially false," which means more than simply erroneous or untrue, and imports an intention to deceive; but where it appears that the bankrupt knowingly and intentionally omitted to disclose the greater part of his indebtedness, the necessary consequence of which was to deceive his creditors, the intention to deceive may be inferred.

[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.]

3. BANKRUPTCY ⟸407(5)—DENIAL OF DISCHARGE—GROUNDS—FALSE STATEMENT—DEPOSIT IN BANK.

Where a bankrupt gave a statement in writing of his assets and liabilities, which showed the amount of money he had in the bank correctly as it appeared on the books of the bank, but he knew that he had drawn and delivered checks thereon which had not been cashed, and which would practically exhaust his account, his statement was false.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 760, 761; Dec. Dig. ⟸407(5).]

4. BANKRUPTCY ⟸408(3)—DENIAL OF DISCHARGE—GROUNDS—CONCEALMENT OF PROPERTY.

Where a bankrupt, at the time he filed his voluntary petition, had a small deposit in the bank, which he did not list in his schedule of assets, and did not turn over to the trustee, but later drew out for his own use, he concealed property from his trustee, for which he can be denied a discharge, since the amount of the property concealed is not material.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 735, 736; Dec. Dig. ⟸408(3).]

In Bankruptcy. In the matter of Benton D. Smith, bankrupt. On report of the special master against the discharge of the bankrupt. Report approved, and discharge denied.

This is a hearing on the application of the bankrupt to set aside the report of the special master, who reports against the discharge of the bankrupt, on the one hand, and an application by the trustee in bankruptcy and a creditor to confirm and approve such report, and, pursuant to the report of the special master, refuse a discharge.

Wm. D. Tuttle, of Cortland, N. Y., for bankrupt.

Costello, Burden, Cooney & Walters, of Syracuse, N. Y. (David F. Costello, of Syracuse, N. Y., of counsel), for trustee and creditors.

RAY, District Judge. Specification of objection to the discharge of the bankrupt No. IV reads as follows:

"IV. That such application should not be granted because of the following facts, constituting an additional ground which the undersigned charged to be true, namely:

"A. That said bankrupt obtained property consisting of meats and provisions on credit from objecting creditor, Morris & Co., upon a materially false statement in writing made by him to said Morris & Co. for the purpose of obtaining credit from Morris & Co. That said statement in writing was dated August 18, 1914, and executed and signed on that date by said bankrupt, and delivered to Morris & Co. on that date, and in and by such statement said bankrupt falsely and fraudulently for the purpose of obtaining credit from Morris & Co. represented to said Morris & Co. that his merchandise on hand cost five hundred dollars ($500), that he owned accounts all good, amounting to eight hundred dollars ($800), that he had cash on hand in the First National Bank of Tully, N. Y., to the amount of one hundred fifty dollars ($150), that he owned real estate of the value of six hundred dollars ($600), that he owed no other debts, aside from four hundred and sixty-one dollars ($461) to Morris & Co., and that he had no liabilities except the debt owed to Morris & Co., amounting to four hundred and sixty-one dollars ($461), and in that said bankrupt represented therein that the firm conducting said meat market was composed of D. B. Smith's estate and Benton D. Smith.

"That said statement was false and known by the bankrupt at the time of the making thereof to be false, in that the merchandise which bankrupt had on hand at that time did not cost to exceed three hundred dollars ($300), in that his outstanding accounts did not amount to eight hundred dollars ($800), in that said bankrupt did not have cash on deposit in the First National Bank of Tully amounting to one hundred and fifty dollars ($150), in that said bankrupt did not own real estate in which his equity was worth the sum of six hundred dollars ($600), and in that said bankrupt had other liabilities and owed other debts than those to Morris & Co., to wit, Armour & Co., the estate of D. B. Smith, and others, and in that the firm conducting said market was not composed of D. B. Smith's estate and Benton D. Smith.

"That said written statement and the representations therein made were made by said bankrupt to objecting creditor, Morris & Co., for the purpose of obtaining credit from Morris & Co., and that Morris & Co. relied upon said statement and the representations therein made, and sold and delivered to said bankrupt thereafter merchandise consisting of meats and provisions of the value of one thousand dollars and upwards, upon which account there remains unpaid the sum of five hundred and four dollars ($504)."

On or about the 18th day of August. 1914, the now bankrupt filled out, signed, and delivered to the objecting creditor, Morris & Co., a written statement as to his resources and liabilities, of which the following is a copy:

"Aug. 18, 1914.

"Messrs. Morris & Company, Syracuse, N. Y.—Gentlemen: For the purpose of obtaining credit with you for merchandise which I (we) may now or hereafter purchase of you, and for the purpose of securing an extension of time for the payment of purchases heretofore made, I (we) make the following true and complete statement of my (our) resources and liabilities:

Resources.	Dollars.	Cents.
Mdse. on hand, cost	500	
Store fixtures	1875	
1 horse, present value		
2 wagons, present value	125	00
Notes, all good		
Accounts, all good	800	00
Cash on hand	140	00
Cash in First National Bank, Tully, N. Y.	150	00
Other personal property		
Real estate, title in name of D. B. Smith		
Situated Tully St., Onondaga St., Market value	600	00
Homestead title in name of		
Situated, market value		
Total resources	4190	00

Liabilities.	Dollars.	Cents.
Mdse., not due, owing to Morris & Co., Syracuse, N. Y.	227	00
Mdse., past due, owing to Morris & Co., Syracuse, N. Y.	234	00
Owe on notes		
Chattel mortgage		
Owe to banks		
Owe on judgments		
Owe for wages		
Confidential indebtedness to relatives and others		
Mortgage on homestead		
Mortgage on other real estate		
All other debts		
Total liabilities	461	00

"I (we) conduct a Meat Market

"I (we) keep the following books of account in my (our) business: Cash book; McCaskey System of bills.

"The firm is composed of D. B. Smith's estate and Benton D. Smith

"I am (we are) at present located at Tully, N. Y.

"My (our) stock and fixtures are insured for $1.000.00 in Niagara Insurance Company; other property is insured for $1,200.00 in Niagara Insurance Company.

"The above statement, printed and written, is true and correct in every particular, and you may rely upon it as a continuing basis for both present and future credit dealings with me (us), unless and until I (we) hereafter from time to time advise you in writing of any change therein at the time such changes occur.

"Yours truly, Benton D. Smith.
"Composing the Firm of D. B. Smith & Son.

"Witnessed by: T. J. Carey."

The proof shows, and the special master finds, that this statement was made for the purpose of obtaining credit and property on credit, and that both credit and property were obtained thereby. The special master also finds that the now bankrupt "knew the contents of the paper, and that as filled out it showed an incomplete and false statement of his financial condition." The special master also finds, and the evidence sustains the finding, that in his opinion the statement "was a materially and willfully false statement in writing."

[1] The bankrupt filed his petition in voluntary bankruptcy with schedules attached on the 7th day of November, 1914, less than three months thereafter. In such schedules he states that his liabilities had a note due the First National Bank of Tully, N. Y., for $500 given for money for his own personal use. This note was secured by a chattel mortgage upon the fixtures in his meat market. He gave his unsecured indebtedness as $904.19, making an aggregate of $1,404.19. In such schedules he reported his personal property as consisting of stock in his market, $300, fixtures and tools in the market, $1,500, bills or accounts receivable, as $300, and his exempt property consisting of wearing apparel, tools, and implements and household furniture as $335. In short, excluding property he claimed to be exempt, he reported his assets to be of the value of $2,100 and his liabilities as $1,404.19. If the machinery, tools, etc., were worth $1,500, and the mortgage for $500 thereon was good, this would reduce his liabilities by $500 and leave his assets unincumbered at $1,600 at the time the petition was filed. In any event, between August 18, 1914, when the bankrupt obtained the property of Morris & Co. upon the written statement aforesaid, and the date of the filing of the petition November 7, 1914, there was a large falling off in assets and a large increase in liabilities.

The evidence shows, and the special master finds, that at the time the bankrupt made the written statement upon which he obtained credit he was owing other parties as follows: Armour & Co., $144.35; the Cortland Beef Company, about $100; the Bank of Cincinnatus, $129; one A. T. Smith, $57.34; the estate of D. B. Smith, $2,000; and to his wife, $375—or in all, $2,805.69, unsecured indebtedness. In addition to this he owed a mortgage on his real estate of $1,200. As to this failure of the bankrupt to include in the statement referred to the liabilities referred to the special master says:

"The bankrupt's testimony in an attempted explanation of his omission of the unstated liabilities is unsatisfactory. It discloses great carelessness, amounting to recklessness, and is sometimes contradictory. The representatives of Morris & Co., of Armour, and other adverse witnesses upon the whole commended themselves to me as being reliable and careful concerning their testimony."

The special master finds that the only real estate the bankrupt ever owned was the parcel mentioned in the financial statement and therein valued at $600, and also finds and reports that it was incumbered by a mortgage of $1,200. The real estate had been recently purchased for $1,525. If the bankrupt in his statement intended to give the value of his equity in the real estate, as he probably did, he had no warrant for placing it above $325. In August or September the bankrupt conveyed

this real estate to his wife in payment of his indebtedness to her, which indebtedness was not included in the financial statement.

The attorney for the bankrupt contends, among other things, that the misrepresentations in the financial statement referred to consist of omissions, rather than assertions; that is, that there are blanks not filled out, and that these omissions cannot be the basis of a finding that the bankrupt willfully and intentionally made a false statement as to his assets and liabilities. But suppose the bankrupt had made no mention, opposite the blanks for stating his liabilities, of the amount of his liabilities—that is, had inserted no figures whatever, and his liabilities in fact had been $2,000, or $4,000—would not this have been a materially false statement in writing? Would it not have been a representation that he was not owing anything? He must have known, and he did know, as the special master finds, substantially what his liabilities were, and he deliberately omitted the amount; that is, he did not insert the amount of certain indebtedness opposite the words printed in such statement for the purpose of having such indebtedness, if any, appear. Here by omissions in the statement in writing he willfully and intentionally concealed the greater portion of his indebtedness by failing to state the truth when called upon to do so. In effect he represented that the other indebtedness mentioned did not exist, when he knew it did exist. In the statement at the foot of the column showing resources the statement says, "Total resources, $4,190.00." And at the foot of the column headed liabilities we find, "Total liabilities, $461.-00." What is this but a statement in writing that his total resources are $4,190, and that his total liabilities are $461?

The statement was knowingly made, intelligently made, purposely made, for the purpose of obtaining credit, and was materially false, for the reason that it concealed from the creditors extending the credit indebtedness amounting to $2,805.69, or about seven times as much as the liabilities disclosed in the statement. It is inconceivable that this bankrupt, in filling out this statement for the purpose of obtaining credit, inadvertently omitted to include a statement of his indebtedness which was omitted. If a few items of small amount had been omitted, we might say with reason that the omission was accidental; that is, that the existence of the indebtedness was not present in the mind of the bankrupt at the time he made the statement. But when we come to a statement in writing wherein the bankrupt deliberately foots up and writes in his "total liabilities" as "$461.00," when in fact to his knowledge his total liabilities are $3,266.69, and this is accompanied by an exaggeration of the valuation of his resources, so as to make it appear to the party extending the credit that he has resources in excess of his liabilities amounting to some $3,500 when in point of fact his liabilities are equal to, if not in excess of, his resources at the time the statement was made, we have a case where the omissions cannot be attributed to inadvertence or failure of memory.

By section 14b of the Bankruptcy Act it is provided:

"The judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by the trustee or other parties in interest, at such time as will give the trustee or parties in interest a reason-

able opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has * * * (3) obtained money or property on credit upon a materially false statement in writing, made by him to any person or representative for the purpose of obtaining credit from such person." Comp. St. 1913, § 9598.

It is evident here that Smith, the bankrupt, obtained credit of Morris & Co. on a statement in "writing made by him to" Morris & Co., or to the representatives of that company acting in the matter, and which written statement was made for the express purpose of obtaining credit from Morris & Co. for the goods sold and delivered. The statements actually made therein were material. The omissions from the statement were material, and, assuming that the written statement is equivalent to a representation that Smith owed no debts of a material amount other than those set forth in the statement, it was "a materially false statement in writing." Smith was called upon to state to the best of his ability all of his liabilities and their amount. He stated that he was owing Morris & Co. for merchandise not due $227, and that he was owing Morris & Co. for merchandise past due $234. He was called upon by the blank placed before him, and which he was to answer, to state what he owed on notes, what he owed on chattel mortgages, what he owed to banks, what he owed on judgments, what he owed for wages, what he owed to relatives or others, what he owed by way of mortgage on real estate, and what he owed to others for merchandise, borrowed money or otherwise. Take, for instance, the printing under liabilities, "Owe on notes." This was in the nature of a question whether or not he owed anything on notes, and by leaving the space opposite this under the head of "Dollars Cents" blank Smith represented that he owed nothing on notes. He was under obligation to disclose the truth, and was called upon to disclose the truth.

[2] It is, of course, true that the statement must be a false statement, and materially false, and the words mean more than simply erroneous or untrue, and import an intention to deceive. See In re Arenson (D. C.) 28 Am. Bankr. Rep. 113, 195 Fed. 609. It is settled law that a person intends to do what he knowingly does do, and that he intends the known and natural consequences of his acts, knowingly and intelligently done. Here it appears that Smith knowingly and intentionally omitted to disclose indebtedness to the amount of some $2,800. The known and necessary consequences of this concealment or failure to disclose was to deceive and mislead Morris & Co. and induce them to extend credit, which as the evidence shows that company otherwise would not have done.

My attention is called to International Harvester Co. of America v. Carlson (C. C. A. 8th circuit) 217 Fed. 736, 133 C. C. A. 430, 33 Am. Bankr. Rep. 178, where it is held that the words "material statement" mean, not a blank, nor an inference from a blank, but a direct statement, either positive or negative, which is false. Conceding that that case was correctly decided on the facts there appearing, and that "material statement" (in writing) is not a blank, nor an inference from a blank, and no one ever supposed it was, in the case at bar we

have a statement, and not a failure to fill out a statement. Benton D. Smith over his signature said, "For the purpose of obtaining credit with you for merchandise * * * I make the following true and *complete* statement of my resources and liabilities: Resources. [Here follows a list, giving kind and nature, with value]. Liabilities"—and here follows the list, with the nature and character of such liabilities, including "Owe on notes," "Chattel mortgage," "Owe to banks," "Owe on judgments," etc., with a blank opposite each, which *is* a statement that the person making the statement owes nothing on such a liability as is described. But this is not all, for the person making up and signing the statement footed up the totals and said: "Total resources, $4,190.00. Total liabilities, $461.00." This is a direct written statement that his total liabilities were $461, when in fact such liabilities, to his knowledge, were over $3,000. This was not "a blank," and did not refer to the amount of liabilities shown in the figures preceding, but to his total liabilities.

[3] But more, the final paragraph of the statement says, "The above statement, printed and written, *is true and correct in every particular,* and you may rely upon it," etc. August 18, 1914, the now bankrupt had on deposit in the First National Bank of Tully the sum of $135. He represented that he had $150. Against the $135 he had drawn and delivered four checks on this account, aggregating $125.23, and if the checks had been paid his balance would have been about $10. This fact he knew.

In my judgment a person makes a willfully false statement when he represents and states in writing, for the purpose of obtaining credit and property, that he has money in bank, when he has drawn and delivered checks which, when presented and paid, will exhaust such credit, and he knows the fact, and does not disclose that he has drawn and delivered such checks. This court cannot put its seal of approval on such statements and transactions and characterize them as other than willfully false. The credit is on the books of the bank *at the time,* but the person making the statement knows that in equity and justice he has transferred it to another. The bankruptcy act was not intended to sanction and permit and condone that species of false statements in writing. It was intended to cover, and in my judgment does cover, them.

[4] At the time the petition was filed the bankrupt had on deposit in the First National Bank of Tully the sum of $15.22. This was not scheduled or turned over to the trustee, and later the bankrupt checked it out and used it for his own personal benefit. True, the sum was small; but it was money and property belonging to the estate of the bankrupt. It was concealed from the trustee. The Bankruptcy Act is not aimed particularly at *large* concealments of property, but at *all* concealments of property. If the amount is small, and inadvertently retained or forgotten, the failure to disclose will not prevent a discharge; but when knowingly and willfully concealed from the trustee, and drawn out and used by the bankrupt for his own personal use, whether the sum be large or small, we have a concealment of property with intent to defraud his creditors, and a case where the bankrupt has

knowingly concealed from his trustee while a bankrupt some of his estate in bankruptcy, and as it was knowingly done, and the money used for his personal benefit, the inference of fraud is inevitable.

The referee, acting as special master, heard the bankrupt and all the witnesses, and has given the matter careful consideration. On going over the evidence, I arrive at the same conclusion as did the special master, and his report is approved, and there will be an order accordingly, confirming same and denying a discharge.

KEITHLEY v. NORTH PAC. S. S. CO.

(District Court, D. Oregon. April 3, 1916.)

No. 7026.

ADMIRALTY ⊂=2—JURISDICTION—SAVING OF COMMON-LAW REMEDY.

Under Judicial Code (Act March 3, 1911, c. 231) § 24(3), 36 Stat. 1091 (Comp. St. 1913, § 991), which gives the federal District Courts original jurisdiction of all civil causes of admiralty and maritime jurisdiction, "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it," a right of action in personam for a tort, given by a state statute, may be enforced by an action at law in a state court, or in a federal court where there is a diversity of citizenship, although the tort was committed on shipboard within the navigable waters of the state, and a remedy might also be had in a court of admiralty.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 18–28; Dec. Dig. ⊂=2.]

At Law. Action by C. Keithley against the North Pacific Steamship Company. On demurrer to answer. Sustained.

Littlefield & Maguire, of Portland, Or., for plaintiff.

Sanderson Reed, of Portland, Or., for defendant.

WOLVERTON, District Judge. This is an action at common law to recover damages for injuries to a longshoreman, sustained, it is alleged, through the carelessness and negligence of the ship, its officers, and agents. The injuries were sustained on board the George W. Elder while engaged in taking cargo aboard; the vessel being moored in the Willamette river, at a wharf in Portland, Or., at the time. The action is brought specifically under the local Employers' Liability Act. The defendant has interposed an answer setting up the defenses of an act of fellow servants, assumption of risk, and contributory negligence. These defenses are met by a demurrer, and the question is presented whether the action will lie, in view of the exclusive jurisdiction accorded courts of admiralty in maritime matters.

By the third clause of section 24 of the Judicial Code the District Courts are accorded original jurisdiction of all civil causes of admiralty and maritime jurisdiction, "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it." That this latter quoted clause is a saving clause, no one can dispute. It is a saving from the admiralty and maritime jurisdiction, the

exclusive cognizance of which is accorded to the District Courts. It is a saving to suitors in all cases where they have a common-law remedy, and the common law is competent to give it; that is, the common-law remedy. "It is not a remedy in the common-law courts which is saved," says Mr. Justice Field in The Moses Taylor, 4 Wall. 411, 431 (18 L. Ed. 397), "but a common-law remedy." And in further illustration the distinguished jurist continues:

"A proceeding in rem, as used in the admiralty courts, is not a remedy afforded by the common law; it is a proceeding under the civil law. When used in the common-law courts, it is given by statute."

The suit arising in the Moses Taylor was in rem against the vessel, for breach of contract for the carriage of a passenger, to enforce a local statute purporting to give a lien in such cases against the vessel.

In further elaboration of the principle is the case of The Hine v. Trevor, 4 Wall. 555, 18 L. Ed. 451. The case arose under a statute of the state of Iowa, which gave a process in rem for a collision between two vessels, which was held to be unconstitutional. "But the remedy," says Mr. Justice Miller, "pursued in the Iowa courts in the case before us, is in no sense a common-law remedy. It is a remedy partaking of all the essential features of an admiralty proceeding in rem." Thus was distinguished between a remedy which was maritime and a common-law remedy. It is the latter, and the right given the suitor to enforce it where the common law is competent to give it, which is saved from remedies maritime. The cases are fully reviewed and the doctrine reaffirmed, in The Glide, 167 U. S. 606, 17 Sup. Ct. 930, 42 L. Ed. 296. In that case the court of admiralty enforced a local statute of Massachusetts giving a lien upon the vessel, but it was held that the court of admiralty had exclusive jurisdiction, the proceeding being in rem. The court, in giving the reasons for its conclusions in that case, says:

"The admiralty and maritime jurisdiction is conferred on the courts of the United States by the Constitution, and cannot be enlarged or restricted by the legislation of a state. No state legislation, therefore, can bring within the admiralty jurisdiction of the national courts a subject not maritime in its nature."

There is no persuasive reason why the converse is not also true, namely, that no state legislation can take from the admiralty jurisdiction of the national courts a subject maritime in its nature. Workman v. New York City, Mayor, etc., 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314; Steamboat Company v. Chase, 16 Wall. 522, 530, 21 L. Ed. 369.

But this does not argue that a common-law remedy may not impinge at one angle or another upon admiralty and maritime jurisdiction. Indeed, the final conclusion has been reached that the courts of the United States as courts of admiralty have not exclusive jurisdiction of suits in personam growing out of collisions between vessels while navigating navigable waters. It was said in Schoonmaker v. Gilmore, 102 U. S. 118, 26 L. Ed. 95:

"That there always has been a remedy at common law for damages by collision at sea cannot be denied."

Common-law courts may, where the action is in personam, enforce the auxiliary remedy of attachment and seizure, or sequestration, and this even where the auxiliary remedy is given by local statute. In Louisiana the local statute gave to mariners the right in an action for the recovery of wages to a writ of sequestration, whereby property might be seized to be held for the mariner's security abiding the outcome of the action. Three mariners instituted an action in personam in the state court for wages earned as seamen, and had a writ of sequestration levied upon the ship Gallego, upon which they served. The question came up on a writ of error to the Supreme Court of the United States (Garcia y Leon v. Galceran, 11 Wall. 185, 20 L. Ed. 74), whether the writ of sequestration could be sustained, the cause not being in admiralty. The writ was sustained; the court saying that suitors "have the right of a common-law remedy in all cases 'where the common law is competent to give it,' and the common law is as competent as the admiralty to give a remedy in all cases where the suit is in personam against the owner of the property."

The same doctrine is reasserted in the case of Johnson v. Chicago & Pacific Elevator Company, 119 U. S. 388, 7 Sup. Ct. 254, 30 L. Ed. 447, wherein it was held to be not inconsistent with the views expressed in The Moses Taylor and The Hine v. Trevor, supra. See, also, Knapp, Stout & Co. v. McCaffrey, 177 U. S. 638, 648, 20 Sup. Ct. 824, 829 (44 L. Ed. 921), where it is said:

"If * * * the cause of action be not one of which a court of admiralty has jurisdiction, or if the suit be in personam against an individual defendant, with an auxiliary attachment against a particular thing, or against the property of the defendant in general, it is essentially a proceeding according to the course of the common law, and within the saving clause of the statute (section 563) of a common-law remedy."

The latest case sustaining an attachment levied in pursuance of a local statute is Rounds v. Cloverport Foundry, 237 U. S. 303, 35 Sup. Ct. 596, 59 L. Ed. 966. The action was for recovery for work and materials furnished under contract to repair and rebuild a steamboat, accompanied with an attachment of the boat in pursuance of a Kentucky statute providing for a lien upon watercraft for work and supplies. The court determined that the case was one in personam, and the attachment was in that suit, which had no other effect than to provide security for the payment of a personal judgment, that the procedure was within the scope of the common-law remedy for seizure of property to satisfy a judgment, and that it constituted no encroachment upon the exclusive jurisdiction vested in the federal court in admiralty.

Another feature of the inquiry is that state Legislatures have been pronounced competent to enact survival statutes, which become legally effective in common-law remedies. Such a statute was upheld and given operative effect in Steamboat Company v. Chase, supra. Further than this, even causes of action which have been created by state legislation have been given effect by the federal courts as a common-law remedy. Thus in the case last cited the cause of action was created by a Rhode Island statute giving a right of action for the loss of

the life of a person crossing upon a public highway, occasioned through the negligence or carelessness of a common carrier. One Cook, while in a sailboat crossing Narragansett Bay, being water wholly within the state, was run down and killed by a steamer owned by the American Steamboat Company. Action was instituted in the state court by Cook's administrator to recover under the statute. The administrator being successful in that court, the cause was removed to the Supreme Court of the United States, where it was affirmed. The errors assigned were as follows:

"(1) That the common-law courts cannot exercise jurisdiction and give a remedy for a consequential injury, growing out of a marine tort, where no remedy for such an injury exists in the admiralty courts. (2) That a suitor cannot have a remedy in such a case in a common-law court, even if the admiralty courts have jurisdiction, as the right of action was created by a state statute enacted subsequent to the passage of the Judiciary Act."

Answering these questions, the Supreme Court said, in part:

"Sufficient has already been remarked to show that the state courts have jurisdiction if the admiralty courts have no jurisdiction, and a few observations will serve to show that the jurisdiction of the state courts is equally undeniable if it is determined that the case is within the jurisdiction of the admiralty courts. Much discussion of that topic cannot be necessary, as several decisions of this court have established that rule as applicable in all cases where the action in the state court is in form a common-law action against the person, without any of the ingredients of a proceeding in rem to enforce a maritime lien. * * *

"Examined carefully, it is evident that Congress intended by that provision [the one relating to the saving to all suitors the right of a common-law remedy] to allow the party to seek redress in the admiralty if he saw fit to do so, but not to make it compulsory in any case where the common law is competent to give him a remedy. Properly construed, a party under that provision may proceed in rem in the admiralty, if a maritime lien arises, or he may bring a suit in personam in the same jurisdiction, or he may elect not to go into admiralty at all, and may resort to his common-law remedy in the state courts, or in the Circuit Courts of the United States if he can make proper parties to give the Circuit Court jurisdiction of his case."

The principle was reaffirmed in The Hamilton, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. Ed. 264. The injury considered was one arising from a collision upon the high seas, between two vessels belonging to two corporations of the same state, namely, Delaware. The statute gave a survival action, concerning which the court, speaking through Mr. Justice Holmes, had this to say:

"And as the state courts in their decisions would follow their own notions about the law, and might change them from time to time, it would be strange if the state might not make changes by its other mouthpiece, the Legislature. The same argument that deduces the legislative power of Congress from the jurisdiction of the national courts tends to establish the legislative power of the state where Congress has not acted. Accordingly it has been held that a statute giving damages for death caused by a tort might be enforced in a state court, although the tort was committed at sea. American Steamboat Co. v. Chase, 16 Wall. 522 [21 L. Ed. 369]. So far as the objection to the state law is founded on the admiralty clause in the Constitution, it would seem not to matter whether the accident happened near shore or in mid-ocean, notwithstanding some expressions of doubt."

I find nothing in Workman v. New York City, Mayor, etc., 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314, to the contrary.

Now, if it be true that it is competent for a state by local law to give an auxiliary lien to secure the fruits of the enforcement of a common-law remedy, that a state may also afford a survival action, where none previously existed at common law, which may be enforced as a common-law remedy, and may even give a remedy where none previously existed which may be enforced as a common-law remedy, why is it not competent for the state to afford to laborers a remedy against employers which may also be enforced as a common-law remedy? Such a remedy would seem naturally to be comprised by the saving clause, and assuredly the common law is competent to give the remedy. This is all that may be said of the statute—that it gives a remedy; one perhaps unknown to the common law, but one which will be enforced as a common-law remedy. While it may be true that admiralty will not enforce the remedy, even by libel in personam, yet it is not an encroachment upon admiralty jurisdiction, in the sense of the United States Constitution and laws of Congress, because it is excepted from that jurisdiction by the saving clause.

Furthermore, this is not an action upon a marine contract, where the law of the sea becomes of the essence of the contract and must be enforced according to that understanding; but it is a tort, and, while committed upon water, is subject, nevertheless, to a common-law remedy. A tort is without terms or conditions, except as the law defines them, and, being a creature of the law, the law may also create a remedy; and if the remedy is one at common law, it may be enforced in the state courts, or in the federal courts where there is diversity of citizenship, although the tort be committed upon navigable waters within the boundaries of the state.

With all due deference to the able and exhaustive opinion of Judge Killits in Schuede v. Zenith S. S. Co. (D. C.) 216 Fed. 566, I am unable to agree with his conclusions.

The demurrer to the answer will be sustained.

BRADY v. RELIANCE MOTION PICTURE CORP. et al.

(District Court, S. D. New York. February 5, 1916.)

1. COPYRIGHTS ⇐50—SUITS FOR INFRINGEMENT—BONA FIDE PURCHASER.
   The purchaser of the dramatic rights in a copyrighted publication from the publisher, who holds the record title to the copyright, is not bound to inquire as to the latter's contract with the author, and takes title free from a trust under which the copyright was taken, unless he had either actual knowledge of it or of facts which should have put him on inquiry.
   [Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 47, 49; Dec. Dig. ⇐50.]

2. EQUITY ⇐142—PLEADING—ALTERNATIVE ALLEGATIONS.
   A bill may properly allege on information and belief, in the alternative, that defendant had actual knowledge or constructive notice of an essen-

tial fact, where the complainant has no means of knowing the facts as to such knowledge or notice.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 332–337; Dec. Dig. ⇐142.]

In Equity. Suit by Cyrus Townsend Brady against the Reliance Motion Picture Corporation, the Mutual Film Corporation, and the Frank A. Munsey Company. On motion to dismiss bill. Sustained as to Reliance Company, and overruled as to Mutual Film Company.

See, also, 229 Fed. 137, —— C. C. A. ——.

William M. Seabury, of New York City, for plaintiff.

Walter N. Seligsberg, of New York City, for defendant Reliance Motion Picture Corp.

Herbert P. Luce, of New York City (Walter N. Seligsberg and Clarence E. Sterrett, both of New York City, of counsel), for defendant Mutual Film Corp.

MAYER, District Judge. The motion of defendants Mutual Film Corporation and Reliance Motion Picture Corporation is to dismiss the complaint upon either of two grounds: (1) That the dramatic rights were never copyrighted, and are therefore in the public domain; or (2) if the dramatic rights were copyrighted, they were held in trust by defendant Frank A. Munsey Company, and the defendants Mutual Film Corporation and Reliance Motion Picture Corporation were bona fide purchasers for value and without notice of the trust.

Heretofore a motion for preliminary injunction was denied by the District Court, and an appeal was taken to the Circuit Court of Appeals. Judge Ward, in an opinion recently filed (229 Fed. 137, —— C. C. A. ——), states succinctly the facts and they need not be here repeated. He says:

"The single question before us for consideration is whether Judge Hough was right in refusing to grant a preliminary injunction."

As in all applications for preliminary injunction, affidavits were submitted by both sides in addition to the pleading. On this motion the court, of course, may consider only the pleading.

On the complaint I am of opinion that it cannot be held that the dramatic rights are in the public domain. Although in these later days many authors have become good business men, yet many others still remain impractical, inexpert in financial matters, and thoroughly unacquainted with the technique and procedure of the law so far as concerns their rights. It would be, indeed, a very narrow view of the law, and tend to work injustice, for the court to hold that, because a trustee had breached his trust, the author as against the rest of the world should be deprived of rights which he never intended to transfer or release to the public domain.

The complaint, therefore, cannot be dismissed upon the first ground, and for the purposes of this motion it must be assumed that the complaint sets forth that the copyright by the Munsey Company covered all rights, and that plaintiff conferred the whole copyright privilege upon the Munsey Company, to hold the same for its own benefit as to serial publication and as trustee for him as to all other rights.

With this assumption it follows, as Judge Ward pointed out, that plaintiff could have required the Munsey Company to reassign to him all the other rights, and, had this been done, such assignment would have been void as against subsequent purchasers or mortgagees without notice for a valuable consideration, unless recorded in the office of the Librarian of Congress as the Copyright Law then required. Rev. Stat. U. S. § 4955.

Before the defendant film companies can be held, it must appear that they had either actual knowledge or constructive notice of the agreement between plaintiff and the Munsey Company. It is true that Judge Ward, in his opinion, states: "Actual notice to the film companies is not pretended." But I cannot assume this conclusion upon the complaint before me. The Circuit Court of Appeals undoubtedly was satisfied that no actual notice had been given because of failure to produce proof thereof in the affidavits submitted on the motion for preliminary injunction; but, in construing the complaint, I am not permitted to go behind its allegations and the necessary inferences therefrom.

Judge Ward also said:

"We discover no sufficient evidence of constructive notice to justify the issuance of a preliminary injunction against" the film companies.

This language would indicate that the film companies could be held if, from existing facts within their knowledge, notice could be construed. In other words, the film companies can be made liable (if there is liability) if they actually knew, or from existing facts within their knowledge were bound to know, of the existence of the so-called trust agreement between plaintiff and the Munsey Company. On examination of the pleading it is found that notice is alleged in paragraph 11 as follows:

"11. And upon information and belief your complainant alleges that the defendant the Mutual Film Corporation, in dealing with and in endeavoring to acquire from the defendant the Frank A. Munsey Company the right to dramatize said short story and to produce the dramatization thereof in motion pictures or otherwise, had actual knowledge or constructive notice of your complainant's aforesaid rights in the premises by reason of the fact that said defendant Mutual Film Corporation then knew, or by the exercise of reasonable prudence and caution and by inquiry of the defendant the Frank A. Munsey Company or of the complainant could easily have ascertained, the existence of your complainant's said rights and of the fact that the said defendant the Frank A. Munsey Company neither then nor at any time had any right or authority to sell or dispose of the right to dramatize said work or to produce the dramatization thereof in moving pictures or otherwise. And in this connection your complainant alleges upon information and belief that the defendants at all said times knew that the complainant was the author of said literary work; that the defendant the Frank A. Munsey Company was not the author thereof, and did not pretend to be, and that the only rights of the said defendant the Frank A. Munsey Company in and to the copyright covering the said short story of your complainant was necessarily derived from an agreement between said defendant as publisher and your said complainant as author; and that the terms of the said publisher's authority to deal with the said copyright when secured were necessarily confined and restricted by the terms of said contract or assignment from your said complainant to said publisher, which said contract and assignment was at all times open to inspection by the defendants, or either of them, upon re-

quest either to the defendant the Frank A. Munsey Company or to your complainant, which said contract disclosed upon its face the rights of your complainant as aforesaid and the total absence of any right or authority in the defendant the Frank A. Munsey Company to sell any rights derived from said copyright to said defendants, except the right to print and publish the said story in serial form as aforesaid. And the complainant alleges that neither said defendant the Reliance Motion Picture Corporation nor the Mutual Film Corporation ever made any request upon the complainant for an inspection of said contract or for any other information whatsoever concerning your complainant's rights in the premises."

What, in effect, is alleged on information and belief, as to the Reliance Company, is that it knew that plaintiff was the author of the work, that the rights of the Munsey Company were "necessarily" derived from the agreement between the Munsey Company and plaintiff, and that the terms of the authority to the Munsey Company to deal with the copyright, when secured, were necessarily confined and restricted by the terms of the contract or assignment from plaintiff to Munsey, and that this paper was at all times open to inspection by the Reliance Company.

[1] What this allegation amounts to is that, where a publisher copyrights a work of an author, there must of necessity exist some arrangement between them, and that, perchance, the author may have reserved something undisclosed which the person dealing with the owner of the copyright should have suspected, although an examination of the record title provided for by law shows good title. This, to my mind, would place a duty upon a person dealing with the owner of a copyrighted work which the law never contemplated, and which, from the standpoint of commercial requirements, would be unjust and seriously hamper legitimate dealings.

Of course, a cautious purchaser may require all sorts of assurances from the owner of the copyright, and thus, perhaps, avoid unexpected litigation; but I am unable to follow the reasoning which requires a person dealing with the owner of a copyright to rely on anything more than the statute requires, unless, of course, either actual notice has been given or some facts are within his knowledge from which he is put upon his inquiry.

The various parts of paragraph 11, when read together, and especially as illuminated by the use of the word "necessarily," do not suggest that the Reliance Company had any knowledge of any fact, but amount merely to a conclusion that because the author did not copyright the work and the magazine publisher did, therefore the Reliance Company must assume that the filed copyright did not truly show who was the owner thereof.

As actual knowledge is not alleged against the Reliance Company, the complaint must be dismissed as to that defendant.

Actual knowledge, however, is charged against the Mutual Film Corporation, and constructive notice "by reason of the *fact* that said *defendant then knew*" the existence of plaintiff's rights is likewise charged. While the complaint remains in this condition, it cannot be dismissed against the defendant Mutual Film Corporation.

[2] Defendant urges that Falk v. Howell (C. C.) 34 Fed. 739, is

authority for the proposition that the alternative pleading must be held bad. In that case the facts were, or should have been, within the knowledge of the plaintiff, and clearly it was his duty to set forth an accurate compliance with statutory requirements. Here, however, this defendant must be better informed than the plaintiff as to whether it had actual knowledge or constructive notice, either of which (properly inferred from facts) would make the Mutual a proper party defendant. Of course, it would save everybody time and expense if, whatever the fact is, the complaint could set it forth; but that is a matter for the attorneys to deal with.

On the face of the complaint, a dismissal cannot be had in favor of the Mutual. Settle order on two days' notice.

If plaintiff desires to amend the complaint as against Reliance Company, he will be permitted so to do on the payment of costs. If he does not, then the complaint will be dismissed, without costs.

MOTION PICTURE PATENTS CO. v. UNIVERSAL FILM MFG. CO. et al.

(District Court, S. D. New York. March 27, 1916.)

1. COSTS ⇐182—FEDERAL COURTS—DISBURSEMENTS FOR COPIES OF RECORDS AND DOCUMENTS.

Under Rev. St. § 983 (Comp. St. 1913, § 1624), which provides that "lawful fees for exemplifications and copies of papers necessarily obtained for use on trials in cases where by law costs are recoverable in favor of the prevailing party shall be taxed, * * *" such fees are taxable in favor of the prevailing party in all cases, whether at law or in equity or admiralty, where by any provision of statute costs are recoverable, subject to the authority of the court to determine whether the exemplifications or copies were "necessary."

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 714; Dec. Dig. ⇐182.]

2. COSTS ⇐182—SUITS FOR INFRINGEMENT—TAXABLE COSTS.

In an infringement suit, the cost of a certified copy of the file wrapper and contents of the patent in suit is taxable as costs, but certified copies of other United States patents are not necessary, unless insisted on by opposing counsel, as the printed copies furnished by the Patent Office will be accepted as authentic. Certified copies of the opinions of other courts, or of Patent Office officials, relating to the patent in suit, are not necessary, and the cost thereof will not be taxed, where the opinions are published in the Federal Reporter or in other standard or official publications; but the cost of a certified copy of any judgment, decree, or order will be taxed. The cost of certified copies of foreign patents or translations thereof will be taxed, where "necessarily obtained for use" in the trial of the cause, but only on a certificate of the judge to that effect.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 714; Dec. Dig. ⇐182.

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

In Equity. Suit by the Motion Picture Patents Company against the Universal Film Manufacturing Company, the Universal Film Ex-

change of New York, Incorporated, and the Prague Amusement Company, Incorporated. On appeal from clerk's taxation of costs. Allowed in part.

Appeal from clerk's taxation of costs. The items in question are as follows:

Cost of certified copy of file wrapper and contents of application of patent in suit	$28 80
Copy of opinion of District Court	1 00
Copy of decree of District Court	1 00
Thirteen copies of United States patents	65
Three copies of French patents; one copy of British patent	9 50
Certified copy of opinion of District Court for the Eastern District of Pennsylvania, United States v. Motion Picture Patents Company et al	9 95
Translations of French patents Nos. 208,617 and 249,875	20 00
Certified copy of decision of the examiner in chief of October 17, 1899, Interference No. 18,461	6 53
Certified copy of decision of the Acting Commissioner of February 5, 1900, in above interference	3 32
Certified copy of decision of Court of Appeals of District of Columbia on appeal from above interference	5 10

George F. Scull, of New York City, for plaintiff.

Wetmore & Jenner, of New York City (Oscar W. Jeffery, of New York City, of counsel), for defendants.

MAYER, District Judge. Some of the items above set forth were allowed and others disallowed by the clerk. As counsel suggest that there is some conflict in the decisions affecting the subject-matter, and urge the desirability of a settled practice, all of the items will be considered.

Section 824 of the Revised Statutes (Comp. St. 1913, § 1378) provides, among other things:

"Sec. 824. On a trial before a jury, in civil or criminal causes or before referees, or on a final hearing in equity or admiralty, a docket fee of twenty dollars: Provided, that in cases of admiralty and maritime jurisdiction, where the libelant recovers less than fifty dollars, the docket fee of his proctor shall be but ten dollars."

Section 828 (section 1383) sets forth in detail certain fees to be paid to the clerk, including those required in equity, law, and admiralty.

Section 4920 of the Revised Statutes (section 9466) provides:

"Sec. 4920. In any action for infringement the defendant may plead the general issue, and, having given notice in writing to the plaintiff or his attorney thirty days before, may prove on trial any one or more of the following special matters: * * * And in notices as to proof of previous invention, knowledge, or use of the thing patented, the defendant shall state the names of the patentees and the dates of their patents, and when granted, and the names and residences of the persons alleged to have invented or to have had the prior knowledge of the thing patented, and where and by whom it had been used; and if any one or more of the special matters alleged shall be found for the defendant, judgment shall be rendered for him *with costs*. And the like defenses may be pleaded in any suit in equity for relief against an alleged infringement; and proofs of the same may be given upon like notice in the answer of the defendant, and with the like effect."

[1] Section 983 (section 1624) provides:

"Sec. 983. The bill of fees of the clerk, marshal, and attorney, and the amount paid printers and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trials in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court, and be included in and form a portion of a judgment or decree against the losing party. Such taxed bills shall be filed with the papers in the cause."

A docket fee is unquestionably "costs," and the word "trial" is comprehensive enough to include a final hearing in equity. Further, "decree" refers to the final determination in equity, as "judgment" does at law. The result is that section 983 (section 1624), when it refers to "trials in cases where *by law*" costs are recoverable, means that costs are recoverable in all cases where by any provision of statute any costs are recoverable.

[2] Thus the prevailing party is entitled as matter of right to "all lawful fees for exemplifications and copies of papers *necessarily* obtained for use on trials." "Necessarily" must be limited to mean those exemplifications and copies of papers which are essential to the cause.

1. Cost of certified copy of file wrapper and contents of application of patent in suit. Allowed.

2. Copy of opinon of District Court. This is the opinion of the District Court in this case. Allowed.

3. Copy of decree of District Court in this case. Allowed.

4. Thirteen copies of United States patents. Allowed. My attention has been called to the fact that occasionally counsel insist that certified copies of United States patents shall be obtained. The court in this district regards the printed copies issued by the Patent Office as satisfactory, and therefore certified copies of United States letters patent will not be construed as being "necessarily obtained for use on trials," unless opposing counsel insists on certified copies—unreasonably, as I think.

5. Three copies of French patents; one copy of British patent. The French and British patents received in evidence in this case were essential to a determination of the cause. There are instances, however, where foreign patents are offered in evidence, and under the liberal practice in equity are received, but are not essential to a determination of the cause, and have the effect merely of unnecessarily adding to the volume of the record. If objection is taken upon the taxation of costs to any foreign patents, the cost of exemplifications or copies will be taxed only if, after application, a certificate or order is made by the trial judge that the exemplifications or copies were, in his opinion, "necessarily obtained for use" on the trial. If, owing to absence or other reason, the trial judge is not available for such application, then the application will be made to the judge sitting ex parte.

6. Certified copy of opinion of District Court for the Eastern District of Pennsylvania, United States v. Motion Picture Patents Company et al. There is no necessity for obtaining a certified copy of

any opinion of another District Court, where, as in this case, the opinion was published in the Federal Reporter. The decree in a case, and not the opinion, is evidence. The opinion is, in effect, argument, although at times extremely important, in order to assist in the interpretation of a decree in another jurisdiction, or to assist the trial court in arriving at its own determination. Where the opinion of a court is published in the United States Supreme Court Reports, or Advance Sheets, or in the Federal Reporter, as the case may be, or the opinion of a state court is published in any official report or standard publication, a certified copy will not be taxed. Where the opinion in another jurisdiction is not reported, and objection is taken to taxing the cost of a copy thereof, then a certificate or order must be obtained from the trial judge, or the judge sitting ex parte, as the case may be, that the opinion was "necessarily obtained for use" on the trial, and the clerk may then tax the cost of a certified copy.

7. Translations of French patents Nos. 208,617 and 249,875. At my request Mr. Scull and Mr. Jeffery made inquiries to ascertain the fair and reasonable charge current for translations in French, German, Spanish, Italian, and Swedish. I also instructed the clerk's office to make the same inquiry, and from the information received I conclude that 50 cents per 100 words is a fair and reasonable charge taxable for such translations.

8. Certified copy of decision of the examiner in chief of October 17, 1899, Interference No. 18,461. Allowed.

9. Certified copy of decision of the Acting Commissioner of February 5, 1900, in above interference. Allowed. In this connection, however, costs will not be taxed, where all the subject-matter sought to be introduced is published in the Official Gazette of the Patent Office.

10. Certified copy of decision of Court of Appeals of District of Columbia on appeal from above interference. The expense of an opinion of the Court of Appeals of the District of Columbia will fall within the rule stated in connection with item 6 supra. The expense of a certified copy of any judgment, decree, or order will be taxed.

It will be noted that I have passed solely upon the questions presented on this taxation. The court will pass on other questions only as they may come up upon the taxation of costs from time to time.

In order to assure uniformity, this memorandum has been submitted to my associates, Judges HOUGH, LEARNED HAND, and AUGUSTUS N. HAND, and I am authorized to say that they concur in the conclusions here stated.

UNITED STATES v. ELDER et al.

(District Court, W. D. Kentucky. March 15, 1916.)

No. 8027.

1. CRIMINAL LAW ⟸432—EVIDENCE—HEARSAY—PUBLIC RECORDS—ADMISSIBILITY.

In a prosecution for violating the oleomargarine law (Act May 9, 1902, c. 784, 32 Stat. 193), as carrying on the business of retailing colored oleomargarine, etc., the government offered in evidence monthly returns of a manufacturer and wholesale dealer in oleomargarine, showing in detail the quantity taxed at one-fourth of a cent a pound, disposed of to persons including defendant. These returns were made on blanks furnished by the Internal Revenue Bureau, and were made to collector on affidavit of the employés of the manufacturer to enable the collector to collect a tax on the product. Such returns were not open to inspection by the public in general, but only to the internal revenue officer or agent. *Held* that, while public records of officials are admissible in evidence, as an exception to the hearsay rule, such returns could not be received, for they were not made by public officers, were not open to inspection by the public, and there was no showing that those employés of the manufacturer who made them could not be obtained as witnesses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1021; Dec. Dig. ⟸432.]

2. CRIMINAL LAW ⟸662(4)—TRIAL—CONFRONTATION OF WITNESSES.

In such case the returns cannot be received, in view of Const. Amend. 6, giving an accused person the right to be confronted with the witnesses against him; the persons who made the returns not being shown to be dead, and the returns not falling within any exceptions to the rule.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1540; Dec. Dig. ⟸662(4).]

At Law. Audley Elder and others were charged with violation of the oleomargarine law. On objection to evidence. Objection sustained.

Perry B. Miller, U. S. Atty., of Louisville, Ky.
George Du Relle, of Louisville, Ky., for defendants.

EVANS, District Judge. [1] For present purposes it will suffice to say, respecting the indictments in this and two other cases being tried at the same time, that they charge various violations of the oleomargarine law. For example, the defendants are charged with unlawfully carrying on the business of manufacturers of oleomargarine, with unlawfully furnishing it to others, and with unlawfully carrying on the business of retail dealers in colored oleomargarine. In support of these charges, and probably with more especial reference to the charge of manufacturing oleomargarine, the United States has offered in evidence certain of the monthly returns of a manufacturer and wholesale dealer in oleomargarine in Chicago, Ill., of certain oleomargarine taxed at one-fourth of a cent a pound, showing in detail the quantity of oleomargarine taxed at that rate disposed of by the manufacturer and wholesale dealer to certain persons in various parts of the country, including the defendants, or some of them, to whom some of it was possibly shipped. These monthly returns, on blanks

furnished by the Internal Revenue Bureau, were made to the collector of internal revenue for that district in Illinois in which Chicago is located, and upon each of which was an affidavit of one of the employés of the manufacturer in this form:

"I, ———, swear that the foregoing statements and details thereof in this return of oleomargarine taxed at ¼ cent a pound received and disposed of, likewise oleomargarine taxed at ¼ cent a pound on hand, are true."

This was signed by the affiant and followed by a jurat showing that it had been sworn to. As shown on its face, each of the returns alluded to was made monthly, and all those offered in testimony were dated and made within the three years next preceding the finding of the indictments. Whether the employé of the manufacturer personally knew the facts thus reported, or whether he ascertained them from the books of the manufacturer, does not appear. There was no effort to show that the persons in the employment of the manufacturer and wholesale dealer who actually made the sales or the shipments were dead, or were out of reach of the process of the court, or that their attendance as witnesses could not have been obtained, and the question presented is: Are such papers competent testimony on the trial of a person accused of the public offenses indicated?

There can be no doubt that public records and documents (which late writers on the law of evidence prefer to call official statements) required to be made by an official person may be used as testimony for certain purposes even in criminal cases. This rule has been announced in many opinions, but we refer only to Evanston v. Gunn, 99 U. S. 666, 25 L. Ed. 306, Sandy White v. U. S., 164 U. S. 103, 104, 17 Sup. Ct. 38, 41 L. Ed. 365, and Rollins v. Board of Com., 90 Fed. 581, 33 C. C. A. 181. The general rule is most clearly discussed in Greenleaf on Evidence, vol. 1 (16th Ed.) in sections 98, 99, 99a, 162m, 163, 163a, 163f, 470, 474, 475, 483, 484, 491, 493, 496, and 498. We need not do more than cite this elementary authority.

But does this general principle have any application to the question we are considering? For purposes of its own the government imposes taxation upon oleomargarine, and in order fully to enforce collection of that taxation it authorizes the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to make regulations to the end that the taxation may be collected and frauds upon the revenue prevented or discovered. Among those regulations are those under which the papers we have referred to were returned. While the return of the manufacturer or wholesale dealer is filed with the collector, and is retained by him, it is not made by an official person. In making them the manufacturer or wholesale dealer acts in his own individual capacity and no other. He personally, and not officially, makes the return, not as evidence against any outside person, but in order that the revenue officers may keep up with and be able to search out the oleomargarine he sells or ships to others. In this way those officers obtain clews that may enable them to ferret out violations of the laws pertaining to oleomargarine. The returns thus made are not official statements—that is, statements made by an official person. The manufacturer of oleomargarine is required by the

regulations to enter daily in a book of the prescribed form the items which are ultimately put into the monthly returns, and the regulations then provide that:

"This book or form must always be kept at the manufactory and be always open to the inspection of any internal revenue officer or agent."

It is far from being a public record made by an officer. It is only a report made by a manufacturer of what he does. It cannot be examined or inspected by the public, but only by an "internal revenue officer or agent." The defendants here could have no access to them, for, so far as they are concerned, the book is the private property of the manufacturer. Defendants could have no opportunity, certainly no public opportunity, of ascertaining what the contents of those papers are. But the facts pertaining to the sales and shipments made by the manufacturer or wholesale dealer are known, and must necessarily be known, to the persons who made those sales and shipments, and who could testify to the actual facts respecting them, including the names of the consignees of shipments and the quantity of oleomargarine sold and shipped to each. Certainly there does not appear to be any necessity for any departure from the universal and most wholesome rule that no person can be convicted of a public offense upon mere hearsay testimony. Primary evidence from persons who know the facts was available and within reach. The mere trouble of getting the testimony cannot excuse its absence.

[2] The learned district attorney at the argument confessed his inability to produce the decision of any court directly supporting his contention, and certainly there is no statute which authorizes the admission of this sort of testimony in this kind of case. And indeed, if there had been any such statute, it might well have been subject to the ruling in Kirby v. United States, 174 U. S. 57, 19 Sup. Ct. 574, 43 L. Ed. 809, which held that a statute analogous to the one suggested was unconstitutional. The sixth amendment to the Constitution of the United States provides, generally, that in all criminal prosecutions the accused shall have the right to be confronted with the witness against him. True, decisions of the Supreme Court and other courts have sustained apparent exceptions to this constitutional rule, such, for example, as cases where the testimony of a dead witness was read at a second trial, or where certain records and public documents and registers were admitted, although there was no witness, except such documents, with which there could be confrontation. But those apparent exceptions are not real ones, and where the facts constituting the offense itself are necessary to be proved they must primarily be proved by living witnesses, who must confront the accused. They must testify under oath taken at the hearing, and full opportunity for cross-examination must be afforded the accused.

In determining the question before us it may suffice to say that the testimony, if any, against defendants, to be gleaned from the monthly returns, must come, if at all, from an outside statement made by one who is not shown to have been known to the defendants, nor to have been authorized by them to make any of the entries in the manufacturer's book used in consolidating the data into the monthly returns.

Those returns were made by one who was not an officer, by one who was not acting as the agent of the defendants, but in the interest of his own employer, by one who is not present in court, who does not confront the accused, who has not been sworn to testify upon the issues in this case, and in respect to whose statements the accused can have no opportunity for cross-examination. It would seem that these considerations are entirely conclusive of the question of the admissibility, even of sworn statements made ex parte by an employé of a manufacturer who was not an official, with whom the defendants had nothing to do, whom they did not know, and with the contents of whose statements they never had any acquaintance until they were presented at this hearing under circumstances excluding all opportunity for cross-examination or for testing the accuracy of the statements made by the manufacturer or his employé.

It seems to the court that these considerations conclusively establish the proposition that the testimony offered is in every respect mere hearsay and wholly inadmissible as against any one of the defendants for any purpose whatever, however much the entries on the monthly returns might refresh the memory of a witness who made them if testifying here. Without going into the matter further, it may be helpful to quote somewhat lengthily from the opinion of the Supreme Court in the case of Kirby v. United States, above referred to, wherein that court, speaking through Mr. Justice Harlan, as reported in 174 U. S. at pages 53, 54, and 55, 19 Sup. Ct. at pages 576 and 577 (43 L. Ed. 809), said:

"As shown by the above statement, the charge against Kirby was that on a named day he feloniously received and had in his possession with intent to convert to his own use and gain certain personal property of the United States, theretofore feloniously stolen, taken, and carried away by Wallace, Baxter, and King, who had been indicted and convicted of the offense alleged to have been committed by them. Notwithstanding the conviction of Wallace, Baxter, and King, it was incumbent upon the government, in order to make its charge against Kirby, to establish beyond reasonable doubt (1) that the property described in the indictment was in fact stolen from the United States; (2) that the defendant received or retained it in his possession, with intent to convert it to his own use or gain; and (3) that he received or retained it with knowledge that it had been stolen from the United States. How did the government attempt to prove the essential fact that the property was stolen from the United States? In no other way than by the production of a record showing the conviction under a separate indictment of Wallace, Baxter and King—the judgments against Wallace and Baxter resting wholly upon their respective pleas of guilty, while the judgment against King rested upon a trial and verdict of guilty. With the record of those convictions out of the present case, there was no evidence whatever to show that the property alleged to have been received by Kirby was stolen from the United States.

"We are of the opinion that the trial court erred in admitting in evidence the record of the convictions of Wallace, Baxter, and King, and then in its charge saying that, in the absence of proof to the contrary, the fact that the property was stolen from the United States was sufficiently established against Kirby by the mere production of the record showing the conviction of the principal felons. Where the statute makes the conviction of the principal thief a condition precedent to the trial and punishment of a receiver of the stolen property, the record of the trial of the former would be evidence in the prosecution against the receiver to show that the principal felon had been convicted; for a fact of that nature could only be established by a record.

The record of the conviction of the principals could not, however, be used to establish, against the alleged receiver, charged with the commission of another and substantive crime, the essential fact that the property alleged to have been feloniously received by him was actually stolen from the United States. Kirby was not present when Wallace and Baxter confessed their crime by pleas of guilty, nor when King was proved to be guilty by witnesses who personally testified before the jury. Nor was Kirby entitled of right to participate in the trial of the principal felons. If present at that trial he would not have been permitted to examine Wallace and Baxter upon their pleas of guilty, nor cross-examine the witnesses introduced against King, nor introduce witnesses to prove that they were not in fact guilty of the offense charged against them. If he had sought to do either of those things—even upon the ground that the conviction of the principal felons might be taken as establishing prima facie a vital fact in the separate prosecution against himself as the receiver of the property—the court would have informed him that he was not being tried and could not be permitted in any wise to interfere with the trial of the principal felons. And yet the court below instructed the jury that the conviction of the principal felons upon an indictment against them alone was sufficient prima facie to show, as against Kirby, indicted for another offense, the existence of the fact that the property was stolen—a fact which, it is conceded, the United States was bound to establish beyond a reasonable doubt in order to obtain a verdict of guilty against him.

"One of the fundamental guaranties of life and liberty is found in the sixth amendment of the Constitution of the United States, which provides that 'in all criminal prosecutions the accused shall * * * be confronted with the witnesses against him.' Instead of confronting Kirby with witnesses to establish the vital fact that the property alleged to have been received by him had been stolen from the United States, he was confronted only with the record of another criminal prosecution, with which he had no connection and the evidence in which was not given in his presence. The record showing the result of the trial of the principal felons was undoubtedly evidence, as against *them*, in respect of every fact essential to show *their* guilt. But a fact which can be primarily established only by witnesses cannot be proved against an accused—charged with a different offense for which he may be convicted without reference to the principal offender—except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases."

Under these circumstances we must hold that the objections to the testimony thus offered should be and they are sustained.

In re BALLANTINE.

(District Court, N. D. New York. May 6, 1916.)

1. BANKRUPTCY ⊂=314(4)—CLAIMS—SUFFICIENCY.

Where a claim against the estate of a bankrupt, presented in 1915, for moneys lent, the last loan being in 1905, did not clearly show any partial payments on account of such claim, and disclosed that the only written acknowledgment of the debt was a purported assignment by the bankrupt in 1907 of certain book accounts, and evidences of indebtedness for a consideration other than the amounts lent, the claim should be disallowed, as showing on its face that it was barred by limitations.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 473; Dec. Dig. ⊂=314(4).]

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

2. LIMITATION OF ACTIONS ⊂=27—RUNNING OF STATUTE—ACKNOWLEDGMENT —PART PAYMENT.

An action for money lent will be barred by lapse of six years, unless there is a written acknowledgment or a payment on account within the six-year period, which will toll the running of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 132, 133; Dec. Dig. ⊂=27.]

3. BANKRUPTCY ⊂=314(4)—CLAIMS—SUFFICIENCY.

A claim against the estate of a bankrupt for moneys lent before 1905, which was presented in 1915, and recited monthly payments on account from October, 1912, to July, 1914, it is insufficient to show that the claim was not barred by limitations; it not appearing from the recitals that the payments were on account of the loan.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 473; Dec. Dig. ⊂=314(4).]

4. BANKRUPTCY ⊂=341—CLAIMS—PRESENTATION.

Though a claim for moneys loaned was insufficient, not showing that limitations had been tolled, the claim will not be finally disallowed, where there were averments of payments on account, which by amendment might be made to show a tolling of limitations, and the claimant will be given an opportunity to amend.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 516, 528; Dec. Dig. ⊂=341.]

5. BANKRUPTCY ⊂=127—TRUSTEE—SELECTION.

While the District Court will not undertake to set aside or vacate the choice or election of the trustee, but will relegate that matter to the referee in bankruptcy, the referee should exercise care to protect the interests of all creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 183; Dec. Dig. ⊂=127.]

6. BANKRUPTCY ⊂=123—SELECTION OF TRUSTEE—RIGHT OF CREDITORS.

Where there was a close struggle over the election of trustee, and the bankruptcy was such that the wife of the bankrupt, who filed a claim, should not be allowed to dominate the choice, it is proper for the referee to refuse to allow her to vote, where to do so would allow her to name the trustee, notwithstanding her claim, which was not finally disallowed, might be amended so as to be made good.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 171–179; Dec. Dig. ⊂=123.]

In Bankruptcy. In the matter of Charles J. Ballantine, bankrupt. Application by Harriet K. Ballantine to review the decision of the referee, rejecting her claim and refusing to allow her to vote on the question of the election of a trustee. Order, which did not finally refuse the claim, but suggested that it be amended, affirmed, and proceedings remanded, with directions.

This is a review of the decision of the referee in bankruptcy rejecting the claim of Harriet K. Ballantine, the wife of the bankrupt, for $12,979.54, at the first meeting of creditors, and refusing to allow her to vote on the question of the election of a trustee, and asking that such order be set aside, as well as the order appointing a trustee. The referee did not finally reject the claim, but suggested that same must be and should be amended before it could be allowed, as on its face it was invalid and barred by the statute of limitations, which

was pleaded or alleged as a defense to the claim and a reason for its disallowance.

Visscher, Whalen & Austin, of Albany, N. Y., for claimant.

Geo. J. Hatt, 2d, of Albany, N. Y., for trustee elected and for certain creditors.

RAY, District Judge (after stating the facts as above). [1] At the first meeting of creditors the claimant, Harriet K. Ballantine, the wife of the bankrupt, presented a claim for money loaned by her to said Charles J. Ballantine, "as per the schedule hereto attached and made a part hereof, marked Schedule A, except the sum of three hundred eighty dollars and 00/100 ($380), as per the annexed schedule hereto annexed and made a part hereof, marked Schedule B; that no part of said debt has been paid, nor has any note been received, or judgment rendered thereon; that there are no offsets or counterclaims to the same, and that deponent has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever."

Schedule A was as follows:

Charles J. Ballantine to Harriet K. Ballantine, Dr.

April 7, 1902	$2,286.70
July 1, 1902	2,208.00
July 20, 1903	507.25
Jan. 6, 1905	2,149.21
Jan. 6, 1905	465.90
	$7,617.06
Interest to February 10, 1915	5,362.48
	$12,979.54

Schedule B was as follows:

Oct. 17, 1912.	Received on account	$ 20.00
Nov. 21, 1912.	" " "	20.00
Jan. 21, 1913.	" " "	20.00
Jan. 28, 1913.	" " "	20.00
Feb. 21, 1913.	" " "	20.00
Mch. 19, 1913.	" " "	20.00
Apr. 18, 1913.	" " "	20.00
May 19, 1913.	" " "	20.00
June 18, 1913.	" " "	20.00
Sept. 4, 1913.	" " "	20.00
Sept. 4, 1913.	" " "	20.00
Oct. 21, 1913.	" " "	20.00
Nov. 26, 1913.	" " "	20.00
Dec. 22, 1913.	" " "	20.00
Feb. 20, 1914.	" " "	20.00
Apr. 22, 1914.	" " "	20.00
May 21, 1914.	" " "	20.00
June 22, 1914.	" " "	20.00
July 20, 1914.	" " "	20.00
Total		$380.00

Certain creditors objected to the allowance of the claim on the ground that it appeared on its face it was barred by the statute of limitations and should not be allowed. Thereupon the claimant with-

drew the claim and amended same, by inserting therein the words "said debt having been revived by an instrument in writing duly acknowledged by said bankrupt dated September 19, 1907, hereto annexed," after the words "marked Schedule B," and also by inserting the words "except as herein stated" after the words "no part of said debt has been paid," and also by inserting after the words "counterclaims to the same" the words "except as above."

The instrument in writing, duly acknowledged by said bankrupt, and referred to in the amended claim, and annexed to the amended claim, reads as follows:

> In consideration of the sum of seven thousand dollars ($7,000), to me in hand paid at or before the ensealing and delivery of these presents, I, Charles J. Ballantine, of the city and county of Albany, state of New York, do hereby sell, assign, transfer, and set over unto Harriet K. Ballantine, of the same place, all book accounts and other evidences of indebtedness now due and owing me.
>
> In witness whereof I have hereunto signed my name and affixed my seal this 19th day of September 1907. Charles J. Ballantine. [L. S.]
>
> State of New York, City and County of Albany—ss.:
>
> On this 19th day of September, 1907, personally appeared before me Charles J. Ballantine, to me known to be the person who executed the foregoing instrument, and he thereupon acknowledged that he executed the same.
>
> George Lawyer,
> Commissioner of Deeds, Albany, N. Y.

There was and is no allegation in the amended claim that any book accounts or other evidences of indebtedness were due and owing to the assignor mentioned in said assignment, Charles J. Ballantine, from any person, and hence it does not appear and did not appear to the referee that anything was assigned to or received by the assignee, Harriet K. Ballantine, to apply on the alleged indebtedness, which as shown in Schedule A was barred by the statute of limitations, as the last loan of money was made January 6, 1905, and the claim was not presented until some time in the year 1915. There is nothing in the amended claim to show that this assignment, even if it assigned anything, or carried anything, to the assignee, was made to apply as a payment on the indebtedness alleged and particularized in Schedule A, and for this reason the amended claim did not show a renewal or revival of the claim, so as to take it out of the statute of limitations.

Schedule B simply says, giving dates, "Received on account, $20.00," and this is repeated each and every year down to and including July 20, 1914. There is no allegation or statement in the amended claim, and there is none in the original claim, that these payments were made or accepted or received on the claim mentioned and set forth in Schedule A, or that they were made by Ballantine himself, or that they were made at the times mentioned. To accept these as payments on the account set forth in Schedule A and mentioned in the original claim, and also in the amended claim, would require that we infer that the alleged payments were made at the dates mentioned, and there is no statement in the claim as amended that they were made at the dates mentioned, and also on the account and claim mentioned in Schedule A, and there is no allegation or statement in the claim that

they were so made. I think the referee was right in sustaining the objection to the sufficiency of the claim, and in sustaining the objection thereto that such claim on its face was barred by the statute of limitations, even in its amended form.

[2-4] There is no written acknowledgment of the debt, and to take a claim of this character for money loaned out of the statute of limitations it must appear that a payment was made by the person owing the debt on the claim within six years. The payment must have been made on that particular claim. A payment on account is not sufficient, unless it was made on account of the particular claim constituting the debt or claim. These essentials should not be left to surmise, guess, speculation, or inference. If it be true that the payments on account mentioned in Schedule B were made to apply as payments on the alleged debt or claim mentioned in Schedule A, it would have been very easy to so say. I rule, however, that the referee should, and he is directed to, allow the claimant to file an amended proof of claim, setting forth whether or not any payments were made on account of the moneys claimed to have been loaned as set forth in Schedule A, and, if so, what payments, specifying them, and the dates when such payments were made, and the amended claim should specify that the alleged payments were made to apply on and as a payment on that account or that indebtedness.

[5] It appears and was conceded on the argument that there are quite a number of approved and allowed claims, and that there was a struggle, and a very close struggle, over the election of a trustee. I rule and hold that the referee was right in not allowing this claim, so as to enable the wife of the bankrupt to dominate the choice of a trustee. There are questions involved in this bankruptcy proceeding which forbid that the wife should so dominate the election of the trustee. The trustee should be a person free from prejudice and entirely disinterested. This court will not undertake to set aside or vacate the choice or election of the trustee made, but will relegate that matter to the referee in bankruptcy, with directions to give the matter careful reconsideration, and appoint such trustee as he is satisfied will protect and care for the interests of all creditors, but with further directions that in no event shall the wife be allowed to dominate the choice of the trustee.

[6] It is not intimated that the referee should set aside the choice of trustee already made, as that matter is left entirely to the good judgment and discretion of the referee, who has control of the matter, and who undoubtedly will exercise his usual good judgment in this matter. Neither is it necessary that the confirmation of the trustee chosen should await an amendment of the claim and an adjudication thereof. This would only lead to delay, and is entirely unnecessary, as the wife in no event should be permitted to dominate the choice of the trustee.

There will be an order accordingly.

In re BLITZ.

(District Court, E. D. Pennsylvania. April 28, 1916.)

No. 4280.

1. BANKRUPTCY ⊜229—EXAMINATION OF BANKRUPT—CONTEMPT—"REFUSAL TO BE EXAMINED."

The "refusal to be examined" according to law, for which a bankrupt may be committed for contempt, may be manifested by a formal refusal, by standing mute, by evasive or inconclusive answers, or by palpably false and flagrantly untruthful answers; but it always involves the element of contumaciousness, and must be distinguished from mere lack of candor or frankness, and from untruthfulness and plain perjury.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 385; Dec. Dig. ⊜229.]

2. BANKRUPTCY ⊜229—EXAMINATION OF BANKRUPT—CONTEMPT—PROCEEDINGS FOR COMMITMENT.

Before a bankrupt is committed for contempt for refusing to be examined, he should be first admonished and given an opportunity to purge himself, after which a specific question should be asked and a specific answer required; and where the record shows merely that he answered questions put to him as to the acquisition and sale of property by saying that he did not know, or that he did not recollect, and was not informed that his answers were insufficient until a petition was filed asking for his commitment, the commitment will be refused.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 385; Dec. Dig. ⊜229.]

In Bankruptcy. In the matter of Simon Blitz, bankrupt. On certificate of the referee that the bankrupt be adjudged to be in contempt for refusal to be examined. Commitment for contempt refused, and case remitted to the referee for further proceedings.

Raymond A. White, Jr., and Maurice W. Sloan, both of Philadelphia, Pa., for trustee.

Edwin Fischer and William M. Lewis, both of Philadelphia, Pa., for bankrupt.

DICKINSON, District Judge. [1] It is obvious that a refusal "to be examined according to law" means a refusal in fact and effect. The form of the refusal, or in what way manifested, is of no importance. A formal refusal by a witness to answer questions, displayed by a flat and defiant declaration that he would not answer, is one form. Standing mute is another. Evasive, inconclusive, or irresponsive replies to clear and plain inquiries is another. Palpably and flagrantly untruthful answers is still another. In re Gitkin (D. C.) 164 Fed. 73. There is, it must be observed, in all of these instances, the element of contumaciousness; something of the element of defiance; something which can be distinguished from mere lack of candor or frankness, or from untruthfulness, or even from plain perjury. Refusing to testify is one thing. Testifying falsely is another thing. Although equally reprehensible and open to condemnation, they are distinct and separate, and the distinction should be kept in mind, or confusion will result in visiting upon the offender the deserved punishment. The line

of demarcation is distinct enough, but cannot be as readily drawn. This can be best left to the discriminating judgment of the referee before whom the bankrupt appears, and such judgment should not lightly be disturbed.

[2] We think, however, a commitment for contempt should be preceded with certain formalities. The witness would ordinarily be permitted to purge himself by showing a willingness to recant and to testify fully. He should therefore be first admonished. This should be followed with a specific question, and an answer required. The real attitude of the witness will be then disclosed, and any further proceeding be clear-cut and definite. The difficulties and complications resulting from any other course is well shown by this record.

The petition in this case was filed in January, 1912. The examination of the bankrupt was conducted upon the theory that his failure was not an honest one. Within a few months of bankruptcy he had bought largely. The property and assets disclosed showed a heavy depletion. It was the plain duty of the bankrupt to have given a truthful and full account of all of the property he had bought and what had become of it, and of the money proceeds of any which had been sold. In this duty the referee finds he wofully failed. He concealed and falsified the real quantity of goods which had come into his possession, by professing ignorance of what the real quantity was, and by falsely estimating its value. When compelled to give a reluctant admission of the receipt of goods, he concealed and falsely testified concerning what had become of them. This was done by testifying to sales never in fact made, and as to which he could give neither the quantity nor value of what was sold, or to whom sold, or, if the sale was admitted, by making a false estimate of the loss on such sales. There was a like concealment and falsification of what was done with the money which was traced to his possession. On the whole, he made a distinctly bad impression upon the referee, who was fully convinced that the bankrupt had possession or control of money and property a disclosure of which he was evading by false statements of some facts and falsely professed ignorance of others. The report of the referee well vindicates these conclusions.

Counsel for bankrupt accounts for these seemingly condemning conditions and appearances on the theory that through business incapacity and sickness and business demoralization he lost account of what he was doing, and in consequence was in real ignorance of his actual financial condition, except the net result that he had sold what he could for anything he could get for it, and had paid out the money to the creditors who were demanding payment. The specific, or at least the main, feature of his testimony which is made the proposed basis of his commitment, is this: He testified to a sale of part of his stock, from which he realized a sum which he finally fixed at $300. What he sold was shoes. How many, he did not know. They were taken away in a wagon, which he helped to load. Each pair of shoes was in a box, and the boxes in cases. How many boxes there were, or how many cases, he did not know. What the cost or selling price was, either in the aggregate or of any of them, he did not know. The

man to whom he sold them was a stranger, whose name only was known. Who he was, or where he could be found, he did not know. The man happened to come into the store, and a deal was made for $300, without either buyer or seller knowing the quantity of goods which was the subject of the sale.

This testimony was given April 16, 1912, at a hearing at which counsel for the bankrupt was not present. The bankrupt had been previously called for examination on January 19, 1912, and had testified in part. The above facts were elicited through questions the answer to which was, "I don't know," or "I don't recollect," or their equivalent. There was nothing which took place, except a searching cross-examination of the witness. No complaint was made to the referee that the witness was evading the questions, or in effect refusing to testify. The referee expressed no dissatisfaction with the witness, and did not call upon him to make other answer than that which he made. Apparently counsel for the trustee was content with the results at the time. At least nothing was done until September 9, 1913. Then a petition to have the bankrupt certified for contempt was presented to the referee. To this an answer was filed, by which the bankrupt purged himself of any such purpose or intent, and tendered himself for full examination. He was afterwards examined by his counsel, and cross-examined by counsel for the trustee. The only additional fact (if it can be called such) which was brought out was that the witness had casually met this quondam purchaser on the street and had learned that there were 400 pairs of shoes in the purchase. On cross-examination he was taken back over the same ground as at his first examination, and repeated his former answers.

The referee certifies the bankrupt to be a proper subject for a commitment for contempt. The exceptions to his report raise the question of the propriety of contempt proceedings under the circumstances. Without subscribing to the soundness of the propositions advanced on behalf of this bankrupt, the conclusion reached is that we cannot see our way clear to commit him for contempt on the showing of this record as it is. A bankrupt is required by the law to testify, and to testify truthfully. The test of this first obligation is not the truth or falsity of his testimony, but whether he is breaking his second obligation in the attempt to evade the first. If the referee is convinced the answer is a mere evasion, we think the proper practice is to give the witness formal notice that he must answer, and to enter of record a formal finding that the answer is an evasion, and to require a real answer. An analogy may be found in the practice of the courts in the trial of a case. The trial judge finds the fact upon which the distinction made rests. In the one case he commands the witness to answer, and commits him for a refusal. In the other, he holds him to bail, or commits him, to answer to the charge of perjury. To confuse the two offenses works confusion in the after consequences, of which we have an illustration in this case. If this bankrupt were committed for contempt, it would not be clear that he was not being punished for the offense of perjury, punishment for which is barred by the statute.

The disposition made of the case is to refuse the commitment and remit the case to the referee for further proceedings in the cause.

UNITED STATES v. JEW SUNG GWONG.

(District Court, D. Oregon. April 10, 1916.)

No. 7046.

1. ALIENS ⟸32(8)—DEPORTATION OF CHINESE—EVIDENCE.
In proceedings for deportation of a Chinese, evidence *held* to show that defendant came to this country while a minor with an uncle who was a contractor, and not with another uncle who was a merchant.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 84; Dec. Dig. ⟸ 32(8).]

2. ALIENS ⟸23(1)—EXCLUSION OF CHINESE—RIGHT TO ENTER—MINOR.
A Chinese boy seven years of age, who came to this country with an uncle and under his charge, should be given the status of the uncle, and permitted to enter without a certificate, if the uncle was a merchant.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 81; Dec. Dig. ⟸ 23(1).]

3. ALIENS ⟸24—EXCLUSION OF CHINESE—RIGHT TO ENTER—"CHINESE LABORER"—CONTRACTOR.
A Chinese contractor is a Chinese laborer, within the Exclusion Acts (Act May 6, 1882, c. 126, 22 Stat. 58; Act May 5, 1892, c. 60, 27 Stat. 25 [Comp. St. 1913, §§ 4315-4323]; Act Nov. 3, 1893, c. 14, 28 Stat. 7), and not entitled to enter, since "Chinese laborer," in those acts, includes all immigrants from China except the designated privileged classes.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 76-78; Dec. Dig. ⟸24.
For other definitions, see Words and Phrases, First and Second Series, Chinese Laborer.]

Proceeding by the United States against Jew Sung Gwong, alias J. S. Song, alias Joe, for deportation. From an order of the United States commissioner, directing that defendant be deported, defendant appeals. Affirmed.

Seneca Fouts and A. Walter Wolf, both of Portland Or., for appellant.

Clarence L. Reames, U. S. Atty., and Robert R. Rankin, Asst. U. S. Atty., both of Portland, Or.

WOLVERTON, District Judge. This case is here upon appeal from an order of the United States commissioner directing that the defendant be deported. The defendant is charged with being unlawfully within the United States, he being a citizen of the republic of China, and having no certificate of registration or other document or lawful authority entitling him to remain within the United States, being also a laborer, and not belonging to the excepted class of Chinese persons entitled to enter the United States as provided by law.

[1] The defendant probably entered the United States about the year 1890, when he was of about the age of 7 years, landing at San Francisco and coming from there to Portland. He probably came with an uncle, Yung Suey. At the time he had another uncle living in Portland, who was then a merchant engaged in business on Second street. The defendant himself has made so many contradictory statements

touching the matter at issue that his testimony is quite unsatisfactory, and is not to be relied upon except as it is corroborated by other witnesses. Yung Suey, according to the testimony of Dr. J. W. Hill, who was acquainted with him, was a contractor, and was employed by Dr. Hill some 24 or 25 years ago, to do some work upon his farm near Portland. The defendant at that time went with his uncle on the farm, and remained there a while, but returned to Portland with him when the work had been completed. Yung Suey probably later engaged in the mercantile business on a small scale, but was surely not a merchant at the time he came to this country. The defendant lived with Yung Kuey a part of the time, and was probably living there when he entered the Hill Military Academy, which was about the year 1904; and Yung Kuey paid his tuition at the school. But it does not appear that the defendant came to this country with Yung Kuey. Indeed, from his own testimony, it would seem that Yung Kuey was in business in Portland at the time Yung Suey brought defendant to this country, because he says in effect that, on coming to Portland, he was brought to the store of Yung Kuey. Other reliable witnesses in Portland have testified to the defendant's presence in this country, indicating that he has been here more than 20 years.

I think there can be no doubt that the defendant came here when he was a young lad, perhaps at the age of 7 years, as he claims. The turning point in the case upon the evidence, to my mind, is whether Jew Sung Gwong came with a relative, namely, an uncle, who was of the merchant class; and, upon a consideration of the whole testimony, the controversy must be resolved against him.

By the act of May 6, 1882, the coming of Chinese laborers to the United States was suspended for the term of 10 years, and it was declared not to be lawful for any Chinese laborer to come from any foreign port or place within that time to the United States. Later statutes have continued the suspension. Section 6 of the act (Comp. St. 1913, § 4293) makes provision touching Chinese persons other than laborers, and specifies in what manner their coming may be certified. But such provision has no relation to the coming of Chinese laborers. By the act of May 5, 1892, it was declared to be the duty of all Chinese laborers within the United States at the time of the passage of the act, and who were entitled to remain in the United States, to apply for a certificate of residence to the collector of internal revenue for their respective districts, within one year after the passage of the act, and that any Chinese laborer within the United States who should neglect, fail, or refuse to comply with the provisions of the act, or who, after one year from the passage thereof, should be found within the jurisdiction of the United States without such certificate of residence, should be deemed and adjudged to be unlawfully within the United States. By a later act of November 3, 1893, this provision was extended for 6 months after its passage. This act contains an exception to the time of making application for a certificate of residence, which reads:

"Unless he shall establish clearly to the satisfaction of said judge that by reason of accident, sickness, or other unavoidable cause he has been unable to procure his certificate, and to the satisfaction of said United States judge,

and by at least one credible witness other than Chinese, that he was a resident of the United States on the 5th of May, 1892; and if, upon the hearing, it shall appear that he is so entitled to a certificate, it shall be granted upon his paying the cost." Section 1 (Comp. St. 1913, § 4320).

[2] Under the authorities, it would seem that the defendant, having come to this country with his uncle and under his charge and protection, should be given the status of the uncle (United States v. Lee Chee, 224 Fed. 447, 140 C. C. A. 649); and, being entitled to such status, it would have been lawful for him to enter the United States without a certificate, providing the person with whom he came was of the merchant class (United States v. Mrs. Gue Lim, 176 U. S. 459, 20 Sup. Ct. 415, 44 L. Ed. 544).

[3] It has been authoritatively determined that the words "Chinese laborers," as used in the act, were intended to designate all immigration to the United States from China other than that of the privileged classes; merchants being included in such privileged classes. Lew Quen Wo v. United States, 184 Fed. 685, 106 C. C. A. 639. The defendant, however, having entered the United States with an uncle who was then a contractor, and not a merchant, and subsequent to the passage of the act of May 6, 1882, he would be unlawfully within the United States, and not entitled under Act May 5, 1892, § 6, or its amendment of November 3, 1893, to apply for a certificate of residence. Were it that he came to this country with an uncle who was a merchant, I should readily overlook the delay in his application for such a certificate, by reason of his youth when he entered, and even when the acts of 1892 and 1893 were passed, and grant him a certificate now. United States v. Hom Lim (D. C.) 214 Fed. 456; United States v. Lee Chee, supra. But no such case has been made upon the testimony.

It is the judgment of the court, therefore, that the defendant is not lawfully within the United States, and that he should be deported.

LEONARD v. TOLEDO, ST. L. & W. R. CO.

MONNETT v. PENNSYLVANIA CO.

(District Court, N. D. Ohio, W. D. April 24, 1916.)

Nos. 2511, 2527.

ATTORNEY AND CLIENT ⇐60—DISBARMENT—EFFECT.

A contingent fee contract to prosecute a case for personal injuries, which, under the laws of Ohio, is valid only when not coupled with a provision giving the attorney the exclusive control of the case, or preventing the claimant from adjusting the case without the consent of the attorney, and which gives him only an equitable interest in the subject-matter, does not make the attorney a party in interest, and entitled as such to appear to advocate his cause in person, so as to entitle him to appear therein after the case was removed to a federal court, which had disbarred the attorney from practice before it for misconduct involving moral turpitude.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 83; Dec. Dig. ⇐60.]

Separate actions by James A. Leonard against the Toledo, St. Louis & Western Railroad Company and by Joseph Monnett against the Pennsylvania Company. Application by Charles A. Thatcher for permission to appear and try said cases. Application denied.

In Case No. 2511:

G. B. Keppel, of Toledo, Ohio, for plaintiff.

Clarence Brown and Chas. A. Schmettau, both of Toledo, Ohio, for defendant.

In Case No. 2527:

T. F. Connell, of Toledo, Ohio, for plaintiff.

Marshall & Fraser, of Toledo, Ohio, for defendant.

KILLITS, District Judge. The issue now before the court is the same in each of the cases whose titles head this memorandum. These causes of action were first brought in the state court, and had been removed by the respective defendants to this court, and are now pending here on a motion to remand. It appears that one Charles A. Thatcher, an attorney at law qualified to practice in the state courts of Ohio, but not competent to practice in this court, has entered into a contract with each of the plaintiffs in these causes by virtue of which, as compensation for his professional services in prosecuting such cause of action to judgment, he shall have a fee, to be paid out of the judgment recovered only, of a certain percentage, the amount of which is not made known to the court. In other words, said Thatcher is under contract with each of the plaintiffs to prosecute these several causes of action to judgment for what is known as a contingent fee.

By judgment of this court, handed down in November, 1911, said Thatcher was disbarred, as an attorney at law, counselor and advocate in equity, and proctor in admiralty, from practice in this court for professional misconduct involving moral turpitude. Our judgment against said Thatcher in that behalf has been sustained by the Circuit Court of Appeals of this Circuit on error, and relief to him against the effect of said judgment has been denied by the Supreme Court of the United States.

Application has now been made by said Thatcher through G. B. Keppel, an attorney admitted to the bar of this court, for permission to appear at the bar of this court and try each of said cases and present any matters touching the same, notwithstanding his aforesaid disbarment and his present incompetency to appear as an attorney at law in this court ordinarily, on the ground that, having the aforesaid contingent interest in each of those cases, he is a party in interest and entitled so to appear because of the privilege accorded to any person to advocate his cause before the court in person. In support of the application we are referred to the cases of Phillips v. Louisville & Nashville Railroad Co. (C. C.) 153 Fed. 795; Esquibel v. Atchison, T. & S. F. Railway Co. (D. C.) 206 Fed. 863; Silvas v. Arizona Copper Co., Limited (D. C.) 213 Fed. 504.

These cases, in our judgment, are not in point. They hold only that, where one otherwise would be entitled to the privileges of the federal statute permitting prosecution of his cause in forma pau-

peris, the cause may not be so prosecuted when the claimant of the cause of action has assigned a contingent interest therein to some attorney as compensation for services in prosecuting the same, unless it shall appear also that the attorney is a pauper. The reasoning of these cases is confined exclusively to a consideration of the purpose of the federal statute permitting prosecution of causes in forma pauperis. They do indeed hold that an attorney taking such a contingent contract has a pecuniary interest in the case, which no one doubts.

In determining this application adversely to the applicant, it is not necessary at this time to consider anything more than the character of the interest which Mr. Thatcher has in these cases, as declared by the highest state court of Ohio. The best we can say for the application would be that, if it could not be granted by the state court, it ought not be granted here. The Supreme Court of Ohio has held that contingent fee contracts are valid, when not coupled with a provision that the attorney beneficiary has exclusive control of the case, or with a provision preventing the claimant from adjusting the case without the consent of his attorney under the contingent fee contract. The last case on the subject is Davy et al., Partners, v. Fidelity & Casualty Insurance Co., 78 Ohio St. 256, 85 N. E. 504, 17 L. R. A. (N. S.) 443, 125 Am. St. Rep. 694. It will occur immediately, because of the distinction made in the case just cited to which we have alluded, that the financial interest which an attorney under contingent fee contract acquires thereby does not reach the status of one having full and independent interest in the subject-matter, an interest so independent as to dignify its holder with the right to claim in a court of law the same privilege to conduct his cause personally which his client holds.

So the courts of Ohio have uniformly held that assignment of a contingent interest in consideration of the prosecution of a claim to judgment gives the holder nothing more than an equitable interest in the subject-matter. Mr. Thatcher himself raised this question, and it was decided adversely to him by the Supreme Court of Ohio unanimously in the case of Pennsylvania Company v. Thatcher, 78 Ohio St. 175, 85 N. E. 55, wherein it was held that such a contract as the applicant claims to hold in the present cases does not give him the right to impose upon the alleged tort-feasor an obligation to account to him for a share of the compensation for injuries accruing to his client; the court approving and quoting from the language of Weller v. Jersey City, Hoboken & Paterson St. Ry. Co., 66 N. J. Eq. 11, 57 Atl. 730. The rule is especially applicable to cases wherein compensation is claimed for personal injuries, and it has been repeatedly noticed that there is a special mischief in permitting one who is not injured to control, by an attempted assignment, the adjustment of a claim for damages in such cases, as the extent of damages can be appreciated only by the actual sufferer, who alone is competent to close negotiations for settlement. As Lord Tenterden, quoted by the New Jersey court, observed, one whose only interest in a claim is the "hope of spoils" cannot, in a personal injury case, acquire by assignment the competency of a real party in interest.

It will readily occur to the average intellect that for the court to

grant this application would be to reverse its solemn adjudication that the applicant is unworthy of the court's confidence, and that the court no longer should be in position to depend upon him for those confidential and trustworthy ministrations which every court has the right to expect from the members of its bar. In other words, the application amounts to a request to the court to permit the applicant to appear again before this court in that sort of legal practice in which he especially indulges.

The application is denied.

In re SMITH.

(District Court, N. D. California, First Division. March 30, 1916.)

No. 8199.

1. BANKRUPTCY ⇐87—INVOLUNTARY PROCEEDINGS—PETITIONING CREDITORS—AMOUNT OF CLAIMS—DETERMINATION—NOTICE TO INTERVENERS.

Creditors, who intervened in involuntary bankruptcy proceedings after the original petition had been referred to the master to liquidate the claims of the petitioning creditors, in order to determine whether their claims were sufficient in amount, and after the time for which the hearing before the master had been noticed, but before the hearing after continuance, were not entitled to notice of the hearing, but were bound to ascertain the state of the record and to appear at the hearing, if they desired to do so.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 12, 152–155; Dec. Dig. ⇐87.]

2. BANKRUPTCY ⇐95—INVOLUNTARY PROCEEDINGS—PETITIONING CREDITORS—AMOUNT OF CLAIMS—DETERMINATION—RE-REFERENCE.

Such creditors are not entitled to a re-reference, after the master found that the original petitioners did not have sufficient claims to support the proceedings, because they failed to introduce any evidence in support thereof on the mere suggestion of collusion between the bankrupt and the original petitioners; but such re-reference can be granted in the interest of due and orderly proceedings in the court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 132, 140, 145; Dec. Dig. ⇐95.]

In Bankruptcy. In the matter of F. M. Smith, bankrupt. On motion of the alleged bankrupt to approve the report of the master that the petitioning and intervening creditors did not hold provable claims against the respondent in the sum required. Motion to confirm denied, and matter re-referred to the master, with directions.

See, also, 209 Fed. 91.

Morrison, Dunne & Brobeck and Walter D. Mansfield, all of San Francisco, Cal., for alleged bankrupt.

Green, Humphreys & Green and Rufus C. Thayer, all of San Francisco, Cal., for petitioning creditors.

Samuel M. Shortridge, of San Francisco, Cal., E. Nusbaumer, of Oakland, Cal., and Walter H. Linforth, of San Francisco, Cal., for certain intervening creditors.

DOOLING, District Judge. [1] In July, 1914, a petition was filed by certain persons, claiming to be creditors of F. M. Smith, and praying that he be adjudged a bankrupt. Thereafter, and in August, 1914, certain other persons, also claiming to be creditors of the alleged bankrupt, intervened in the proceeding and joined in the prayer of the original petitioners. In November, 1914, the whole matter was referred to a special master, that the claims of the petitioners and interveners, which were in the nature of unliquidated demands, might be liquidated, in order to determine whether they had in fact claims sufficient in amount to support the petition and thus to determine whether or not the petition was "rightfully filed." This reference was made in the face of strenuous opposition thereto on the part of petitioners and interveners. On June 10, 1915, the matter was, upon notice given by respondent to all who were then parties to the proceeding, called up for hearing by the master, and was thereafter continued by him by regular continuances to January 28, 1916, at which time it was heard.

Meanwhile, and on June 28, 1915, after the order of reference, and after the same had come on regularly for hearing before the master, certain other persons claiming to be creditors of the alleged bankrupt, having obtained from the court leave to do so, also intervened and joined in the prayer of the original petitioners. No notice was given these interveners of the proceeding before the master, although the files of this court showed that the matter had been referred to him, and the purpose of such reference. The certificate of the master shows that on January 28, 1916, when the matter was finally called by him for hearing, respondent appeared by his attorney, and the petitioners and first intervening petitioners appeared by their attorney, but that no evidence was introduced either by petitioners or such interveners for the purpose of liquidating their said claims, or in relation thereto, and that for that reason he reported:

"That said petitioners and intervening petitioners have not established that they hold provable claims or debts against said respondent in the sum of $500, or in any sum whatever."

Respondent now moves the court to approve this report of the master, which motion is resisted by the last intervening petitioners, on the ground that they had no notice of the hearing before the master, and that they were entitled to such notice. I do not think the last intervening petitioners were entitled to any notice of the proceedings then in progress before the master. All parties to the proceeding at the time that the matter was first called up by him had received notice of such calling, and when the last petitioners intervened it was their duty to ascertain the state of the record, both in this court and before the master, to whom the matter had been referred long before they appeared. In other words, when they intervened, they intervened in the proceedings as they then stood, and the burden was upon them to ascertain what had occurred before the master prior to their intervention, if they thought they had any interest in the proceedings before him. Had they done so, they could readily have learned that the hearing before the master had been continued to June 29th (they intervened on June 28th), and could have kept track of the continuances there-

after. So far as their claim of lack of notice is concerned, I deem it to be without merit.

[2] But they suggest now that the matter should be re-referred to the master for the purpose of ascertaining whether the failure of the petitioners and the first interveners to produce any proof in support of their claims was the result of any collusion between them and respondent. I am quite certain that they cannot obtain such re-reference upon a mere suggestion as a matter of right. But having in mind the vigorous contentions made by the petitioners and first interveners when these proceedings were inaugurated, and particularly when the court was considering the question of referring their claims to the special master for the purposes of liquidation, I am desirous myself of knowing, in the interest of the due and orderly proceedings in this court, why the energy displayed at that time has so spent itself as to result in a failure to present any proof in support of their claims.

The motion to confirm the report of the master is for the present denied, and the matter is re-referred to him, with directions to investigate the question whether there was any agreement or understanding between respondent and the petitioners and first interveners, or any collusion btween them, and whether the latter have received or will receive, directly or indirectly, any consideration whatever for their failure to offer proof in support of their claims upon the prior reference.

KUZMA v. WITHERBEE, SHERMAN & CO.

ZYNEL v. SAME.

(District Court, E. D. New York. May 25, 1915.)

1. COURTS ⇐270—JURISDICTION OF FEDERAL COURTS—DISTRICT OF SUIT.
An action to recover damages for personal injury is not one of a local nature, and, where plaintiff is an alien, can be brought only in the district whereof defendant is an inhabitant, unless the question be waived.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 810; Dec. Dig. ⇐270.]

2. COURTS ⇐344—FEDERAL COURTS—SERVICE IN ANOTHER DISTRICT.
In a suit of a local nature, where process is served on a defendant residing in a different district in the same state under Judicial Code (Act March 3, 1911, c. 231) § 54, 36 Stat. 1102 (Comp. St. 1913, § 1036) the summons must issue to the marshal of such district.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 917; Dec. Dig. ⇐344.]

3. APPEARANCE ⇐10—"SPECIAL APPEARANCE."
A special appearance by a defendant to challenge the jurisdiction of the court by a motion is not rendered a general appearance by the fact that he also obtains an order extending the time to plead until the motion shall be disposed of, where the order recites the fact and states that the extension is without prejudice to the motions.
[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 53, 54; Dec. Dig. ⇐10.
For other definitions, see Words and Phrases, First and Second Series, Special Appearance.]

At Law. Actions by Branislaw Kuzma and by Floriyan Zynel against Witherbee, Sherman & Co., a corporation. On motions to quash the service and to dismiss for want of jurisdiction. Motions sustained.

Baltrus S. Yankaus, of New York City, for plaintiffs.

Ralph E. Rogers, of New York City, for defendant, appearing specially.

CHATFIELD, District Judge. [1] These actions are brought by an alien, at present living within this district, against a corporation, which has its domicile and principal place of business in the Northern district of New York. It is evident that these actions, which are for personal injuries, are not local in their nature, in the sense in which that word is used in sections 52 to 55 of the Judicial Code. The actions can only be instituted, therefore, in the district of the residence of the defendant, unless the question be waived. Galveston, etc., Railway v. Gonzales, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248.

[2] It appears from the record that the summons in the action was served by a person other than the marshal in the Southern district of New York. This could be done only under section 52 to section 55 of the Code. Toland v. Sprague, 37 U. S. (12 Pet.) 300, 9 L. Ed. 1093; United States v. American Lumber Co. et al., 85 Fed. 827, 29 C. C. A. 431. While it has been recently held in the case of United States, to the Use of Miller et al., v. Mitchell and the Illinois Surety Company (D. C.) 223 Fed. 805 (March 29, 1915), in this district, that process in common-law actions need not be served by the United States marshal, it would seem that the plaintiff cannot profit thereby. Section 54 provides that process in actions of a local nature, in states having more than one district, may be issued for service in other districts of the same state, directed to the marshal of the district in which the defendant resides. If, as the plaintiffs contend, the present actions could be maintained as suits of a local nature, service of the process would seem to have been improperly made.

[3] The defendant has obtained an extension of time to answer pending the determination of these motions. See Murphy v. Safe Co. (C. C.) 184 Fed. 495. He appeared specially, and the order recites that fact, as well as stating that the extension is without prejudice to the motion. The affidavit of merits under these circumstances is not a waiver of jurisdiction over the person, nor does it make the special appearance void.

The actions, therefore, will be dismissed for lack of jurisdiction.

VITKUS v. CLYDE S. S. CO. (two cases).

(District Court, E. D. New York. March 13, 1916.)

1. REMOVAL OF CAUSES ⇐115—JURISDICTION ACQUIRED BY FEDERAL COURT—SUFFICIENCY OF SERVICE.

On removal of a cause from a state court, the sufficiency of the service, made under the state law, is still to be tested by the necessities required to give jurisdiction in an action instituted at the outset in the federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 245, 247, 248, 251; Dec. Dig. ⇐115.]

2. COURTS ⇐338, 344—FEDERAL COURTS—CONFORMITY TO STATE PRACTICE.

When an action is commenced in a federal court, the provisions of Judicial Code (Act March 3, 1911, c. 231) §§ 24–27, 40–68, 36 Stat. 1091, 1094, 1100–1105 (Comp. St. 1913, §§ 991, 1007–1009, 1022–1050), relating to jurisdiction and the service of process, cannot be superseded nor affected by the laws of the state. As to matters covered by such Code the conformity statute (Rev. St. § 914 [Comp. St. 1913, § 1537]) has no application.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 901, 917; Dec. Dig. ⇐338, 344.]

3. COURTS ⇐273, 344—FEDERAL COURTS—SERVICE IN ANOTHER DISTRICT.

A federal court service outside of the district, on a single defendant residing in another district of the same state, can be made only in actions of a local nature, and in such case the summons must issue to the marshal of such district.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 813, 917; Dec. Dig. ⇐273, 344.]

4. PROCESS ⇐155—FEDERAL COURTS—OBJECTIONS TO SERVICE.

In a federal court application to set aside the service of summons, either for defect in the service itself or for want of jurisdiction over the person of the defendant, may be made by motion or plea, if presented before the question raised has been waived by a general appearance or its equivalent.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 210; Dec. Dig. ⇐155.]

5. COURTS ⇐270—JURISDICTION OF FEDERAL COURT—DISTRICT OF SUIT.

Under Judicial Code, § 51 (Comp. St. 1913, § 1033), an action by an alien to recover damages for personal injury can be brought only in the district whereof defendant is an inhabitant, unless the objection be waived.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 810; Dec. Dig. ⇐270.]

At Law. Actions by Frank Vitkus against the Clyde Steamship Company. On motions to set aside service of summons and to dismiss for want of jurisdiction. Motions sustained.

Baltrus S. Yankaus, of New York City, for plaintiff.

Haight, Sandford & Smith, of New York City, for defendant, appearing specially.

CHATFIELD, District Judge. In each of the above cases, as in several others decided herewith, motion has been made to this court, prior to the interposition of an answer, for an order setting aside the alleged service of the summons and complaint and dismissing the

action, upon grounds which will be stated specifically as each one is taken up for discussion. In each instance the defendant making the motion has appeared "specially" by attorneys for the purpose of making these motions, and in each instance the defendant has intended to avoid a waiver of the right to object to the jurisdiction of the court over the case, while moving upon the alleged failure to acquire jurisdiction over the person of the defendant making the motion.

The plaintiff urges certain grounds for denying the motion in each instance, which are common to the various cases, and which therefore need be discussed but once. In each case the service of the summons has been made upon some person who, the plaintiff claims, *under the laws of the state of New York,* represents the defendant sufficiently to enable the plaintiff to acquire jurisdiction by delivering the summons to that individual.

The actions are at law, and are of course governed by section 914 of the Revised Statutes (Comp. St. 1913, § 1537), providing that in actions at law the "practice, pleadings, and forms and modes of proceeding * * * shall conform, as near as may be," to those of the state within which the court is held. The plaintiff therefore claims that the laws of the state relating to the methods of service of papers, unless specifically changed by statute of the United States, shall control, and that jurisdiction over the cause of action and over the person of the defendant may be obtained in all cases and in the same way in which jurisdiction over the cause of action and over the persons of the defendant could be obtained in an action started in the Supreme Court of the state and removed into the federal court for this district on the ground of diversity of citizenship.

[1] With this proposition, the defendants take issue. If actions are started and removed into this court, the sufficiency of the service under the state law is still tested by the necessities required to give jurisdiction in an action instituted at the outset in the federal court. Goldey v. Morning News, 156 U. S. 518, 522, 15 Sup. Ct. 559, 39 L. Ed. 517.

[2] But, when an action is started in the United States court, the statutes creating jurisdiction and relating to the service of papers now embodied in Judicial Code, §§ 24 to 27 and 40 to 68, can in no way be superseded by the laws of the state. The provisions of section 914, Revised Statutes, supra, do not enlarge the specific enactments of the sections mentioned. On the contrary, they are merely applicable, so far as they may be used, to carry out those sections.

[3] As was held in the case of Kuzma v. Witherbee, Sherman & Co., 232 Fed. 286, decided in this court on the 25th of May, 1915, service outside of the district, within the same state, upon a single defendant, residing in another district, can be made only in actions of a local nature, and in such a case the summons must issue to the marshal of the other district. The present actions under consideration are not local in their nature, and the summons or process was directed to the marshal of this district. It certainly could not run beyond the boundaries of the district, and the provisions of the New York state Code are not effective to enlarge the district or the territory within which the suit may be brought. Atkins v. Fibre Disintegrating Co.,

2 Fed. Cas. at page 84 (No. 602). The "District Courts of the United States cannot send their process into another district, in suits at common law or in equity, and thereby obtain jurisdiction of the person." Harkness v. Hyde, 98 U. S. at page 478, 25 L. Ed. 237; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; Insurance Co. v. Bangs, 103 U. S. 439, 26 L. Ed. 580. This limitation has been removed by statute in some instances, such as by section 59 of the Judicial Code, but none of these cover the present case.

[4] Second. The plaintiff in each case claims that under the state Code of New York no objection as to jurisdiction over the cause of action or over the person of the defendant can be raised except by demurrer or answer. Section 487, Code of Civil Procedure of New York. This proposition is denied by all of the defendants, and it may be assumed that upon a special appearance in the United States court an application to set aside an alleged service of summons and complaint, either for defect in the service itself or for lack of jurisdiction over the person of the defendant, may be made by motion or by plea, if that application be presented to the court before the question raised has been waived by a voluntary appearance, or what is equivalent thereto. Goldey v. Morning News, supra; Shaw v. Quincy Mining Co., 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768. It is in the nature of a special plea to jurisdiction and must be made as soon as the defect appears, for, as has been seen, the right not to be sued in any district other than the one where the defendant resides, or to object to the manner of service, may be lost by waiver. Ex parte Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264; In re Moore, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164; Southern Pacific Co. v. Denton, 146 U. S. 206, 13 Sup. Ct. 44, 36 L. Ed. 942.

[5] We must therefore look to the manner in which the process of the court has been obtained, issued, and served, and to the action of the defendant in seeking to avoid what is claimed by the plaintiff to be a valid service of that process, so as to bring the defendant into court. In the two cases of Vitkus v. Clyde Steamship Co. (Nos. 105 and 106) the defendant appears specially and moves upon the summons and complaint, and upon a complaint in an action previously brought in the Supreme Court of the state of New York, as well as the judgment dismissing that action, and upon the affidavits of various individuals, to set aside service of the summons and complaint issued out of this court directing the defendant to appear.

The causes of action alleged in the pleadings refer to the same transaction as that considered in the action in which judgment of dismissal in the state court was granted, because of lack of proof as to the scope of the employment of the defendant's employé who is alleged to have assaulted the plaintiff. A copy of each summons and complaint was served upon an employé of the New York & Porto Rico Steamship Company at the Brooklyn pier where the summons was served. Steamers of the defendant company dock at this pier, and under the contract the stevedoring is done by the New York & Porto Rico Steamship Company. The person served is the head stevedore, who does the work and is therefore primarily the employé of an independent con-

tractor, and not an officer of the defendant. Whether he has authority constituting him a resident agent of the defendant depends upon the facts shown.

The defendant is incorporated in the state of Maine, the plaintiff is an alien, and under the cases already cited an action could be brought against the defendant only in the district where it is an inhabitant—that is, where it had its home office or place of incorporation—unless the right to insist thereon were waived. Galveston, etc., Railway v. Gonzales, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248; In re Moore, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164. If jurisdiction over the person of the defendant is successfully acquired, it is evident that this court would have jurisdiction of the cause of action as between the plaintiff and defendant, inasmuch as this is a cause of action between an alien and a citizen, which is not inherently a federal question, but over which the federal courts have concurrent jurisdiction. Male v. A., T. & S. F. Railway Co., 240 U. S. 97, 36 Sup. Ct. 351, 60 L. Ed. —— (Feb. 21, 1916).

The defendant has included in his moving affidavits the statement that a similar suit, based upon the same transaction, was tried in the state court of New York and the complaint dismissed. While this action was between the same parties, the allegations are not presented upon a plea of res adjudicata, and no use is made of these facts, except to point out the allegation of the plaintiff in the state court that the defendant was a corporation of the state of Maine. This bears out the affidavit of the defendant, and for the purpose of this motion adds to the language of the complaint, by showing that the action is brought by an alien against a citizen of the United States, who is also the inhabitant of—that is, domiciled in—a particular state.

Without, therefore, the need of an amendment to the complaint, and without the necessity of interposition of a plea by the defendant, the matter can be finally disposed of. If the plaintiff and defendant were both aliens, jurisdiction would not lie in the United States courts. If the defendant is a citizen inhabitant of a state other than New York, this court has no jurisdiction, unless the right of the defendant to object has been waived. A specific plea of res adjudicata would be a waiver of defendant in the manner of service, and also a waiver of the right to object to the exercise of jurisdiction by this particular federal court.

In each of the actions brought by Vitkus, the objection to service upon the head stevedore of the Porto Rico Company in Brooklyn is plainly made, in addition to the objection that the court has no personal jurisdiction over the defendant, and criticism of the manner of service of the summons is not of itself in these cases a waiver of the primary objection to the jurisdiction of the court itself. The defendant has appeared specially and has made no motion with respect to pleading, except the one motion to set aside the service and dismiss the action for failure to obtain jurisdiction over a defendant which is an inhabitant of the state of Maine. The case differs from that of St. Louis S. W. Ry. v. Alexander, 227 U. S. 218, 33 Sup. Ct. 245, 57 L. Ed. 486, Ann. Cas. 1915B, 77, in that this action is brought originally

in the federal court, and has not been removed from the state court for the purpose of testing the manner of service alone.

In one of the Vitkus Cases, a summons and complaint was served on the same day upon an officer of the defendant in the Southern district of New York. As to this service the defendant has raised the additional question that the summons of this court cannot run out of the district. Such service is evidently bad, and if the defendant in any way appeared generally in this action, or in attacking the service waived the right to object to the maintenance of the action itself in this district, the result of the motion could be only that the particular service should be set aside, and that the action could proceed if proper service could be obtained. But as the defendant has, without waiver of jurisdiction, urged the fundamental objection to the maintenance of the action, the situation is exactly the same as that in the case of Yanuszauckas v. Mallory Steamship Co. (C. C. A. 2d Circuit, February, 1916) 232 Fed. 132, — C. C. A. —.

The motion to dismiss the case for want of jurisdiction over the defendant corporation in this district must be granted in each action.

LUKOSEWICZ v. PHILADELPHIA & READING COAL & IRON CO.

(District Court, E. D. New York. March 13, 1916.)

1. COURTS ⟸274—FEDERAL COURTS—SERVICE OF PROCESS—FOREIGN CORPORATIONS.

In an action against a corporation in the Eastern district of New York, a valid judgment cannot be rendered unless defendant is served within the district, or voluntarily appears, and service in the Southern district on an agent designated under the laws of the state for service of process is not a good service.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 814; Dec. Dig. ⟸274.]

2. COURTS ⟸274—FEDERAL COURTS—DISTRICT IN WHICH SUIT MUST BE BROUGHT.

An action by an alien against a corporation must be brought in the district where defendant is incorporated, or in which it can be found having a general office or doing business, if it waives the right to insist on trial in the district of its home office.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 814; Dec. Dig. ⟸274.]

3. COURTS ⟸276—PROCESS ⟸166—SERVICE—WAIVER OF OBJECTIONS.

In an action in the Eastern district of New York against a corporation served in the Southern district, it appeared specially, but, in addition to objecting to the method of service, offered several objections going to the merits of the right to proceed with the suit, based upon the pendency of other actions, alleged that its time to answer would expire before the matter could be disposed of, applied for an extension of time to plead, demur, answer, or take such steps as it might be advised, submitted an affidavit of merit, and presented objections based on the federal Constitution. *Held*, that it waived the right to object to being brought into the Eastern district, and waived the defect in the service of the papers.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 815; Dec. Dig. ⟸276; Process, Cent. Dig. §§ 250–255; Dec. Dig. ⟸166.]

At Law. Action by Matyosus Lukosewicz, also known as Matt Lukoszus, against the Philadelphia & Reading Coal & Iron Company. On motion to set aside the service. Motion denied.

Baltrus S. Yankaus, of New York City, for plaintiff.

Armstrong, Brown & Purdy, of New York City, for defendant, appearing specially.

CHATFIELD, District Judge. [1] In this case the service of the summons and complaint was made upon James Armstrong, who is the designated agent under the laws of the state of New York for service of process in actions brought under the state law. Service was in the Southern district of New York, and, as was held in the case of Insurance Co. v. Bangs, 103 U. S. 435, 26 L. Ed. 580, a valid judgment cannot be rendered unless the defendant has been served within the district or voluntarily appears. Many of the questions presented have been discussed in the case of Vitkus v. Clyde Steamship Co., 232 Fed. 288, and other similar cases decided this day, and need not be repeated here.

[2] As decided in the Vitkus Case, supra, the district of a defendant's residence, in an action brought by an alien, must be the district where the defendant is incorporated (if a corporation), or one in which it can be found, having a general office or doing business, if it waives the right to insist upon the trial in the district of its home office, asking that the service be declared void.

[3] The defendant appeared specially, but in addition to objecting to the method of service it has offered several objections going to the merits of the right to proceed with the suit. It set up the beginning of an action in the Supreme Court for New York county, as well as the beginning of a third action in the court of common pleas for the county of Philadelphia, Pa., alleged that its time to answer would expire before the matter could be disposed of, applied for an extension of time to plead, demur, answer, or take such steps as it might be advised, submitted an affidavit of merit, and presented objections based upon the Constitution of the United States. An attempted service of the summons upon the secretary of state, under section 432 of the New York Code, allowing service where the party designated cannot be found, is in exactly the same category, and is included in the present motion.

The defendant has thus appeared and submitted to the determination of the court questions which might be raised by a plea in bar, if it wishes this court to determine which action should be proceeded with, and has obtained an extension of time to answer, plead, or demur, as it may see fit, if this court overruled its motion. It has thus waived the right to object to being brought into this district, and in so doing waived the defect in the service of the papers, which might have been urged when an attempt was made to follow the state statute and to serve the summons and complaint without the district.

Motion to set aside the service will be denied.

TAUZA v. PENNSYLVANIA R. CO.

(District Court, E. D. New York. March 13, 1916.)

1. COURTS ⟸344—FEDERAL COURTS—SERVICE OF PROCESS.
In an action in the Eastern district of New York against a corporation, service of process in the Southern district on an agent designated under the laws of the state will be set aside on motion, as the designation of an agent adds nothing to the jurisdiction of a United States court over an action started in that court.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 917; Dec. Dig. ⟸344.]

2. COURTS ⟸266—FEDERAL COURTS—TERRITORIAL JURISDICTION.
That state courts have jurisdiction throughout the entire state cannot enlarge the authority of a federal court to do things beyond the physical limits of its own jurisdiction, except where a statute extends that jurisdiction beyond the boundaries of the district.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 806–808; Dec. Dig. ⟸266.]

3. PROCESS ⟸155—MOTIONS TO SET ASIDE SERVICE.
An objection that summons was not properly served can be raised by motion to set aside the service upon the face of the complaint.
[Ed. Note.—For other cases, see Process, Cent. Dig. § 210; Dec. Dig. ⟸155.]

4. COURTS ⟸276—DISTRICT IN WHICH SUIT MUST BE BROUGHT—WAIVER.
The federal court of a district other than that of defendant's residence may exercise jurisdiction over a case of a nature of which federal courts generally have jurisdiction, if the right to object to the bringing of the action in that particular district is waived.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 815; Dec. Dig. ⟸276.]

At Law. Action by George Tauza against the Pennsylvania Railroad Company. On motion to set aside the service. Motion granted.

Baltrus S. Yankaus, of New York City, for plaintiff.

Burlingham, Montgomery & Beecher, of New York City, for defendant, appearing specially.

CHATFIELD, District Judge. [1, 2] The complaint in this action was served upon a designated agent of the defendant (under the laws of the state) in the Southern district of New York. As has been shown in the previous cases (Vitkus v. Clyde Steamship Co., 232 Fed. 288, and other similar cases decided this day), the designation of an agent does not add anything to the jurisdiction of the United States court in this district over an action started in this court. The jurisdiction of the state courts, throughout the entire state, cannot enlarge the authority of this court to do things beyond the physical limits of its own jurisdiction, except in instances where a statute of Congress extends that jurisdiction beyond the boundaries of this particular district.

[3, 4] The defendant moves to set aside the service solely upon the objection that the summons was not properly served. Such objection can be raised by motion upon the face of the complaint. The United

States courts generally have jurisdiction over cases of this nature, and the court, in a particular district other than that of the defendant's residence, may exercise jurisdiction over the case, if the parties are properly in court (that is, if the right to object to the bringing of the action in that particular district is waived). See cases cited in the preceding opinions.

This defendant, while objecting to the service, has at the same time applied to the court in its order to show cause, and obtained protection against judgment by default, upon the theory that it had a valid defense upon the merits, and that it wishes to oppose the plaintiff's claim if the court decides that it should. Whether this is a submission to the jurisdiction of the court, and whether the defendant has waived the right to present objection to the maintenance of a suit in this district, if proper service can be made, need not now be considered.

The relief asked and the facts seem to distinguish this from the case of Yanuszauckas v. Mallory Steamship Co. (C. C. A. 2d Circuit, Feb., 1916) 232 Fed. 132, —— C. C. A. ——, or at least from the propositions on which the court relied in deciding that case. But the motion to set aside the service must be granted.

HARASIMOWICZ v. PENNSYLVANIA R. CO. et al.

(District Court, E. D. New York. March 13, 1916.)

1. COURTS ⟸344—FEDERAL COURTS—SERVICE OF PROCESS.
Where, though corporations made sales of coal to parties in the Eastern district of New York, and deliveries in that district followed the sales, they had no regular place of business or representative within the district, service of process within such district upon a sales agent for such companies residing within the district, but having his office in the Southern district of New York, was insufficient.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 917; Dec. Dig. ⟸ 344.]

2. COURTS ⟸274—FEDERAL COURTS—DISTRICT IN WHICH SUIT MUST BE BROUGHT.
Judicial Code (Act March 3, 1911, c. 231) § 50, 36 Stat. 1101 (Comp. St. 1913, § 1032), provides that when there are several defendants, and one or more of them are neither inhabitants of nor found within the district, and do not voluntarily appear, the court may entertain jurisdiction and proceed to the trial and adjudication of the suit between the parties before it. *Held*, that the words "found in the district" do not confer jurisdiction over corporations not inhabitants of the district, except in special cases provided by other statutes, such as patent cases.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 814; Dec. Dig. ⟸274.]

3. APPEARANCE ⟸24(5)—WAIVER OF DEFECTS IN SERVICE.
Where defendants made application to set aside the service of process upon a special appearance, and asked that plaintiff be stayed from further proceedings until determination of the motion, they did not waive a defect in the service of process.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 126, 130–132, 134–136, 139, 140; Dec. Dig. ⟸24(5).]

At Law. Action by Julian Harasimowicz, also known as Louis Harris, against the Pennsylvania Railroad Company and others. On motion by the defendants Mineral Railroad & Mining Company and another to set aside the service of process. Motion granted.

Baltrus S. Yankaus, of New York City, for plaintiff.

Burlingham, Montgomery & Beecher, of New York City, for defendants Pennsylvania R. Co. and Northern Cent. Ry. Co.

Kellogg & Rose, of New York City, for defendants Mineral R. & Mining Co. and Susquehanna Coal Co., appearing specially.

CHATFIELD, District Judge. The plaintiff, an alien, brought this action against all four of these defendants, upon allegations charging that the defendants generally were responsible for the injuries to the plaintiff, and that they were conducting the business in which that injury was sustained, either directly or as agents for each other.

It is unnecessary to consider the various allegations as to the transfer of property by reason of which the plaintiff seeks to show that all of the companies were responsible for the acts complained of. Many of the questions presented here have been discussed in the case of Vitkus v. Clyde Steamship Co., 232 Fed. 288, and other similar cases decided this day, and need not be repeated here.

[1] The Pennsylvania Railroad Company and the Northern Central Railway Company have appeared generally and answered. The Mineral Railroad & Mining Company and the Susquehanna Coal Company have appeared specially to seek to set aside the service of the summons and complaint, upon the ground that they do no business and have no office for the transaction of business within this district. They show that the papers were served upon a sales agent for these companies, who resides in Brooklyn, in this district, but who has his office in the Southern district of New York.

It appears that sales of coal in behalf of the various defendants are made to parties in the Eastern district, and that deliveries in this district follow such sales. There is no evidence that a regular place of business, or any representative of these defendants, is located within this district, and the service would be insufficient, even if this case had been removed from the state court, unless some general agent or officer were in the district as a representative of the defendant.

[2] Section 50 of the Judicial Code (formerly section 787, Revised Statutes) used the words "found in the district"; but this is a quotation of the provision formerly contained in chapter 137 of the Act of March 3, 1875 (18 Stat. 470), which was repealed by chapter 866 of the Act of August 13, 1888 (25 Stat. 433), correcting chapter 373 of the Act of March 3, 1887 (24 Stat. 552). These words in section 50 do not confer jurisdiction, unless in a patent case (section 48, Judicial Code), or some special case provided by other statutes. Macon Grocery Co. v. Atlantic Coast Line, 215 U. S. 505, 30 Sup. Ct. 184, 54 L. Ed. 300.

[3] Whether, under section 52, service will be sufficient if made in the Southern district, whether the provisions of that section will bring in a corporation of another state, and whether the defendants have

waived that objection, are not before the court. These defendants have made this application to set aside the service upon a special appearance, and have asked that the plaintiff be stayed from further proceedings on the alleged service until determination of the motion. This does not constitute a waiver of a defect in the service of process.

The present service upon the defendant Mineral Railroad & Mining Company and defendant Susquehanna Coal Company must therefore be set aside.

UNITED STATES v. LOPHANSKY.

(District Court, E. D. Pennsylvania. May 8, 1916.)

POST OFFICE ⊂⊃44—POSTAL OFFENSES—STATUTE—CONSTRUCTION.

Act March 4, 1909, c. 321, § 194, 35 Stat. 1125 (Comp. St. 1913, § 10364), making it an offense to extract from or out of a letter box or authorized depository mail matter which has been deposited therein, does not apply to the act of taking mail matter which has been placed on and outside the box.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 60, 61; Dec. Dig. ⊂⊃44.]

Tony Lophansky was charged with crime. On demurrer to indictment. Demurrer sustained.

Robert J. Sterrett, Asst. U. S. Atty., and Francis Fisher Kane, U. S. Atty., both of Philadelphia, Pa.

E. B. Richards, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. This record discloses a question which ordinarily could be best raised as a trial question. The case may, however, be well deemed an exception to the general rule and disposed of on demurrer. The prosecution and defense join in asking such disposition to be made of it, and the indictment has been so framed as to invite a demurrer, by so presenting the facts that the guilt of defendant is presented as wholly a question of law.

The question may be thus formulated: Section 194 of the act of Congress of March 4, 1909, makes it an offense to extract any mail which has been deposited in a letter box designated as an "authorized depository" for such mail matter. The language of the act is "from or out of." The defendant is not charged to have taken anything "from" a letter box, in the sense of taking it "out of" the box, because what is charged to have been taken had never been deposited in the box. We are therefore asked to construe the act of Congress as if the evidence had shown the fact to have been that the mail matter testified to have been taken by the defendant had been placed on, but outside of, the box, and to rule whether this constituted the offense defined in the quoted section of the statute.

The rule that penal statutes must be strictly construed is in this case fortified by the observation that Congress might well have hesitated to extend the penalties of this law so as to embrace mail matter which

had not been deposited in the boxes. Counsel for the United States display (as would be expected) some embarrassment in opposing the demurrer, because it has the support of a ruling of the Attorney General, expressed in an opinion given the Post Office Department. The department was advised that an act such as that charged here did not constitute an offense under the Penal Code. There is some sanction given to the thought that this ruling was in accord with the will of Congress by the fact that the phraseology of the act has not been changed. We feel justified in accepting and following this ruling.

The demurrer is therefore sustained.

BROWN & McCABE, STEVEDORES, Inc., v. LONDON GUARANTEE & ACCIDENT CO.

(District Court, D. Oregon. October 11, 1915.)

No. 6514.

INSURANCE ⟸512—EMPLOYERS' LIABILITY INSURANCE—LIABILITY OF INSURER.

Where an employers' liability insurer, recognizing its liability and having ascertained that an injured employé would settle for less than the amount of the policy, refused to pay the claim unless the policy holder would bear half the loss, the insurer, having attempted to coerce the policy holder, is liable, the employé having recovered a judgment considerably in excess of the amount of the policy, for such excess.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. ⟸512.

At Law. Action by Brown & McCabe, Stevedores, Incorporated, against the London Guarantee & Accident Company. On demurrer. Demurrer overruled.

Ralph E. Moody, A. Walter Wolf, and John F. Reilly, all of Portland, Or., for plaintiff.

Griffith, Leiter & Allen, of Portland, Or., for defendant.

BEAN, District Judge. The case is based on a liability policy issued in November, 1910, by which the defendant company agreed to indemnify the plaintiff against liability for personal injuries sustained by an employé. The policy provided that immediately after an accident or loss the company should be notified thereof, and if suit or action were commenced it should be advised of same, it to defend such suit or action at its own cost and expense, or settle same as it might deem advisable. The policy also provided that the assured might settle claims at its own expense, giving immediate notice thereof in writing to the insurance company, or at the expense of the company if authorized to do so in writing, and that no suit should be brought against the company for any loss after 90 days from the payment thereof.

The plaintiff alleges that one of its employés was injured; that the defendant insurance company was immediately notified thereof, investigated the claim, ascertained that there was a liability, and that the

injured party would settle for $3,000, $2,000 less than the face of the policy. It thereupon notified the plaintiff of the offer and demanded that it pay one-half of the amount, or $1,500, stating that, in case the plaintiff would not do so, it would permit the pending action to proceed to trial, and it would necessarily result in a judgment in excess of the face of the policy, so that the assured would ultimately be compelled to pay more than the $1,500. The plaintiff refused to accede to this demand, the case was tried, and the employé recovered a judgment for $12,000. The insurance company thereupon paid $5,000, the face of its policy, and costs, and refuses to pay any more. This action is brought to recover the balance.

Now, I understand from counsel, confirmed by my own investigations, there are no authorities directly in point. It has been held that, under a policy like the one in question, the insurance company has a right to settle with an injured employé or not, as it deems advisable, and if it neglects or refuses to do so, and litigates the matter in good faith, and judgment is recovered for more than the face of the policy, it is not liable for the excess. But that is not this case. This is a case where, according to the allegations of the complaint, the insurance company attempted to hold up the assured and make it pay $1,500, or one-half the loss, and, because it would not do so, suffered the action to proceed to judgment for more than double the face of the policy.

I conclude that under these circumstances the plaintiff should recover, and the demurrer in this case will be overruled.

THE CROWN OF GALICIA. THE M. MORAN. THE HELEN B. MORAN.

(District Court, E. D. New York. October 16, 1914.)

COLLISION ⇐⇒71(2)—DRY DOCK IN TOW—COLLISION WITH STEAMSHIP AT PIER.

A section of a dry dock, being towed into the Erie Basin by two tugs, came into collision with the stern of the steamship Crown of Galicia, which was lying alongside a pier just inside the Basin, with a part of her stern extending beyond the line of the entrance gap. She was where she was placed by those in charge of the Basin, which is private property. *Held*, that she was not in fault for her position, nor because, being without motive power at the time, she did not move out of danger, but, on the evidence, that the two tugs were in fault for not maneuvering with proper care and skill; the position of the steamship being obvious.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig. ⇐⇒71(2).]

In Admiralty. Suit for collision by Harry Cossey against the steamship Crown of Galicia, the Crown Steamship Company, Limited, claimant, and the tugs M. Moran and Helen B. Moran, the Moran Towing & Transportation Company, claimant, with cross-libel by the Crown Steamship Company against the tugs, Dry Dock Section No. 6, Harry Cossey, claimant, and others. Decrees in favor of libelant and cross-libelant against the two tugs, but modified on motion.

Affirmed on appeal, 232 Fed. 305, —— C. C. A. ——.

William J. Martin and George V. A. McCloskey, both of New York City, for libelant.

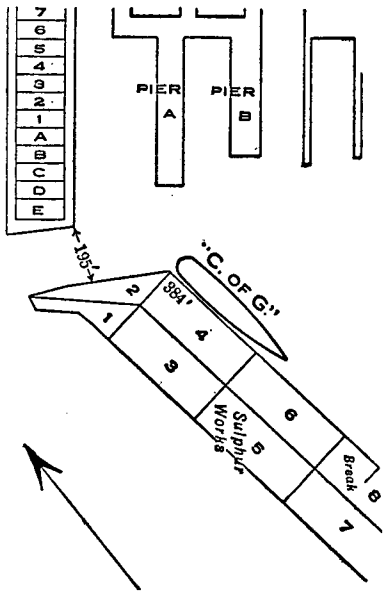
Samuel Park, of New York City, for claimant.

Kirlin, Woolsey & Hickox, of New York City, for the Crown of Galicia.

Haight, Sandford & Smith, of New York City, for Gans S. S. Line.

Ralph James M. Bullowa, of New York City, for trustees Beard and Robinson.

CHATFIELD, District Judge. The Erie Basin is a private property, used for wharfage purposes by vessels placed, at the direction of the owners of the property, in berths numbered and designated upon maps of the property according to location and size. The entrance is called the Gap, and is shown by the testimony to be 196 feet in width, between substantially parallel walls. The wall upon the north side is about one-third the length of that upon the south side, and the relative shape and location can be seen best from the following diagram:



The steamship Crown of Galicia was taken into the dock by a competent pilot, upon the 23d day of November, 1913, and moored alongside the portion of the dock marked in the diagram. Some conflict of testimony was presented as to whether the owners of the basin were given the exact dimensions of the steamer before assigning her a berth, or whether the consignees and agents of the steamer made due inquiry as to the size of the berth. But a determination of this question would seem to make no difference, for the steamer evidently used the berth without protest, and occupied such a position with respect to that berth that the entire issue rests between the steamer herself and the tugs which later attempted the maneuver causing the accident.

The testimony indicates that the steamer was about 400 feet long, and was attached by the usual fore and aft lines to that portion of the dock which is marked as 384 feet in length. At the place marked "Sulphur Works," a fence runs across the pier or bulkhead, and the steamer was not taken further down the dock, as the lessees of the sulphur works property needed their pier front for the unloading of lighters. The officers of the steamship, the pilot, and some of the other witnesses, testify that the steamer was lying broadside against the

dock, with her stern substantially even with a line drawn at right angles to the extreme end of the pier face. As the steamer was 52 feet wide, it is evident that from a point near the middle of the outer side of the Gap, a person entering would see substantially the whole of the stern of the steamer and much of her starboard counter, and whether she were a few feet further ahead or astern would make no substantial difference to any ordinary craft coming in the Gap. The testimony indicates that after the accident the Crown of Galicia was moved somewhat further ahead, so as to be entirely within the projection of the side wall of the Gap. But these movements of themselves are not proof of negligence in the position of the steamship before the accident and are rather matters of precaution for the sake of the steamship itself.

It will be noticed that to the northeast, Pier A, inside the basin, again narrows the space for vessels entering around the south wall of the Gap, leaving but 260 feet between this pier and the corner at which the stern of the Crown of Galicia was lying. On the day in question, certain lighters and small vessels were moored around and alongside Pier A, so that the entire space of 260 feet was not available for purposes of navigation, when two tugs, the M. Moran and the Helen B. Moran, brought up to the Gap a section of a floating dry dock which, when entering, came in collision with the stern of the Crown of Galicia and caused the damage which is the basis of this action.

The dry dock was to be assembled within the basin, by the fastening together of a number of parts substantially alike in size and shape, and of which four had been previously towed into the basin by these two tugs. This section was 125 feet over all (in the dimension which would be the width of the entire dry dock) and 80 feet over all (across the particular section). On each end of this section was the usual high wall to form a part of the sides of the dry dock, and bitts were located upon the *deck* of the section (the floor of the dry dock) near the side walls and near the edges of the section. The parts of this dry dock had been towed from Staten Island, and upon the voyage in question the tug stopped outside of the gap while the Helen Moran went in and caused the movement of certain lighters, so as to give space to maneuver on the side of the Gap toward Pier A.

The Helen B. Moran saw the Crown of Galicia, but did not cause her to be moved, nor did the Helen B. Moran entirely free the space on the north side, or over to Pier A, but apparently made sure only of an opening as wide as the Gap itself; that is, at least 196 feet of clearance between the Crown of Galicia and the boats upon the north. Meantime the M. Moran attached a hawser to the forward one of the bitts on the port side of the deck of the section, and placed the Helen B. Moran, upon her return along the opposite side of the section, to act as an auxiliary tug in handling the tow. Signals had to be transmitted from the M. Moran to the Helen B. Moran by a deckhand upon the floor of the dry dock, and the Helen B. Moran seems to have properly obeyed orders and attempted to assist, to the extent of her ability, in all subsequent maneuvers.

It is apparent that the method of towing adopted would cause the dry dock to move forward cornerwise, with the 80-foot dimension of the section (from which the dry dock side wall projected upward) extending back to port from the tug, and the long (or cross dry dock side of the section) extending backward to starboard from the tug. When a pull was exerted in a straight line, the corner of the section would move forward parallel to the line of the hawser, but a few feet to port, and if the direction of the section was not changed, by any side strain upon the hawser, nor by the wind, nor by the tide, the section of the dry dock would move steadily.

The testimony indicates that this method of towing, after momentum had been obtained, produces less yawing and allows easier control of the object towed by the helping tug than when a bridle is used, and when a broad forward surface is presented to the resistance of the water. But the method of towing adopted necessarily presents the disadvantages incident to lack of rigidity or fixed control of the object towed (except as the helping tug may take the object entirely in its charge and direct its motion) if the strain upon the towing hawser cannot overcome any tendency to move in a direction not desired or dangerous to the tow.

The testimony of all the witnesses is that the two tugs proceeded safely with the dry dock through the narrow portion of the Gap forming the entrance proper, until the tug M. Moran reached a point between the stern of the Crown of Galicia and Pier A. Up to this time the tug had maintained a straight course. The destination of the dry dock was to the south or to the starboard, and it was necessary for her to make a turn around the stern of the Crown of Galicia before reaching the vicinity of the boats upon the north side of the Gap off Pier A.

At this point all of the witnesses observed a tendency on the part of the dry dock to swing in toward the stern of the Crown of Galicia. The captain of the M. Moran testifies that it was from some gust of wind or current influence which he could not anticipate or observe, and there is no evidence that the helping tug affected the direction of movement of the dry dock until the captain of the M. Moran put his own helm to port and signaled to the helping tug to also turn the dry dock to the south, in order to twist the rear end of the section, as it moved through the water, toward the north and away from the Crown of Galicia.

It would seem to be entirely immaterial whether some sudden motion upon the part of the dry dock caused the captain of the M. Moran to undertake this maneuver, or whether the beginning of the movement was caused by the course of the M. Moran to the starboard, in order to work around into the basin, upon the natural course to reach its destination. The result of the maneuver would be exactly the same. The force of the helping tug would turn the dry dock, but would not move the dock bodily to the north and away from the Crown of Galicia, even if the Helen B. Moran could by herself move the section, so long as both tugs were under a port helm, and so long as the strain upon the towing hawser prevented it from so doing. The towing hawser would

by the change of course swing the dry dock with some pivotal motion around a center, but would also, with any substantial length of hawser, move the entire section ahead and to the south in exactly the direction in which the captain of the M. Moran did not wish the dock to go, because of the presence of the stern of the Crown of Galicia.

The inevitable result followed. The dock continued to move forward toward the Crown of Galicia and came in contact with her stern. The accident could have been prevented only by taking the dry dock sufficiently to the north or toward Pier A, so as to keep her clear of the Crown of Galicia, which was in plain sight of the M. Moran during all the maneuvers inside the Gap, and to the Helen B. Moran when estimating the amount of space necessary to bring the dock in. The fact that the Crown of Galicia was left without motive power, or that her crew did not succeed in getting her out of the way, may throw some light upon what might have been done if circumstances had been different to save her from the danger which was impending; but no fault or negligence can be imputed to the owners of a vessel, who did not successfully snatch her from destruction, because they might have succeeded in so doing if they had known of the dangers which others were going to put her in.

The present case is not similar to that of The Margaret J. Sanford (D. C.) 30 Fed. 714, where a public channel was being blocked in such a way as to form a trap to vessels which had the right to anticipate that the path was entirely unobstructed. The Erie Basin is not a public highway of that nature, and the mere presence of the Crown of Galicia in such a location as to use a part of the entrance to the Gap would not be negligence to any one who was not misled, or who was able to avoid danger by the proper exercise of care on his part. Success in bringing in the previous sections of the dry dock furnishes no excuse for carelessness with respect to the handling of the fifth section, and the case must be determined from the particular circumstances shown in this particular voyage.

The tug M. Moran must be held responsible for the accident. The tug Helen B. Moran seems to have been at fault through failure to warn the M. Moran of the presence of the Crown of Galicia, even after estimating how much room the M. Moran would need to make the turn, and knowing that it could not be accomplished unless the M. Moran kept far over to Pier A and understood properly the danger from the Crown of Galicia. This would seem to be sufficient negligence to hold the Helen B. Moran for a share in the fault.

The Crown of Galicia has alleged fault against the dry dock, has brought in by petition the Gans Steamship Company (which in turn has brought in the Beard Estate), and has raised a number of issues which should be decided (as between the steamship and those parties) against the steamship. But this in turn was occasioned by the act of the libelant, Cossey, who alleged fault against the steamship as well as against the tugs. No costs will therefore be awarded the steamship or the owner of the dry dock as against each other; but the libel against the steamship Crown of Galicia, and the cross-libel against the dry dock, will be dismissed, and the petition of the steamship against the

Gans Line, and of the Gans Line against the Beard Estate, will also be dismissed, without costs.

The libelant, Cossey, may have a decree against the tug M. Moran and the tug Helen B. Moran, with costs, including the expense of taking testimony with respect to the issue against the tugs.

On Motion to Modify.

The steamship Crown of Galicia in the cross-libel claimed damages, the items of which were set forth in the depositions filed. One of the witnesses appearing upon the trial testified that the only damage actually suffered by the steamship was the mar in the paint shown by the photograph introduced in evidence. Upon the argument of the case and in the briefs the court acted under the mistaken assumption that the testimony of this witness was correct and that the steamship intended to waive any claim for actual damage.

The opinion previously filed was rendered upon this mistaken assumption by the court, and application has been made by the Crown of Galicia for a decree in its favor against the dry dock with respect to such damage as may be proven. Upon the representations of counsel that they intend to show items of damage substantial enough to justify the entry of a decree, the court will modify the opinion previously rendered to the extent of granting an interlocutory decree in favor of the Crown of Galicia against the tugs, if upon a reference or by stipulation any substantial damage be shown, and will also reserve any modification of the allowance of costs which might properly follow such a change in the decree.

THE CROWN OF GALICIA. THE M. MORAN. THE HELEN B. MORAN.

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

Nos. 187, 188.

COLLISION ⊂=71(2)—DRY DOCK IN TOW—COLLISION WITH STEAMSHIP AT PIER.

Two tugs *held* solely in fault for a collision between a section of dry dock, 80 by 125 feet in size, which they were towing into Erie Basin by a hawser attached to one corner, and a steamship which lay at a pier just within the entrance, on the ground that the steamship was in a safe place under ordinary circumstances, and that the tugs could have avoided the collision by the exercise of ordinary care, or by requesting the steamship to move until they passed.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig. ⊂=71(2).]

Appeals from the District Court of the United States for the Eastern District of New York.

Suit for collision by Harry Cossey against the steamship Crown of Galicia, the Crown Steamship Company, Limited, claimant, and the tugs M. Moran and Helen B. Moran, the Moran Towing & Transportation Company, claimant, with cross-libel by the Crown Steamship Company against the tugs, Dry Dock Section No. 6, Harry Cossey, claimant, and others. Decrees for libelant and cross-libelant against the two tugs (232 Fed. 299), and their claimant appeals. Affirmed.

On appeal by the Moran Towing and Transportation Company from final decrees holding both of the appellant's tugs—the M. Moran and the Helen B. Moran—liable for the damages sustained by Dry Dock Section No. 6, which, while being towed by the tugs, collided with the stern of the steamship Crown of Galicia, which was moored to a pier in the Erie Basin.

Samuel Park, of New York City, for appellant.

William J. Martin and George V. A. McCloskey, both of New York City, for appellee Cossey.

Kirlin, Woolsey & Hickox, of New York City (William H. McGrann, of New York City, of counsel), for the Crown of Galicia.

Haight, Sandford & Smith, of New York City, for Gans S. S. Line.

Ralph James M. Bullowa, of New York City, for appellees Beard and Robinson.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge. The facts are fully stated in the opinion of the District Judge and need not be repeated here in detail. There also appears in the opinion a simple diagram which makes the place of collision and the general situation perfectly plain.

The collision occurred in the Erie Basin on Sunday about 10:30 a. m., resulting in serious damage to a section of a dry dock which was being towed in by two tugs—the M. Moran and the Helen B. Moran. The Crown of Galicia, a steamer about 400 feet long and 52 feet beam,

was moved to Pier 4 on the southerly side of the slip, her stern protruding out into the gap for a short distance, from 15 to 20 feet. The dry dock was an awkward structure 125x80 feet and 45 feet in height and it was towed cornerwise. We do not think the Crown of Galicia can be held liable in any event, first, because she was in no way negligent and second, she was chartered by the Gans Steamship Line whose duty it was to provide a safe berth. If there was failure to do this the Gans Line was responsible and not the vessel ordered to the berth. The slight extension of her stern could not have been avoided and it was perfectly obvious to any vessel entering the Basin. We do not think, however, that in these circumstances the Gans Line was responsible. The dock in question provided a safe berth under ordinary circumstances. The stern of the Crown of Galicia projected only about 15 or 20 feet beyond the pier. Any ordinary vessel could have proceeded without the least difficulty. The Gans Line and the Crown of Galicia had no reason to suspect that a large unwieldly craft was to be towed into the Basin with the line attached to one corner only. This method of towing was referred to by us in The Merida, 210 Fed. 440, 127 C. C. A. 172. We there said:

"The practice of towing a rudderless scow with square ends by a line fixed to one corner of the bow is new to us. It is said to be followed for the purpose of keeping the scow clear of the tug's wash, the scow under such circumstances towing steadily on one side or the other of the tug, according as the line is fixed to the port or starboard corner. Several of the witnesses say that the effect of towing the scow from her port corner would be to keep her on the starboard side of the tug. We think this cannot be so."

The tugs were in full charge of this dry dock section; there was nothing to prevent them from towing it safely had they shown ordinary prudence. If the channel was dangerous, as is now asserted, they should have requested the Crown of Galicia to move further in and waited until the channel was in a safe condition to proceed. In The Skidmore, 115 Fed. 791, 53 C. C. A. 287, this court said:

"Especially should the court be slow to hold such an error of judgment a fault contributory to a collision when there need have been no collision if the other and moving vessel had been cautiously and vigilantly navigated."

It is unnecessary to add further to the opinion of the District Court. We think both tugs were liable for the damage done to the Dry Dock Section No. 6 and to the Crown of Galicia.

The decrees are affirmed with interest and costs.

AMERICAN MUSIC STORES v. KUSSEL.

Circuit Court of Appeals, Sixth Circuit. March 17, 1916.)

No. 2668.

1. MASTER AND SERVANT ⇐21—CONTRACTS OF EMPLOYMENT—CONSTRUCTION.
Where an employé agreed to perform the services required of him to the satisfaction of the employer, the employer is justified in discharging him if his services are not satisfactory, and the employer has absolute discretion in determining that question, and is not guilty of a breach of contract,

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

because, though the services rendered should have been satisfactory, they were not.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 20, 21; Dec. Dig. ⟸21.]

2. MASTER AND SERVANT ⟸21—CONTRACT OF EMPLOYMENT—RIGHT OF EMPLOYER.

Where a contract of employment required the employé to perform the services required of him as manager of a business to the satisfaction of the employer and to devote all his working time, labor, and skill, giving his attendance and best endeavors to the business of the employer, the added clause did not qualify the right of the employer to discharge the employé because his services were not satisfactory by prescribing a criterion regulating whether the services were satisfactory.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 20, 21; Dec. Dig. ⟸21.]

3. MASTER AND SERVANT ⟸21—CONTRACT OF EMPLOYMENT—CONSTRUCTION—DISCHARGE OF SERVANT.

Where a contract required services of an employé to be to the satisfaction of the employer, the employer is liable for a breach of contract, where he discharged the employé for other reasons, and not because his services were unsatisfactory.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 20, 21; Dec. Dig. ⟸21.]

4. MASTER AND SERVANT ⟸43—WRONGFUL DISCHARGE—JURY QUESTION.

Whether the services of an employé were satisfactory to an employer, or whether the employer discharged him because of other reasons, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 57, 58; Dec. Dig. ⟸43.]

5. MASTER AND SERVANT ⟸40(2)—CONSTRUCTION—ACTIONS—EVIDENCE.

Where a contract for services required the employé to render services required, evidence of what services were required is admissible in an action for the employer's breach.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 48; Dec. Dig. ⟸40(2).]

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

Action by Philip Kussel against the American Music Stores. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded.

D. M. Levy and C. P. Johnson, both of Cincinnati, Ohio, for plaintiff in error.

J. L. Meyer, of Cincinnati, Ohio (David N. Rosenbaum, of Cincinnati, Ohio, of counsel), for defendant in error.

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

TUTTLE, District Judge. This is an action to recover damages for the alleged wrongful termination by an employer of a contract of employment. The trial court submitted the case to the jury, who rendered a verdict in favor of the plaintiff, and defendant has brought the case to this court on writ of error.

The contract for the alleged breach of which plaintiff (defendant in error) seeks damages was as follows:

"This agreement made this 3d day of August, 1908, by and between the American Music Stores, a corporation organized under the laws of the state of New York, party of the first part, and Philip Kussel, of Cincinnati, Ohio, party of the second part, witnesseth:

"First. The party of the first part agrees to and does hereby employ the party of the second part for a period of two years from the 3d day of August, 1908, as western manager of its music stores, agencies and music departments controlled or operated by it, or which may hereafter be controlled, or operated by it, at a salary of eighteen hundred ($1,800.00) dollars for the first year and two thousand ($2,000.00) dollars for the second year, payable in weekly installments at the end of each and every week during which the party of the second part is actually engaged in the services of the party of the first part.

"Second. The party of the second part hereby accepts said employment during said period and agrees to perform the services required of him as western manager, to the satisfaction of the party of the first part, and to devote all his working time, labor and skill, and give his attendance and best endeavors to the business of the party of the first part, and to the utmost of his skill and power exert himself for the interest, profit, benefit and advantage of said business as western manager thereof.

"Third. The said party of the second part shall not make or enter into any contract, order or obligation of any kind in the name or in behalf of the party of the first part without its previous written authorization.

"Fourth. The party of the first part agrees to reimburse the party of the second part for traveling expenses necessarily expended while traveling in the service of the party of the first part, said traveling expenses not to exceed thirty-five ($35.00) dollars in any one week, however.

"Fifth. The party of the second part agrees during the term of this contract, not to engage his time or attention, or be interested, directly or indirectly, in any other business, nor to compose, write or publish or cause to be published any musical composition, or the words or music thereof, in his own name or that of any other, or to acquire any interest in any composition.

"Sixth. The party of the first part shall have the right to renew this agreement at the expiration thereof for a further period of three years in consideration of the sum of four hundred and fifty ($450.00) dollars to be paid upon the renewal of said agreement to said party of the second part, upon the party of the first part giving to the party of the second part a written notice of its intention to renew the same three months prior to the expiration thereof, and upon the giving of such notice, this agreement and every clause and covenant thereof shall be extended for a further period of three years except that the party of the second part shall be entitled to receive a salary of two thousand five hundred ($2,500.00) dollars a year during the first year of the extended term, two thousand seven hundred and fifty ($2,750.00) dollars and three thousand ($3,000.00) dollars during the second and third years respectively.

"Seventh. It is expressly understood that part of the duties of the party of the second part is to secure departments and stores for the party of the first part and to organize, supervise, operate and take charge of the music departments and stores of the party of the first part in different parts of the United States and Canada as directed by the party of the first part, and the party of the first part may require him to perform such services at any time and place.

"In witness whereof, the party of the first part has caused these presents to be signed in its name by Chas. K. Harris, its vice president, and its corporate seal to be affixed, and the party of the second part has set his hand and seal the day and year first above written."

Plaintiff was discharged before the expiration of the term mentioned in such contract, on the ground that his services were not satisfactory to defendant. Plaintiff admits that he was discharged on such ground, but contends that the right of defendant to terminate this contract depends, not upon the question whether he was actually sat-

isfied, but whether he ought in reason to have been satisfied, with the services performed by plaintiff, and that such question was properly submitted to the jury. The parties agree that their rights are governed by the law of the state of New York, where the contract was made. The trial court charged the jury as follows:

"There are two classes of cases in New York on this subject. In one of these the contracts made were held to gratify taste, to serve personal convenience or individual preference; and in these, if performance is to be to the satisfaction of another, he alone is to decide whether or not he is satisfied, and it is not a question for the court or jury to determine whether or not he ought to be satisfied. He is to determine that question.

"The other class of cases embraces contracts of employment of an ordinary servant to perform work or labor and services of an ordinary nature—of an ordinary business or commercial nature. In these it is held that, 'That which the law will say a contracting party ought in reason to be satisfied with, that it will say he is satisfied with.'

"Now the question is: Under which class of cases does this case come? Whether it is one which would entitle the defendant to say that he is not satisfied with the performance of the plaintiff, and therefore has the right to discharge him, or whether it is one of such character that the law would permit an investigation of the facts and have the jury determine whether or not the performance was reasonably complete and the defendant ought in reason to have been satisfied with it under all the circumstances of the case?

"Now, was the plaintiff (and this is a question for the jury to answer) was the plaintiff, by the terms of this contract and as the parties interpreted it themselves, as you may find from the testimony and evidence in the case, the manager, in the sense that he took the place of his employer and was to use his own judgment and discretion in the management of that business in that territory—a proposition that the defendant must establish by a preponderance of all of the evidence? Or did the word 'manager' mean only that he was to do the things required of him by the defendant, under its direction and subject to its approval, and not use his own judgment and discretion in the management of its business in that territory?

"If you find from the language used and the conduct of the parties that the agreement was that he would manage the defendant's western business in the sense that he should use his own judgment and discretion in acting for them, then I charge you that if the defendant was dissatisfied, for any reason, with his services, and by reason of its dissatisfaction discharged him, then your verdict must be for the defendant, and under those circumstances the plaintiff cannot recover.

"If, upon the other hand, you shall find that his agreed management was not to involve his own judgment and discretion, but that he was to do only what he was required to do by the defendant and under its direction and subject to its approval, then your next inquiry will be whether he so performed the duties required of him that the defendant ought in reason to have been satisfied therewith. If you shall have found that he was not to use his own judgment and discretion in the management of defendant's western business, but was only to do what was required of him by the defendant and under its direction, then you will inquire whether or not in reason the defendant ought to have been satisfied with what he did.

"If you find it ought not, in reason, to have been satisfied—and this the defendant must establish by a preponderance of the evidence—then your verdict will be for the defendant.

"If, upon the other hand, you find that the defendant ought in reason to have been satisfied with what the plaintiff did, then your verdict will be for the plaintiff, and you will assess his damage in the sum of $1,648.50."

Defendant complains of these instructions, by its assignments of error and by arguments in support thereof, presenting contentions which may be conveniently grouped and stated as follows:

(1) That the controlling ultimate question to be determined is

whether defendant was actually dissatisfied with the services of plaintiff.

(2) That the court should have directed a verdict in its favor because plaintiff's own evidence showed that defendant was so dissatisfied, and because there was no evidence tending to show the contrary.

(3) That the court erred in submitting to the jury the question of the construction of the contract involved.

[1] 1. We are clearly of the opinion that the trial court erred in instructing the jury that in cases of this kind involving contracts of employment of an ordinary business or commercial nature, if an employer ought in reason to be satisfied with the services of his employé, he will be held to be satisfied with such services.

The principles applicable are stated in Cyc. as follows:

"Contracts are frequently the subject of litigation in which the promisor agrees to pay for work or goods provided he is satisfied with them. The cases of this character may conveniently be put under two heads: (1) Where the fancy, taste, sensibility, or judgment of the promisor are involved; and (2) where the question is merely one of operative fitness or mechanical utility.

"*Cases of Fancy, Taste, or Judgment.*—The personal thread which runs through agreements of this class has caused a unanimity of judicial opinion that here at least the promisee is practically debarred from questioning the ground of decision on the part of the promisor or investigating its propriety. The courts refuse to say that where a man agrees to pay if he is satisfied with a thing of this kind he can be compelled to pay on proof that some one else is satisfied with it. They recognize that in matters of fancy, taste, or judgment there is no absolute standard as to what is good or bad, and leave each man free to act on his ideas or prejudices as the case may be. Hence we find that where the subject-matter of the contract was a suit of clothes, a bust of the defendant's husband, a portrait of the defendant's daughter, a cabinet organ, a set of artificial teeth, a carriage, a steam heater for a house, a play to be written by an author for an actor, a literary or scientific article for an encyclopedia, a design for a bank note, and horses, it has been held that the question was not one for court or jury to decide, but for the promisor alone. And so it has been held of a contract giving a master a right to discharge a servant if he is satisfied that the servant is incompetent, of a contract to employ a person so long as he is satisfactory, and of a contract to pay for services if they are satisfactory. * * *

"There is no good reason why in case of operative fitness or mechanical utility the same principle of law should not be applied. Although the thing to be done may not involve the feelings, taste, sensibility, or personal opinion of the promisor, yet he, in making the contract, may not have been willing to leave his freedom of choice exposed to any contention or subject to any contingency. He is resolved to permit no right in any one else to judge for him or to pass on the wisdom or unwisdom, the justice or injustice, of his action. Such is his will. He will not enter into any bargain except upon condition of reserving the power to do what others might regard as unreasonable, and, as there is assuredly no law which prevents a person from making contracts of this kind if he chooses, the courts should not hesitate to enforce them. The agreement is, in short, not to make or do a thing which the promisor ought to be satisfied with, and therefore ought to pay for, but to make or do a thing which he is satisfied with. Such a contract may be one-sided in being dependent upon the caprice of one of the parties; it may be an unwise contract to make; but if it is entered into voluntarily, the promisee is bound, and can have no right to ask a court to alter its terms in his favor. This view of the matter is the only logical one, and has been taken in a number of cases." 9 Cyc. 618–620.

In a note on the subject in Ann. Cas. 1915A, 746, appended to the recent case of Schmand v. Jandorf, 175 Mich. 88, 140 N. W. 996, 44

L. R. A. (N. S.) 680, is the following statement, citing in its support many authorities:

"As a general rule, though a contract of employment is for a definite term, if it provides that the services are to be performed to the satisfaction of the employer, it may be terminated by him at any time if he in good faith becomes dissatisfied with the services of the employé, though no real or substantial grounds for dissatisfaction exist."

The case of Schmand v. Jandorf, referred to, involved the construction of a contract quite similar to the instant case, whereby plaintiff was employed as a candy maker. After reviewing previous decisions, Judge Stone concluded as follows:

"Here the contract contained independent provisions. It is clear and explicit in its terms. Had it been the intention that the contract should continue, in case plaintiff should 'perform all of his duties as a candy maker and shall serve said first party diligently and according to his best ability in all respects,' it would have been quite unnecessary to have added the clause as to the satisfaction of the defendant, and it would then have been a question for a jury whether plaintiff had performed his contract or not. To give the 'satisfaction' clause any force, it must refer to the mental condition of the defendant, and not to the mental condition of a court or jury. We think that the construction of the contract by the circuit judge was the correct one. Whatever of apparent hardship there may be in such a contract, it was one of the parties' own making. As was said by Justice Steere in the Isbell Case [170 Mich. 304, 136 N. W. 457]: 'If parties voluntarily assume the obligations and hazards of a satisfaction contract, their legal rights are to be determined and adjudicated according to its provisions. It is elementary that courts cannot make contracts for parties, nor relieve them of the consequences of their contracts, however ill-advised.'"

The "Isbell Case," mentioned, is Isbell v. Anderson Carriage Co., 170 Mich. 304, 136 N. W. 457, and involved the alleged wrongful termination of a contract giving to plaintiff the exclusive agency for the sale of the electric automobiles made by defendant; the manner of conducting the details of such agency to be at all times satisfactory to defendant. Among other things, the court, speaking by Mr. Justice Steere, said:

"Contracts of this general character, known as 'satisfaction contracts,' in which one party agrees to perform his part to the satisfaction of the opposite party, are fruitful and frequent sources of litigation, owing to the disappointments they so often bring to the party who has taken the chance of performing satisfactorily, and the difficulty of ascertaining what really constitutes satisfaction, which primarily is but a mental process. Such contracts are enforceable, however, to the extent the intention of the contracting parties can be ascertained. If parties voluntarily assume the obligations and hazards of a satisfaction contract, their legal rights are to be determined and adjudicated according to its provisions. It is elementary that courts cannot make contracts for parties nor relieve them of the consequences of their contracts."

As was said by Judge Brown in Campbell Printing Press Co. v. Thorp (C. C.) 36 Fed. 414, 1 L. R. A. 645:

"The true doctrine is expressed in McCarren v. McNulty, 7 Gray [Mass.] 139, 141: 'It may be that the plaintiff was injudicious or indiscreet in undertaking to labor and furnish materials for a compensation, the payment of which was made dependent upon a contingency so hazardous or doubtful as the approval or satisfaction of a party particularly in interest. But of that he was the sole judge. Against the consequences resulting from his own bargain the law can afford him no relief; having voluntarily assumed the obligations

and risk of the contract, his legal rights are to be ascertained and determined solely according to its provisions.'

"Other cases extend the same doctrine to contracts for the performance of labor, or for the support of another to his satisfaction. In such case, the employer may be wholly dissatisfied with the character of the service rendered, or the beneficiary made exceedingly uncomfortable by his surroundings, without in either case being able to assign what the law would recognize as a sufficient reason for his dissatisfaction. It makes him, however, the sole judge of the reasonableness of his own discontent."

In view of the concession of both parties to the effect that this contract must be construed according to the law of the state of New York, we refrain from further discussion of the decisions, which are numerous and of which those already cited are typical of courts outside of that state. Many of them are collected in 1 Labatt on Master and Servant (2d Ed.) § 198 et seq. A careful examination of all of the decisions of the courts of New York which we have been able to discover convinces us that they are not opposed to, but are in accord with, those from which we have quoted.

In the case of Tyler v. Ames, 6 Lans. (N. Y.) 280, involving an employment contract which provided that plaintiff "should serve as defendant's agent in the sale of engines manufactured by defendant, for the term of one year, if plaintiff could fill the place satisfactorily," the plaintiff insisted that he was discharged in violation of the contract of hiring, and that he was entitled to recover his wages for the residue of the year. In overruling this contention the court said:

"It was for defendant to determine when plaintiff failed to fill the place of agent satisfactorily, and I know of no one who is authorized to review his decision.

"The word 'satisfactorily' refers to the mental condition of the employer, and not the mental condition of a court or jury. The right of determining whether the plaintiff filled the place of agent satisfactorily must, from the nature and necessity of the case, belong to the person whose interests are directly affected by the plaintiff's action. To require the employer, under such a contract, to prove that plaintiff did not fill the place satisfactorily, would be to require of him an impossibility, unless his own oath was taken as to his mental status on the subject. If he is required to prove facts and circumstances that would justify him in feeling dissatisfied with the manner plaintiff filled his office, it would be annulling this clause of the contract, as, without such a clause, he would have the right to dismiss the plaintiff if he did not properly perform his duties."

In Spring v. Ansonia Clock Co., 24 Hun (N. Y.) 175, it appeared that plaintiffs and defendant entered into an agreement whereby plaintiff agreed to work for the defendant as clock-case maker, for one year, provided his work and services should be to defendant's satisfaction. Before the expiration of such year, plaintiff was discharged without the assignment of any cause, except he was not the man the company wanted. He brought action to recover the damages sustained by him by reason of such discharge, and at the close of the plaintiff's testimony on the trial the complaint was dismissed. On appeal by plaintiff the judgment was affirmed; the court saying, among other things:

"Without the provision for that purpose introduced in the contract, the law secured to the defendant the right to discharge the plaintiff at any time for cause, and it must be assumed that the provision on that subject was inserted

in the contract to enable the defendant to exercise more power in discharging than could have been exerted in its absence. The contract of the defendant to pay is subject to the proviso that the services shall be to its satisfaction, and that fact is subject to no determination but the will of the company expressed through the proper agency. The determination of the question whether the services of the plaintiff under this contract were satisfactory, belonged entirely to the company, subject to no control from the courts. The will of the company is the only tribunal to which the question can be referred."

In Snyder v. Greenhut & Co., 71 Misc. Rep. 117, 127 N. Y. Supp. 1068, the plaintiff sued to recover damages for the alleged breach of a contract of employment. The contract was in writing, and under it the defendant employed the plaintiff as buyer and manager of its shoe department. By the terms of the contract, the plaintiff agreed to devote his entire time and attention and to give satisfactory service to said Greenhut & Co. in the conduct and management of the department above mentioned. The evidence established the fact that the plaintiff entered upon the discharge of his duties under the contract, and that the defendant was not satisfied with the results which the plaintiff produced, and terminated his employment. The trial justice left to the jury the question as to whether or not the services the plaintiff performed were satisfactory to the defendant, or whether or not his services were executed with such skill and with such care as a reasonable man might be satisfied with. To this charge of the court the defendant excepted, and in reversing the judgment the court said:

"The charge tendered an erroneous issue to the jury, and prescribed a test for determining whether the defendant was justified in discharging the plaintiff, different from that specified in the contract which both parties had signed."

In Zeiss v. American Wringer Co., 62 App. Div. 463, 70 N. Y. Supp. 1110, the action was founded upon an alleged breach of contract, entered into between the plaintiff and the defendant, employing plaintiff to work for the defendant as its managing agent in a certain county "for and during such times as the business relations between the parties hereto shall be mutually satisfactory." The defendant reserved the right to appoint other agents in such county if the plaintiff failed to canvass such territory to its satisfaction, and it agreed to protect him in said territory and give him the exclusive right to it "as long as said Zeiss shall conduct a faithful and efficient canvass." It was held that the agreement to protect the plaintiff and give him the exclusive right in the county of Richmond as long as he conducted a faithful and efficient canvass must be read in connection with the provision immediately preceding it, which gave the defendant the right to appoint other agents if the plaintiff failed to canvass the territory to its satisfaction; the court saying:

"The agreement to protect the plaintiff and give him the exclusive right is subject to the proviso that the plaintiff's canvass shall be satisfactory. That fact is made the test of the faithful and efficient canvass upon which the protection of the plaintiff and his exclusive right depend.

"The agreement is clearly within the rule laid down in Tyler v. Ames, 6 Lans. [N. Y.] 280, where the contract was to employ an agent for a year if he 'could fill the place satisfactorily,' and the court said: 'It was for defendant to determine when plaintiff failed to fill the place of agent satisfactorily, and I know of no one who is authorized to review his decision.'"

In Diamond v. Mendelsohn, 156 App. Div. 636, 141 N. Y. Supp. 775, it was said:

"There is no doubt that under the terms of this written contract, 'It is also agreed and understood that said Jacob Diamond shall perform the duties of foreman competently and energetically to the best of his abilities and complete satisfaction of his employers,' it lay within the power of the defendants to discharge the plaintiff because he did not perform his duties to their complete satisfaction, and that it would not be proper to submit to a jury the question whether they ought to have been satisfied."

In Messmer v. Boettger Silk Finishing Co., 160 App. Div. 519, 145 N. Y. Supp. 560, the plaintiff was employed by defendant as a silk finisher under a written contract whereby the plaintiff agreed that the work done by him should be done in skillful and competent manner, satisfactory to the trade and customers of the defendant. Plaintiff was discharged during the term of the contract and sued for damages. One defense was that his work had not been satisfactory to defendant's customers. In reversing the judgment for plaintiff, the court said:

"The trial court held that it was not sufficient to show that defendant's customers were dissatisfied, but that defendant must go further and show that cause for dissatisfaction actually existed. This was erroneous. The plaintiff had signed a contract by which the term of his employment was expressly made dependent upon the satisfaction or dissatisfaction of defendant's customers. If they became dissatisfied, that of itself was sufficient justification for plaintiff's discharge. Crawford v. Mail & Express Pub. Co., 163 N. Y. 404 [57 N. E. 616]."

In Smith v. Robson, 148 N. Y. 252, 42 N. E. 677, involving a contract between a theatrical manager and an actor, whereby it was agreed that if the former felt satisfied in good faith that the latter was incompetent he might discharge him, it was said:

"It was doubtless intended to give the defendant a wide discretion. The grounds which might exist for reasonable dissatisfaction on the part of the defendant could not readily be formulated in advance so as to cover all the contingencies. It was reasonable that the defendant should be in a position, if in good faith he felt that the plaintiff did not come up to the requirements of the situation, to discharge him. If the defendant had shown to the satisfaction of the jury that acting in good faith he had discharged the plaintiff because he was dissatisfied, and that his action was not arbitrary and capricious, he could not have been held liable."

In Crawford v. Mail & Express Publishing Co., 163 N. Y. 404, 57 N. E. 616, plaintiff sought to recover damages for an alleged breach of the contract by which he was employed for a definite term to write newspaper articles for defendant; it being provided that his services should be satisfactory to defendant. He was discharged on the ground that such services were not satisfactory, and in reversing a judgment on a verdict awarded him the Court of Appeals said:

"The plaintiff did not agree to satisfy a court or jury, but undertook to satisfy the publishers. It was their taste, their fancy, their interest and their judgment that was to be satisfied."

We have examined the cases cited by plaintiff and are of the opinion that they do not sustain the views expressed by the trial court. We think that they go no further in that direction than to hold that in

this class of cases the dissatisfaction of the employer, to justify him in discharging the employé, must be not only alleged but real. Thus in Hydecker v. Williams, 18 N. Y. Supp. 586, cited by counsel for plaintiff, the Court of Common Pleas said:

"It may be conceded that the employer was the sole judge as to whether the management of the press work by the plaintiff was 'artistically and financially satisfactory'; but this power, vested in the employer by the contract, must be exercised in good faith. He cannot discharge the plaintiff for the purpose of reducing expenses, and arbitrarily say that he was not satisfied with the artistic and financial management of defendant's press room by the plaintiff."

And in Summers v. Colver, 38 App. Div. 553, 56 N. Y. Supp. 624, also cited by plaintiff, it was said:

"On this appeal from a judgment of a district court, the only point presented for serious consideration is whether a servant engaged for a determinate period, 'so long as he shall satisfactorily perform his duties,' may be discharged at the mere volition of the master. For the jury found, upon adequate evidence, that the servant—plaintiff's assignor—did in fact perform his duties to the satisfaction of the defendants, the masters, and that they dismissed him only because 'business was dull,' and 'they could not afford to go on with the contract.' None of the citations sustains the proposition upon which appellants must rely for reversal of the judgment, namely, that although an employé perform the condition, by breach of which only his employment may determine before expiration of its stipulated period, he may be discharged meantime at the will of the employer. The proposition is a self-evident absurdity."

To the same effect are Fuller v. Downing, 120 App. Div. 36, 104 N. Y. Supp. 991; Diamond v. Mendelsohn, 156 App. Div. 636, 141 N. Y. Supp. 775; and Smith v. Robson, supra.

We think that the rule must be considered well settled to the effect that when an employer and an employé make a contract whereby the latter agrees to perform the services required of him to the satisfaction of the former, the failure of such employé to satisfy such employer is a breach of such contract.

Of course, if it appears, or if there is evidence fairly tending to prove, that the employer in such a case really is satisfied, but discharges the employé on some other ground, obviously the rule in question has no application. So, if the employer alleges dissatisfaction but there is evidence fairly tending to prove that such alleged dissatisfaction did not in fact exist, an entirely different question is presented. Thus, if A. has agreed to perform certain specific work to the satisfaction of B., proof that such work has been properly done and accepted by B. may be evidence tending to show that B. was really so satisfied, notwithstanding any statement by him to the contrary. In such a case we think that the question of fact is not whether B. ought, in reason, to be satisfied, because that was not what the parties agreed; but that the question is, "Was B. really satisfied?" We cannot avoid the conviction that the language of the decisions apparently holding otherwise is pure dictum, and that such decisions, while correct in what they decide, are incorrect in the reason assigned for so deciding.

Thus, as pointed out in Crawford v. Mail & Express Publishing Co., supra, in Duplex Safety Boiler Co. v. Garden, 101 N. Y. 387,

4 N. E. 749, 54 Am. Rep. 709, the contract called for "the repairing of a boiler under a stipulation that it should not leak and that the owner should be satisfied that it was a success," while that in Doll v. Noble, 116 N. Y. 230, 22 N. E. 406, 5 L. R. A. 554, 15 Am. St. Rep. 398, provided "that the woodwork in a house should be polished, stained, and rubbed in the best workmanlike manner under the supervision of a superintendent named, to the satisfaction of the owner," each being "a case of a completed contract in which work has been performed in an ordinary business." In the case first named, attention is called, in the opinion, to the fact that "the work required was specified and was completed; the defendants made it available and continued to use the boilers without objection or complaint," and it might well be argued that this was evidence fairly tending to show that the alleged dissatisfaction of defendants was not genuine but only a pretext for avoiding a just debt. And in Doll v. Noble, supra, it was merely held that defendant "must not attempt to defeat a just claim by arbitrarily and unreasonably saying he is not satisfied. The work must be done according to the contract." Neither of these decisions, in our opinion, is in conflict with the views which we have expressed. No other case has been cited requiring consideration in this connection.

[2] Finally, it is urged that the provision in the contract requiring the performance of the services to the satisfaction of defendant must be regarded as qualified by the addition of the clause, "and to devote all his working time, labor and skill, and give his attendance and best endeavors to the business of the party of the first part, and to the utmost of his skill and power exert himself for the interest, profit, benefit and advantage of said business as western manager thereof."

Counsel for plaintiff rely, in this connection, on the case of Doll v. Noble, supra, from the contract in which we have quoted.

We think that there is a marked distinction between the use of the phrase "in the best workmanlike manner" and that of the clause found in the present contract. The former phrase prescribes a definite test of performance of the merely mechanical services involved in that case, and it might be urged with much force that so long as this work was done in the best workmanlike manner the party for whom it was done should, and would, be satisfied. In the present case, however, neither were the services required of a kind to be subjected to such a test nor, in our opinion, can the clause mentioned be considered as fixing a test which an employer would be likely to intend in such a case. Not only is it indefinite and difficult of application, but it is incomplete and ignores the elements of efficiency, ability, and success in producing results, so essential to the satisfactory performance of such services. Under such a test, an employer would be unable to terminate such employment until he was able to prove that his employé was not devoting all his working time, labor and skill to his business, or not exerting himself to the utmost of his skill and power for such business, regardless of his inefficiency, lack of ability, and failure to produce results. We think that such an intention should not be ascribed, by implication, to defendant. On the contrary, it seems to us that the words in question were intended merely to emphasize the minimum

requirement expected of plaintiff, and that the failure of defendant to specifically require more, such as the "competent," "skillful," or "proper" performance of his duties by plaintiff is cogent evidence of an intention to insist on their being rendered to his "satisfaction," which would, of course, render any other such requirement unnecessary.

In many of the cases which we have cited and quoted the contract contained qualifying words of the kind mentioned, and yet in no instance were they held to limit or modify the effect of the stipulation requiring the satisfaction of the employer concerned.

For the reasons stated it is clearly apparent, both on principle and on authority, that the right of defendant to discharge plaintiff depended, not upon the question whether it ought in reason to have been satisfied with his services, but upon the question whether it was, in fact, and therefore in good faith, satisfied with such services. It results that the trial court was in error in instructing the jury otherwise, and that for this reason the judgment must be reversed and a new trial granted.

[3, 4] 2. What we have said renders it unnecessary to decide the other questions presented. We deem it proper, however, to add that while the defendant in this case had the right to terminate plaintiff's employment in case of actual, good-faith dissatisfaction with his services, no right existed to terminate it otherwise; and that it is open to plaintiff to question the fact of good-faith dissatisfaction, provided there is testimony reasonably tending to dispute defendant's assertion that it was dissatisfied.

We think that the record on the former trial was such as to permit the raising of this question of fact. Taking into account the defendant's previous expressions, of not only satisfaction with but pronounced commendation of plaintiff's services in the early period of the employment, the ten cent. store's competition and defendant's attitude toward it, and the fact that during the long period which elapsed from plaintiff's discharge until the trial, defendant had put no one in plaintiff's territory, but had done the work entirely by correspondence from the home office, there was, in our judgment, testimony tending to show that defendant, through causes for which plaintiff was not responsible, decided that it was to its interest to do its business on a different plan than it had in mind when plaintiff was employed, and that the discharge was made not because of dissatisfaction with plaintiff's services, but because of such change of method of doing business.

[5] 3. As the contract provided for the performance by plaintiff of the services required of him by defendant, it was, of course, proper to introduce evidence to show what services were so required. The meaning and effect of the contract we have already indicated.

For the error pointed out, the judgment is reversed, and a new trial granted, with costs to plaintiff in error.

BARNES et al. v. CADY.

(Circuit Court of Appeals, Sixth Circuit. May 5, 1916.)

No. 2660.

1. JUDGMENT ⊂⊃720—CONCLUSIVENESS—MATTERS CONCLUDED.

While a decree of a court of competent jurisdiction upon a question involved in one suit is conclusive as to that question in another suit between the same parties, the estoppel operates only as to matters in issue, or points or questions actually decided.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1251; Dec. Dig. ⊂⊃720.]

2. MORTGAGES ⊂⊃497(2)—FORECLOSURE DECREE—EFFECT—BAR.

In a suit to foreclose a prior mortgage on land, the petition charged that the trustee of a subsequent mortgage had or claimed some interest in the premises, and prayed that he be compelled to set up the same or be forever barred from asserting it. The trustee appeared, but defaulted, and a foreclosure decree was entered, declaring that he had no interest in, lien on, or claim to the premises or any part thereof. Before sale, the mortgagor conveyed the property to his brother, who paid the first mortgage debt and procured a dismissal of the suit and release from such mortgage. *Held*, that the trustee's default operated only as an admission of the first mortgagor's prior interest, and hence the decree was not a bar to the assertion of the second mortgage lien.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1472; Dec. Dig. ⊂⊃497(2).]

3. JUDGMENT ⊂⊃243—FORECLOSURE DECREE—JURISDICTION OF COURT.

In such case, the court was without jurisdiction to determine the validity of the second mortgage.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 428; Dec. Dig. ⊂⊃243.]

4. SUBROGATION ⊂⊃14(3)—PURCHASE FROM MORTGAGOR—FORECLOSURE—PAYMENT OF DEBT.

A suit having been instituted to foreclose a first mortgage on land, and a decree having been entered barring the interest of the second mortgagee, who was made a party, but failed to answer, the mortgagor before sale conveyed the property to his brother, who had paid the first mortgage and procured a dismissal of the suit and a release of the first mortgage, *held*, that the brother, notwithstanding the conveyance from the mortgagor was subrogated to the rights of the first mortgagee as against the second mortgagee; the estates not merging, and it being the intention of the brother to acquire the interest of the first mortgagee.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. § 38; Dec. Dig. ⊂⊃14(3).]

Appeal from the District Court of the United States for the Western Division of the Northern District of Ohio; John M. Killits, Judge.

Bill by Edward H. Cady, trustee for the Ohio Savings Bank & Trust Company, against John E. Barnes and others. From a decree (208 Fed. 361) for complainant, defendants appeal. Reversed and remanded.

See, also, 208 Fed. 359.

This is an appeal from a decree ordering a foreclosure of a mortgage on certain land and the sale of such land to satisfy such mortgage. The material facts and questions involved are stated in the opinion of the District Court as follows:

"About April 1, 1908, the Barnes Grain & Commission Company, of which one Charles W. Barnes was president and manager, was indebted to the Ohio Savings Bank & Trust Company, in the sum of about $2,900, on several promissory notes. In order to secure his indebtedness and such further advances as the bank might make said Charles W. Barnes, his wife joining him, and his father executed and delivered to Edward H. Cady in trust for the bank a deed conveying the property involved in this litigation, it being understood that the deed, although absolute in form, should be treated as a mortgage. At this time the land in question had already been conveyed by mortgage still subsisting to the Fremont Savings Bank Company, of Fremont, Ohio, and whatever rights then were acquired by Cady as trustee were subject to said mortgage. * * *

"All the parties in interest prior to December 18, 1911, were residents of Ohio and within the jurisdiction of this court. The Fremont Savings Bank Company brought an action in the court of common pleas of Sandusky county to foreclose its mortgage, making Charles W. Barnes and wife and Cady and wife parties defendant. Cady entered his appearance, but defaulted by answer. Barnes answered, taking issue solely with the plaintiff in the action and raising no issue between himself and Cady. Plaintiff's petition in the case, touching the Cady interest, simply alleged: 'That the defendants Edward H. Cady and Emma W. Cady have or claim to have some lien or interest in or to said premises, and plaintiff asks that they be compelled to set the same up or be forever shut off from asserting the same.' A decree of foreclosure was entered in favor of the plaintiff bank, in which a finding was had against the Cadys in these terms: 'And the court further finds that the said defendant Edward H. Cady and the defendant Emma W. Cady have no interest in or lien on or claim to said premises or any part thereof.'

"An order of sale was allowed and issued and the property advertised to be sold December 19, 1911. * * * With his interest thus subsisting in the property, on the 18th of December Barnes effected a sale of this property to his brother, John E. Barnes, of Chicago, one of the defendants in the case here. Having agreed upon the terms of sale, the two brothers visited Fremont, consulted an attorney, who assured them that the record effectually shut out as to all persons the Cady interest, and consummated their business by paying up and causing to be entered as satisfied on the court records the judgment in behalf of the bank, and having the action, after payment of the costs by them, dismissed without further procedure and obtaining a release and discharge of the mortgage from the bank and causing the same to be entered of record in the office of the county recorder. Thereupon a conveyance was made of this property by Charles W. Barnes and wife to John E. Barnes.

"There can be no question whatever upon the record before us but that the payment of the bank's judgment and court costs by John E. Barnes was part of the consideration for the conveyance of this property to him. A small balance remaining after the payment of these claims was paid to Charles W. Barnes. Cady, as trustee, thereafter commenced in this court the action now being determined to foreclose the lien in the nature of a mortgage held by him upon this property by virtue of the deed to him above referred to, and the facts we have just recited are set up by way of defense by John E. Barnes and wife, with the further claim that out of these transactions grew a right of subrogation to Barnes of the lien of the Fremont Savings Bank Company.

"Three questions were presented on the hearing. The first one of fact the court has already disposed of. The other two are: (1) Were the rights of Cady under his deed foreclosed by the proceedings in the Sandusky common pleas court in favor of the defendant John E. Barnes, as a successor in interest to Charles W. Barnes? (2) Is John E. Barnes, under the circumstances, subrogated to the rights of the Fremont Savings Bank Company in its decree foreclosing its mortgage? * * *"

B. W. Johnson, of Toledo, Ohio, for appellants.

H. W. Isenberg, of Toledo, Ohio, for appellee.

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

TUTTLE, District Judge (after stating the facts as above). We have carefully examined the record and are satisfied that it supports the statement of facts just quoted. It should, however, be added that defendant John Barnes testified that he "understood that lien had been wiped out" and that he "didn't want to take it under any condition unless everything was absolutely clear," and that there was no evidence to the contrary. The court below decided both of the questions referred to in favor of the plaintiff, holding that the decree foreclosing the first mortgage was not decisive of any right of the holder of the second mortgage, except that of priority of lien, and that defendant, in paying the first mortgage, paid his own debt and therefore extinguished such mortgage, thereby promoting the second mortgage to the rank of the first, and that under these circumstances he was not entitled to be subrogated to the previously existing rights of the senior mortgagee as against the junior mortgagee.

[1-3] 1. We agree with the conclusion of the trial court that the present plaintiff is not precluded from maintaining this suit by the decree in the former foreclosure suit. The principles governing the application to such a case of the doctrine of res judicata have been stated by the Supreme Court as follows:

"In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever. But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict is rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action, * * * the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action." Cromwell v. County of Sac, 94 U. S. 351, 24 L. Ed. 195.

"It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record—as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered—the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible." Russell v. Place, 94 U. S. 606, 24 L. Ed. 214.

"Is this a case of estoppel by judgment? The law in respect to such estoppel was fully considered and determined by this court in the case of Cromwell v. County of Sac, 94 U. S. 351 [24 L. Ed. 195]. It was there decided that when the second suit is upon the same cause of action, and between the same parties as the first, the judgment in the former is conclusive in the latter as to every question which was or might have been presented and determined in the first action; but when the second suit is upon a different cause of action, though between the same parties, the judgment in the former action operates as an estoppel only as to the point or question actually litigated and determined, and not as to other matters which might have been litigated and determined." Nesbit v. Riverside Independent District, 144 U. S. 610, 12 Sup. Ct. 746, 36 L. Ed. 562.

"The estoppel operates only as to matters in issue or points controverted and actually decided." Radford v. Myers, 231 U. S. 725, 34 Sup. Ct. 249, 58 L. Ed. 454.

As was said in Union Central Life Insurance Company v. Drake, 214 Fed. 536, 131 C. C. A. 82:

"Where the record is such that there is or may be a material issue, question, or matter in the second suit upon a different cause of action, which may not have been raised, litigated, and decided in the former action, the judgment therein does not constitute an estoppel from litigating this issue, question, or matter, unless by pleading or proof the party asserting the estoppel establishes the fact that the issue, question, or matter in dispute was actually and necessarily litigated and determined in the former action."

Applying these principles to the instant case, we are of the opinion that it has not been shown that the question of the existence or validity of the mortgage for the foreclosure of which this suit is brought was involved, litigated, or determined in the previous suit brought to foreclose the first mortgage. The mere fact that the decree of foreclosure in the first suit purported to find that the present plaintiff had no interest in the premises is, of course, not sufficient to give to such decree the effect claimed by defendants here. In the language of the Supreme Court in Barnes v. Chicago, Milwaukee & St. Paul Railway Company, 122 U. S. 1, 7 Sup. Ct. 1043, 30 L. Ed. 1128:

"Every decree in a suit in equity must be considered in connection with the pleadings, and, if its language is broader than is required, it will be limited by construction so that its effect shall be such, and such only, as is needed for the purposes of the case that has been made and the issues that have been decided."

The petition in the former suit was filed according to the answer of appellant to foreclose the mortgage of the Fremont Savings Bank "as

a first and prior lien" on the premises involved. Such petition alleged, as the only reference to the present plaintiff and his wife that they "have or claim some lien or interest in said premises, and plaintiff asks that they be compelled to set the same up or be forever cut off from asserting the same." It prayed for judgment against defendants Barnes and foreclosure of said mortgage and "sale of said premises free from all claims of all defendants." The decree recited that the defendants Cady, who had entered their appearance, were in default for answer, "and that the allegations of the petition are thereby confessed by them to be true. And on consideration thereof the court find, on the issues joined, for the plaintiff, and that there is due the plaintiff, from the defendant Charles W. Barnes and James A. Barnes" a certain sum, and that unless said sum were paid within a certain time "the defendants' equity of redemption be foreclosed and said premises be sold" as upon execution. No other reference to the mortgage involved here was made by any of the parties to that suit.

We think it apparent that the only issue there decided, or necessarily involved, between the first and second mortgagees was the priority of their respective mortgages, and that the only adjudication intended, and therefore effected, by the court as between said mortgagees was its decree that the first mortgage was a good and valid lien and that in default of the required payment thereof said land should be sold to satisfy such mortgage free from any claims of the junior mortgagee. We think that the following language, used in the case of Lincoln National Bank v. Virgin, 36 Neb. 735, 55 N. W. 218, 38 Am. St. Rep. 747, is applicable here:

"There is no doubt of the jurisdiction of a court of equity upon proper pleadings in a foreclosure proceeding, to determine the rights of all parties thereto with respect to the subject of the controversy, whether plaintiffs or defendants. But the power to conclude parties not claiming adversely to the plaintiff, whether subsequent mortgagees, or mortgagor and mortgagee, so as to prevent them from afterwards asserting their rights as against each other, depends upon whether such power has been invoked by one or more of the parties thus interested. In the judgment pleaded as a bar in this case, the only relief sought was the foreclosure of the Neir mortgage. In his petition the plaintiff therein alleged, in effect, that his mortgage was the prior lien. That was a proposition which the Merchants' Bank could not controvert. It is true it might have answered (assuming that it was still the owner of the mortgage) and by cross-bill secured an accounting and decree against the mortgagors, and an order for payment from the proceeds of the mortgaged property after the satisfaction of the prior lien. * * * The Merchants' Bank, by its default, must be held to have confessed the cause of action of the plaintiff therein, and to that extent the decree is conclusive. But the question of the validity of the mortgage now under consideration, as a second lien, was not presented by the petition, and the bank, as a defendant in that action, was justified in assuming that Neir, the plaintiff, was merely seeking to assert his own lien."

No case has been cited, and we have found none, holding that under the circumstances disclosed here the rights of a junior mortgagee, as against the mortgagor, were divested by such a decree. The cases cited by appellant involved foreclosure sales or questions relating to priority of lien, and are not applicable. Nor does the fact that the parties to this suit were joined as defendants in the previous suit, no issue having been framed between them, give to the decree therein the

effect of an adjudication of any of their rights as between themselves. As was said in Koelsch v. Mixer, 52 Ohio St. 207, 39 N. E. 417:

"Whilst the exact limits of the doctrine of res judicata in its application to some cases, are not definitely settled, it is accepted as generally true, that the judgment relied on for that effect in subsequent litigation, must have been pronounced upon the same issues, between the same parties, or their privies, standing in an adversary character to one another. By this is not meant that they should have stood upon the record as plaintiff and defendant, but that this should have been their real attitude upon the issues tried and determined."

Or, as the rule is expressed in Moehlenpah v. Mayhew, 138 Wis. 561, 119 N. W. 826:

"In a subsequent litigation between themselves, parties who were codefendants in a former action are not concluded by the judgment in such former action, unless there was an issue framed between such codefendants covering the point in question, or unless the plaintiff in the former action made a claim against each defendant which negatived in effect the right thereafter claimed by the other against his codefendant."

As we have pointed out, no issue was framed between the codefendants in question, and we think that the decree of foreclosure did not, and was not intended to, determine any controversy between them. If, however, it was intended by such decree to determine as between the two defendants the validity or existence of the junior mortgage, the decree was, to that extent, beyond the jurisdiction of the court, and void. As was said by the Supreme Court in Graham v. Railroad Co., 70 U. S. (3 Wall.) 704, 18 L. Ed. 247:

"It is true that it is the constant practice of courts of equity to decree between codefendants upon proper proofs, and under pleadings between plaintiffs and defendants, which bring the respective claims and rights of such codefendants between themselves under judicial cognizance. In the case of Farquharson v. Seton [5 Russel, 45], cited by counsel, the pleadings showed that Farquharson, as a codefendant with Seton, in another suit, had, by answer, set up the same case against him that he afterward set up by bill. In the former suit the decree had been against Farquharson, and he afterward sought to renew the litigation by an original proceeding, and it was held properly that the former decree, though between codefendants, was a bar. So in the case of Chamley v. Lord Dunsany [2 Schoales & Lefroy, 718], the general litigation was for the settling and marshaling of incumbrances, and it was held that where a case was made out between defendants, by evidence arising from pleadings and proofs between plaintiffs and defendants, a court of equity was entitled to make a decree between the defendants. In this case the decree was between defendants who asserted adverse interests in the incumbered estate. But neither of these cases assert the doctrine maintained here for the appellants, that a court of equity may decree between defendants when neither pleadings nor proofs show any controversy or adverse interest between them. Nor have we been referred to any case which does assert that doctrine."

The doctrine is, of course, well settled to the contrary. The rule is thus stated in 23 Cyc. 1318:

"Since a judgment is not valid which is rendered without jurisdiction of the question or issue decided, and since a void judgment creates no estoppel, it follows that if the court assumes to pass judgment upon a point or question not submitted to its decision by the parties in their pleadings, nor drawn into controversy by the course of the evidence, the judgment to that extent is not conclusive in a subsequent proceeding."

The rule is recognized in Ohio. In applying the doctrine in Commercial Bank v. Buckingham, 12 Ohio St. 402, the court said:

"As the pleadings stood, we think it clear, that the court, in assuming to determine the rights of the defendants, as against each other, was exercising a jurisdiction which had not been invoked, and its adjudication was, so far, coram non judice."

Appellants urge that, since the instant case was decided by the District Court, the Supreme Court of Ohio has affirmed the decree of the court of common pleas in the first foreclosure case mentioned, and that the issue involved in this branch of the case before us was thereby finally decided in appellant's favor, and we are asked to permit the filing in this court of a supplemental answer setting up such adjudication. But the record presented fails to make it clear that either the court of common pleas by its action subsequent to the original decree of foreclosure, or the Supreme Court of Ohio through its action invoked, has decided any question involving the existence or validity of the mortgage of appellee or any question involved in this suit. The application for leave to file supplemental answer should be denied for this reason if for no other.

For the reasons stated we think that the decree in the first foreclosure suit did not divest the appellee in the present case of his rights as mortgagee as between himself and the mortgagor, or preclude him from maintaining this suit.

[4] 2. We cannot, however, agree with the conclusion of the trial court that defendant is not entitled to be subrogated to the rights of the holder of the mortgage paid by him under the circumstances disclosed. It is manifest that in making such payment defendant intended to acquire, and supposed that he was acquiring, the interest in the premises held by the holder of such mortgage. He had not assumed the mortgage and was under no obligation, to either the mortgagor or mortgagee, to pay it. Nor was it his purpose to make a voluntary payment on behalf of such mortgagor. On the contrary, his sole object was the purchase of the land covered by this mortgage, which he supposed to be the only incumbrance thereon; and as one step in such purchase he sought, by paying the mortgagee to obtain the title of the holder thereof. In equity, therefore, he must be considered as the equitable assignee of such holder, and subrogated to the rights of the latter, as fully as if he had taken an actual assignment. Rachal v. Smith, 101 Fed. 159, 42 C. C. A. 297; Citizens' National Bank v. Wert (C. C.) 26 Fed. 294; Edwards v. Davenport (C. C.) 20 Fed. 756; Straman v. Rechtine, 58 Ohio St. 443, 51 N. E. 44; Amick v. Woodworth, 58 Ohio St. 86, 50 N. E. 437; Young v. Morgan, 89 Ill. 199; Smith v. Dinsmoor, 119 Ill. 656, 4 N. E. 648; Wilkins, Neely & Jones v. Gibson, 113 Ga. 31, 38 S. E. 374, 84 Am. St. Rep. 204.

"Subrogation is nothing more than an equitable assignment. When equity and good conscience requires the assignment to be made, subrogation, if necessary, will be allowed." National Surety Co. v. State Savings Bank, 156 Fed. 21, 84 C. C. A. 187, 14 L. R. A. (N. S.) 155, 13 Ann. Cas. 421.

"Under some circumstances the payment of a mortgage does not satisfy it or destroy its lien, because equity regards the person making the payment as the owner thereof for certain definite purposes and keeps it alive and pre-

serves its lien for his benefit and security. According to the well established principles upon which the doctrine of equitable assignment by subrogation rests, if the person paying stands in such a relation to the premises that his interest, whether legal or equitable, can not otherwise be adequately protected, the transaction will be treated in equity as an assignment. Sheldon on Subrogation, §§ 1, 3, 14, 16; 3 Pomeroy's Equity Jur. § 1211; Jones on Mortgages, § 874." Arnold v. Green, 116 N. Y. 566, 23 N. E. 1.

"Where money due upon a mortgage is paid, it may operate to cancel the mortgage or in the nature of an assignment of it, placing the person who pays the money, in the shoes of the mortgagee, as may best subserve the purposes of justice, and the just and true interest of the parties. The purpose, however, must be innocent, and injurious to no one." Bullard v. Leach, 27 Vt. 491.

Nor is this right of defendant to be subrogated to the position of the owner of the mortgage so paid affected by the fact that such mortgage was discharged of record.

"In applying the doctrine of subrogation, no attention should be paid to technicalities which are not of an insuperable character, but the broad equities should always be sought out so far as possible." Merchants' & Miners' Transp. Co. v. Robinson-Baxter-Dissosway Towing & Transp. Co., 191 Fed. 769, 113 C. C. A. 427.

As was pointed out by Judge Taft in a similar case (Cameron v. Holenshade, 1 Cin. Super. Ct. R. [Ohio] 83):

"If the [purchasers], when they paid off these mortgages, had taken an assignment of them, instead of canceling them, they could have stood upon them as a plank with which to escape from the wreck. We think that, in the eyes of equity, their relation to junior incumbrances is not affected by the ceremony of canceling the mortgages. By paying them, under the circumstances of this case, they became substituted to the position of the mortgagees, so far as such a substitution was necessary to protect them from the injustice of having a junior incumbrancer force them to pay for their property more than once."

The principles applicable here were involved and well stated in the case of Matzen v. Shaeffer, 65 Cal. 81, 3 Pac. 92. In that case it appeared that it had been arranged between the mortgagee, mortgagor, and appellant that she, appellant, should pay the sum of $3,500 for the satisfaction of the mortgage and a conveyance to her of the mortgaged premises by the mortgagor. This entire sum was handed to the mortgagee, who retained the amount due on the mortgage, and gave the residue to the mortgagor, whereupon the mortgagor executed a conveyance of the premises to appellant, and the mortgagee entered satisfaction of the judgment which had been previously obtained in an action to foreclose the mortgage. Previous to this the premises had been sold to the respondent under an execution issued upon a judgment recovered against appellant's grantor after the execution of the mortgage. But the time for redeeming the premises from said execution sale had not expired at the time of appellant's purchase. Respondent received a deed from the sheriff who sold the premises to him under said execution, and the question presented in the case was whether appellant, by paying and discharging the mortgage, subjected the land to the execution as a prior lien. Among other things, the court said:

"This presents a case in which the interest of the appellant required that the lien of the mortgage which she paid off should be kept alive. Her interest

can only be fully protected by regarding the transaction in which she paid off the mortgage as an assignment of it to her, and the lien has been kept alive for her security and benefit. 'In general, when any person having a subsequent interest in the premises, and who is therefore entitled to redeem, for the purpose of protecting such interest, and who is not the principal debtor primarily and absolutely liable for the mortgage debt, pays off the mortgage, he thereby becomes an equitable assignee thereof, and may keep alive and enforce the lien so far as may be necessary in equity for his own benefit; he is subrogated to the rights of the mortgagee to the extent necessary for his own equitable protection.' 3 Pomeroy's Eq. Juris. § 1212. And this equitable result follows, 'even though a receipt was given speaking of the mortgage debt as being fully paid, and sometimes even though the mortgage itself was actually discharged and satisfied of record.' 3 Pomeroy's Eq. Juris. § 1211. If the respondent had purchased the premises while the satisfaction of the judgment of foreclosure remained of record, he doubtless would be protected. But the finding shows that he purchased the premises and received a certificate thereof, before any action to foreclose the mortgage had been commenced, and that he was made a party defendant, and served with summons in said action. And if it be held that the appellant became the equitable assignee of the mortgage, and as such was entitled to have the lien created by it kept alive for her protection, notwithstanding the satisfaction and discharge of it of record, the respondent will be in no worse position than he would if the judgment of foreclosure had been actually assigned to appellant when she paid it off. The fact of the entry of the satisfaction of the judgment could not have influenced him when he purchased the premises, because the action in which said judgment was entered had not then been commenced. He purchased the premises subject to the mortgage, and the rights which he thereby acquired could not be affected by an assignment of the mortgage, either in fact or by operation of law. We think this is one of the cases in which the satisfaction of a mortgage of record does not of itself prevent a court of equity from holding that the payment of it operated as an assignment of it to the person making the payment. There is nothing to indicate that appellant when she paid off the mortgage intended to purchase it, or to have it kept alive for her benefit. It does not appear that anything was said on that subject when she paid it off, and the mortgagee without her request satisfied it of record. But the payment was made for her benefit, or for that of respondent. If the payment under the circumstances operated as an equitable assignment of the mortgage to her, she gets the benefit of it. Otherwise the respondent. Now it is quite clear that she intended the payment of the mortgage should inure to her own, and not to his benefit. She had in view her own, and not his interest. And it is only by regarding the transaction as an assignment of the mortgage to her that her interest can be protected and maintained, and a court of equity will presume that it was intended she should reap the benefit of her investment. Equity regards that as done which ought to be done, and looks to the intent rather than to the form. There is no equitable ground on which the respondent could object to the mortgage lien being kept alive for the protection of appellant's interest, and the mortgage having been satisfied of record when it should have been assigned to the appellant, it was not error to vacate the satisfaction."

We are satisfied that, under the principles and authorities referred to, appellant, in paying the first mortgage, became the equitable assignee thereof. Did the subsequent conveyance to appellant of the interest of the mortgagor result in the extinguishment of the first mortgage by merger, and so promote the junior mortgage to seniority? We think not. As was said in Case v. Fant, 53 Fed. 41, 3 C. C. A. 418:

"The general rule is that a mortgage will not be merged or extinguished by a subsequent conveyance from the mortgagor to the mortgagee of the mortgaged premises unless such appears to have been the intention of the parties, and justice requires it."

In the language of the court in Duffy v. McGuiness, 13 R. I. 595:

"It is well settled that, in equity, where a mortgage passes by assignment to a purchaser of the equity of redemption, the two estates will not merge, if it is for the interest of the purchaser to keep them distinct, for protection against an intervening incumbrance, unless it be very clear that merger was intended."

The rule is thus stated in 27 Cyc. 1381:

"There will be no merger of estates where such a result would be productive of injustice to the mortgagee, or injurious to his interests, by depriving him of his rights which he could claim and exercise by keeping the two estates distinct; for, the result depending on his intention in the matter, if there is no proof of what such intention was, the law will presume that he intended what would best accord with his interests, and therefore will prevent a merger, in accordance with such presumed intention."

We think that the following language, used in the similar case of Bell v. Tenny, 29 Ohio St. 240, is applicable:

"The case, therefore, involves the question, whether a conveyance by the mortgagor of the mortgaged premises to the assignee of a senior mortgage, in consideration of the sum due on the mortgage, and a further sum paid, has the effect to extinguish the mortgage debt and the lien of the mortgage, as between such assignee and a junior encumbrancer. A merger is said to arise where a greater estate and a less coincide and meet in one and the same person, in one and the same right, without any intermediate estate. Whatever may be the rule at law, * * * as between the mortgagor and mortgagee, or as between the mortgagee and an innocent purchaser, it is well settled in equity that the conveyance of the mortgaged premises, by the mortgagor to the mortgagee, does not necessarily merge the mortgage nor extinguish the mortgage debt. The question generally depends upon the intention of the person in whom the two estates unite. If it is entirely indifferent to him whether the charge or encumbrance should be kept alive, a merger follows, as no beneficial purpose is to be subserved by keeping the two estates apart and subsisting. James v. Johnson, 6 John. Ch. (N. Y.) 424. He may, however, elect to merge or sink the charge in the conveyance, or he may elect to keep and continue it separate and distinct from the estate upon which it rests. Where the intent to merge or not to merge, is, with knowledge of the facts, expressly or unequivocally fixed and declared, the question is settled by such determination. But where there is no expressed intent, or the party is incapable of expressing any, the court looks into the circumstances, and implies an intent upon the part of the owner of the two interests to keep the charge, or incumbrance, subsisting, where its subsistence is beneficial to him, and where there are no equitable circumstances which ought to require its extinguishment."

In the light of the foregoing authorities and of the principles of equity and good conscience by which we are here governed, we are of the opinion that the appellee is entitled to be subrogated, as against the appellants, to the rights of the holder of the mortgage paid, which must be considered as kept alive for their benefit so far as may be necessary to protect their interests. We think that appellant is entitled, in equity, to no less, and that appellees cannot, in equity, complain. In the words of the court in the case of Shaffer v. McCloskey, 101 Cal. 576, 36 Pac. 196:

"It will be noticed that the judgment in this case does not weaken any position which appellants were induced to take by any conduct of the respondent. It does not take away from them any money which they were induced to invest by any act or laches of respondent; nor does it lessen the

value of any security which he in any way induced them to take. They did not acquire any lien after the mortgage had been marked satisfied, and were not led by a clear record to invest money in the land. They took the deed of trust while the mortgage was in full legal existence, recorded and unsatisfied, and with perfect understanding that it was a valid prior lien, and they are merely seeking to take an advantage offered by an inadvertence or mistake of respondent. This is what equity will not allow."

We do not deem it necessary to discuss the objections made by appellants in the court below, but not argued in the briefs in this court, further than to say that we have carefully considered them, but agree with the conclusions of the District Court in its opinion overruling them, as reported in 208 Fed. 359, which conclusions and opinion we adopt as our own in this connection.

The decree of the court below will be set aside, with costs to appellants, and the case remanded for further proceedings not inconsistent with this opinion.

HOSS v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. April 12, 1916.)

No. 4087.

1. BANKS AND BANKING ⊜61—OFFICERS—OFFENSES—"BILL OF EXCHANGE"—CASHIER'S CHECK.

A cashier's check, drawn by the cashier of a bank, payable to the order of a named person, is a bill of exchange, within Rev. St. § 5209, Comp. St. 1913, § 9772), providing that every president, director, cashier, or agent of any banking association, who, without authority from the directors, draws any order or bill of exchange with intent to injure or defraud the association and every person who with like intent aids or abets, shall be guilty of crime; a "bill of exchange" being a written order or request by one person to another for the payment of a specified sum of money to the order of a third person absolutely and at all events.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 121; Dec. Dig. ⊜61.

For other definitions, see Words and Phrases, First and Second Series, Bill of Exchange.]

2. BANKS AND BANKING ⊜62—OFFICERS—OFFENSES—FRAUD—BILLS OF EXCHANGE—EVIDENCE.

Evidence *held* to warrant a finding that a cashier drew cashier's checks with intent to defraud a banking association, contrary to Rev. St. § 5209, and that plaintiff in error aided and abetted him with like intent.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 122–124; Dec. Dig. ⊜62.]

3. CRIMINAL LAW ⊜110—OFFENSES—ACCESSORIES—JURISDICTION OF COURT—"PRINCIPAL"—"FELONY."

The Penal Code which went into effect January 1, 1910 (Act March 4, 1909, c. 321, 35 Stat. 1152) provides in section 332 (Comp. St. 1913, § 10506) that whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, or procures its commission, is a "principal," while section 335 (section 10509) declares that all offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies. Rev. St. § 5209, provides that every cashier, officer, or agent of any banking association, who without authority shall draw any order or bill of exchange with intent to injure or de-

fraud the association and every person who shall aid or abet him with like intent, shall be guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten years. *Held* that, after the enactment of the Penal Code, the offense must be deemed a "felony," and therefore, under the rule that where a statute provides that an accessory may be prosecuted and convicted as for a substantive felony, one who aided and abetted in the offense, though he was at the time without the district in which the offense was actually committed, may be convicted in the district where the offense was committed, if such court had jurisdiction over the principal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 228; Dec. Dig. ⟸110.

For other definitions, see Words and Phrases, First and Second Series, Felony; Principal.]

4. CRIMINAL LAW ⟸98—OFFENSES—ACCESSORIES.

Where a statute provides that an accessory may be prosecuted and convicted as for a substantive felony the crime is cognizable in any court having jurisdiction over the principal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 192–195; Dec. Dig. ⟸98.]

5. CRIMINAL LAW ⟸829(1)—TRIAL—INSTRUCTIONS.

It is improper to single out individual facts, and call the jury's special attention to them, where the whole matter can be satisfactorily given in the general charge; therefore, in a prosecution of a bank cashier for drawing and issuing bills of exchange with the intent to defraud a banking association, and of other defendants for aiding and abetting therein, contrary to Rev. St. § 5209, special instructions relating to kiting of checks, which singled out isolated matters presented by the general charge were properly refused.

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

6. CRIMINAL LAW ⟸829(1)—TRIAL—INSTRUCTIONS—REFUSAL.

The refusal of special instructions, though correct in law, which were covered by the general charge, is proper.

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

7. CRIMINAL LAW ⟸371(1)—EVIDENCE—SIMILAR TRANSACTIONS.

In such prosecution, evidence of other drafts and transactions between the parties to the scheme, issued and occurring about the same time, is admissible; all the occurrences being related.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830, 831; Dec. Dig. ⟸371(1).]

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

C. M. Hoss and another were convicted of aiding and abetting a bank cashier in issuing a bill of exchange with intent to defraud a bank, and sued out a writ of error, which was dismissed, except as to the named defendant. Affirmed.

Benjamin F. Burwell, of Oklahoma City, Okl. (A. P. Crockett and Charles Edward Johnson, both of Oklahoma City, Okl., on the brief), for plaintiff in error.

Isaac D. Taylor, Asst. U. S. Atty., of Guthrie, Okl. (John A. Fain, U. S. Atty., of Lawton, Okl., on the brief), for the United States.

Before ADAMS and CARLAND, Circuit Judges, and TRIEBER, District Judge.

ADAMS, Circuit Judge. This was an indictment against Julius F. Rochau, Raymond H. Hoss, and C. M. Hoss, for violating provisions of section 5209 of the Revised Statutes of the United States. There were five counts in the indictment, each charging Rochau, as cashier of the First National Bank of Fairfax, Okl., with drawing a certain specified bill of exchange, without the authority of the board of directors, and with the intent to defraud the bank, and Raymond H. Hoss and C. M. Hoss with aiding and abetting him, with like intent, in so doing.

Rochau fled, and has never been arrested or tried. Raymond H. Hoss and C. M. Hoss were duly apprehended, arraigned, entered pleas of not guilty, tried, convicted on each and all of the counts of the indictment, and sentenced—Raymond for a period of seven years, and C. M. Hoss for a period of five years in the United States penitentiary at Leavenworth, Kan. Both sued out a writ of error from this court, and the cause was docketed here. The writ of error as to Raymond H. Hoss was dismissed by him, and he then entered upon his term of imprisonment; but C. M. Hoss prosecutes the writ of error. He makes the following assignments of errors:

(1) The court erred in refusing to instruct the jury to find a verdict in his favor.

(2) The court erred in refusing to give two certain requested instructions to the jury.

(3) The court erred in admitting certain documents and papers in evidence over his objection.

There are some facts which are uncontradicted and certain, and these we state at the outset. The First National Bank of Fairfax, Okl., was organized as a national banking association in 1905, with a capital stock of $25,000. Later, in 1909, this was increased to $50,000. Julius F. Rochau was originally made assistant cashier and director. Raymond H. Hoss was made cashier and director. Later, in 1908, Raymond H. Hoss resigned as cashier, and was then made vice president, and Rochau was then made cashier. Later Raymond H. Hoss resigned as vice president and director; Rochau still retaining his position as cashier. Raymond Hoss, although no officer, was afterwards a frequent visitor at the bank, and had free access to the books of the bank, frequently inspecting his own account and the account of the firm of Wismeyer, Moody & Hoss, of which he was a member. Rochau and Raymond Hoss resided in Fairfax, Osage county, Okl., which is in the Western judicial district of that state. C. M. Hoss was an uncle of Raymond Hoss, and resided in Tulsa county, near to the city of Tulsa, which is in the Eastern District of Oklahoma.

The bills of exchange counted on in the indictment were cashier's checks, in the usual form, drawn by Rochau, as cashier, and payable to the order of C. M. Hoss, and by him indorsed. The first count

of the indictment charged the drawing of a bill of exchange on June 7, 1910, for the sum of $7,500, in the following words and figures:

"June 7, 1910.

"First National Bank of Fairfax:

"Pay to the order of C. M. Hoss $7,500.00, seven thousand five hundred and no/100 dollars

"Cashier's Check. [Signed] J. F. Rochau, Cashier."

The second count was based on a cashier's check, like that in the first count, except that it was dated June 17, 1910, and was for $12,000. The third count was based on a cashier's check, like the others, except that it was dated June 20, 1910, and was for $7,800. The fourth count was based on a cashier's check, like the others, except that it was dated June 11, 1910, and was for $14,500. The fifth count was based on a cashier's check, like the others, except that it was dated June 20, 1910, and was for $7,725.

At the time these checks were drawn, in June, 1910, Raymond Hoss was hard pressed for money and in much financial distress, and on June 8, 1910, he commenced drawing personal drafts upon his uncle, C. M. Hoss, to be collected through the Union Trust Company, at Tulsa, Okl., at which company C. M. Hoss carried a personal banking account. The first draft was for $7,186.25. At that time he (C. M. Hoss) had a balance to his credit in the Union Trust Company of only $28.58. On June 10, 1910, this draft was paid by the Trust Company and the amount thereof charged to the account of C. M. Hoss. On the same day, June 10, 1910, the account of C. M. Hoss in the Trust Company was credited with $7,500, the amount of the cashier's check involved in the first count of the indictment. On June 11, 1910, R. H. Hoss drew a personal draft on C. M. Hoss for $13,900. On June 16, 1910, this draft was paid by the Trust Company and charged to the personal account of C. M. Hoss. On June 14, 1910, his account was credited with $14,500, the amount of the cashier's check described in the fourth count of the indictment. On June 18, 1910, R. H. Hoss drew a personal draft on C. M. Hoss for $12,000, and on June 23, 1910, this was paid by the Trust Company and charged to the account of C. M. Hoss. On June 22, 1910, his (C. M. Hoss) account was credited with the sum of $12,000, the amount of the cashier's check of date June 17, 1910, described in the second count of the indictment. Prior to June 27, 1910, R. H. Hoss drew a personal draft on C. M. Hoss for $15,000. On June 27, 1910, this amount was paid by the Trust Company and charged to the personal account of C. M. Hoss. On June 24, 1910, the account of C. M. Hoss was credited with two items, one $7,800, and the other $7,725; these sums corresponding to the amounts of the two cashier's checks involved in the third and fifth counts of the indictment.

From the foregoing it appears that there was a striking coincidence between the amounts of the several cashier's checks counted on in the indictment and the personal drafts of Raymond Hoss upon his uncle, C. M. Hoss, and also a substantial coincidence between the dates the cashier's checks were credited to C. M. Hoss in his account with the Union Trust Company and the dates the personal drafts on C.

M. Hoss were presented for payment at the same Trust Company. It further appears that C. M. Hoss personally indorsed four of the cashier's checks at or before the time they were credited to his account in the Trust Company, and that the other one was indorsed by the cashier of the Trust Company for deposit to the credit of C. M. Hoss. It further appears that the cashier's checks were drawn by Rochau, the cashier, surreptitiously, and were not entered of record in the books of the bank in their proper place where cashier's checks were kept. The checks were drawn by Rochau, the cashier, without the authority of the board of directors of the bank, or without any other lawful authority. They were finally paid by Raymond H. Hoss when they were presented by the Union Trust Company for payment at the First National Bank.

So much for what is practically uncontradicted testimony. In addition to this there was evidence of other transactions involving the use of personal drafts and cashier's checks at about the same time by the same parties, and much extraneous evidence tending to show directly and inferentially the intent with which the cashier's checks were drawn; the government claiming that it all tended to show an intent to defraud the bank upon which they were drawn, and the defendant claiming that it failed to disclose that intent, but did disclose an intent to tide the bank over an embarrassing condition, and more particularly to maintain its legal reserve, which was claimed to have been in danger of impairment.

On this testimony the case was submitted to the jury in a charge fairly presenting the issues involved and the law applicable to them, and particularly the issue of intent. The court, in repeated ways, advised the jury that they could not convict the defendants Raymond and C. M. Hoss, or either of them, as aiders or abettors, unless they should find that Rochau, the cashier, drew the cashier's checks with intent thereby to defraud the bank, and also find that the defendants Raymond and C. M. Hoss aided and abetted him in so doing, with the same intent. That issue was very clearly impressed upon the jury as the one important and controlling issue of fact in the case. The result was the jury found a verdict of guilty on each and every count of the indictment, and judgment was rendered thereon, as hereinbefore stated.

[1] The first assignment of error challenges the action of the trial court in refusing the request of the defendant C. M. Hoss for an instructed verdict of not guilty in his favor. Counsel now assign three reasons why that instruction should have been given: First, because the cashier's checks counted on in the several counts of the indictment were not bills of exchange within the meaning of section 5209 of the Revised Statutes (Comp. St. 1913, § 9772); second, because there was no substantial evidence tending to show that either Rochau, the cashier, or Raymond or C. M. Hoss, had the intent to defraud the bank in what they did; and, third, because there was no proof that C. M. Hoss committed the offense charged against him in the Western district of Oklahoma, as charged in the indictment.

Were the cashier's checks bills of exchange within the meaning of section 5209? That section reads as follows:

"Every president, director, cashier, * * * or agent of any association, * * * who, without authority from the directors, * * * draws any order or bill of exchange, * * * with intent, in either case, to injure or defraud the association, * * * and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

A bill of exchange, according to generally accepted definitions, is a written order or request by one person to another for the payment of a specified sum of money to the order of a third person absolutely and at all events. The cashier's checks involved in this case, already copied, manifestly respond to every element of this definition. An order is drawn by the cashier of a bank, who, according to the general usage, custom, and course of banking business, is authorized to act in such matters as the agent of the bank, requiring it to pay absolutely and at all events a specified sum of money to the order of a third person. The Supreme Court of the United States, in Rogers v. Durant, 140 U. S. 298, 11 Sup. Ct. 754, 35 L. Ed. 481, in considering whether an order or a check was barred by the statutes of limitations of the state of Illinois, which reads as follows:

"All actions founded upon accounts, bills of exchange, orders or upon promises not in writing, express or implied, * * * shall be commenced within five years next after the cause of action accrued, and not thereafter"

—held that a check was contemplated in the words "bills of exchange," and therefore must be sued on, if at all, within the period of five years after the cause of action accrued, as contemplated by section 2 of the act, rather than within the period of ten years, which limited the bringing of actions upon promissory notes, simple contracts, or "other indebtedness in writing," as contemplated by section 1 of that act.

In the case of First National Bank v. Whitman, 94 U. S. 343, 345, 24 L. Ed. 229, the Supreme Court says:

"It is not to be doubted, however, that it is within the power of the bank to render itself liable to the holder and payee of the check. This it may do by a formal acceptance written upon the check, in which case it stands to the holder in the position of a drawer and acceptor of a bill of exchange"—citing Merchants' Bank v. State Bank, 10 Wall. 604, 19 L. Ed. 1008, and Espy v. Bank of Cincinnati, 18 Wall. 604, 21 L. Ed. 947.

The reasoning of these cases would, in our opinion, fairly cover a cashier's check, whereby the bank, through its agent, becomes the drawer, and the bank itself, by the action of its duly authorized agent in issuing the check, has become the acceptor. Drinkall v. Movius State Bank, 11 N. D. 10, 88 N. W. 724, 57 L. R. A. 341, 95 Am. St. Rep. 693.

The industry of counsel for plaintiff in error has drawn our attention to some cases sustaining a different view. Most, if not all, of those cases are concerned with private checks drawn by depositors on banks in which they keep a personal account. In such cases the check is not payable absolutely and at all events. The drawer may, at any time before the check has been actually presented to the bank for payment, countermand it, and in other particulars personal checks

differ from cashier's checks; accordingly principles which govern such a check are not necessarily applicable to a cashier's check. In our opinion the cashier's checks involved in this case are fairly comprehended within the words "bills of exchange," as employed in section 5209, Revised Statutes.

[2] Was there substantial evidence tending to show that Rochau drew the cashier's checks with intent to defraud the bank, and that C. M. Hoss aided and abetted him in so doing with like intent? We have already referred to important uncontradicted testimony in the case, and stated in a general way what the testimony on both sides tended to prove. In our opinion the evidence so referred to in itself, and especially when taken in connection with all the facts and circumstances of the case, tends strongly to show that Rochau, Raymond Hoss, and C. M. Hoss deliberately devised a scheme to make use, temporarily at least, of the funds of the First National Bank for their private purposes.

The drawing of personal drafts by Raymond Hoss upon his uncle for amounts far beyond any reasonable expectation of their being honored, and contemporaneously therewith having Rochau, the cashier of the bank, supply the funds with which they could be honored by drawing the cashier's checks in question, payable to the order of C. M. Hoss, and arranging for their collection by and through the Union Trust Company, turned out to be an effective device for obtaining money by Raymond Hoss, and incidentally, as the proof tends to show, for leaving a little surplus arising from the negotiation of the cashier's checks from time to time with the defendant C. M. Hoss. The device was obviously not intended for great permanency, as the sequel showed; but it served the purpose of raising money for the immediate exigency at least. But the use of the bank's money while the "kiting" purposes were being conducted, even if in the end the bank lost no money (as claimed by counsel for appellee), amounted to an unlawful conversion to their own use of money of the bank, and would establish, if permitted to be resorted to, a very dangerous practice which might in time ruin any bank.

The proof, in our opinion, justified the jury in finding the issue clearly submitted to them by the court, namely, whether the cashier's checks were drawn by Rochau with the intent to defraud the bank, and whether the defendant Hoss aided and abetted him in so doing, with like intent, against the defendant. At least it is an unwarrantable tax upon our credulity to hold that there was no substantial evidence to warrant a jury in finding the issue of intent against the defendant.

[3, 4] Was the venue wrong? Rochau, the cashier, lived in Fairfax, within the Western district of Oklahoma, and there drew the cashier's checks in question, to provide a fund with which to take up the personal drafts drawn by Raymond Hoss upon his uncle, C. M. Hoss, who resided in or near the city of Tulsa, in the Eastern district of Oklahoma. It is contended by counsel for Hoss that the evidence discloses no act done by him at Fairfax, or at any place in the Western district of Oklahoma, in aid of Rochau, and that as a result Hoss could not have been lawfully tried in the Western district as an

aider or abettor. It is doubtful if the assumed premises are correct, for it is hardly conceivable that the elaborate device resorted to for the accomplishment of their purpose, involving, as it did, the active co-operation of C. M. Hoss, could have been concocted without the co-operation in its inception of the person who was to play the important part which C. M. Hoss played, and the reasonable inferences from the facts proven may have warranted the jury in finding that he did co-operate with them at Fairfax where this scheme had its origin. Without admitting the fact so to be, that C. M. Hoss did not actually perform any act in the Western district as an aider or abettor of Rochau in his unlawful act, how does the case stand? Rochau, the principal, without doubt, did an unlawful act in the Western district, and according to the verdict of the jury C. M. Hoss aided and abetted him, at least in Tulsa in the Eastern district, in so doing.

While section 5209 denominates the offenses therein denounced as misdemeanors, subsequent statutes have made a different provision concerning the character of the offenses. Section 335 of the federal Penal Code, which went into effect on January 1, 1910, provides as follows:

"All offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors."

Accordingly the punishment imposed for violating section 5209, being for at least five years in the penitentiary, constitutes those offenses felonies. The indictment in this case was found by the grand jury on September 9, 1911, and the offenses charged in the indictment were committed some time in June, 1910. It results, therefore, that the rights of the parties were fixed by the law as it stood after the passage of the federal Penal Code on January 1, 1910. Section 332 of the Penal Code provides as follows:

"Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

C. M. Hoss, therefore, although an aider and abettor in the crime charged against Rochau, was a principal in the same crime, and was liable himself as for a substantive offense, and is punishable in the same manner as the principal actor is for a felony. It is well settled, we think, that where a statute provides that an accessory may be prosecuted and convicted as for a substantive felony the crime is cognizable in any court having jurisdiction of the principal. Scully v. State, 39 Ala. 240; People v. Wiley, 20 N. Y. Supp. 445;[1] State v. Ayers, 67 Tenn. (8 Baxt.) 96; Carlisle v. State, 31 Tex. Cr. R. 537, 21 S. W. 358; State v. Ellison, 49 W. Va. 70, 38 S. E. 574. See also Keliher v. United States, 114 C. C. A. 128, 193 Fed. 8.

[5, 6] It is next contended that the court erred in refusing to give two certain instructions to the jury, as requested by defendant's counsel. These were to the general effect that the drawing and circulating of "kite" drafts or checks did not constitute a violation of any federal

[1] Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 65 Hun, 624.

law, and that if the jury should believe that such drafts or checks were issued and put in circulation for the use and benefit of the defendants, or either of them, yet if the jury should believe that R. H. Hoss had reasonable ground to believe that he would be able to pay or take care of the same when they should be presented for payment at the Fairfax Bank, then and in that event such act would constitute no crime, and, further, that if such drafts or checks were paid or caused to be paid by Raymond Hoss when they were finally presented for payment that the jury might take that fact into consideration in determining the intent with which the drafts or checks were issued.

It is quite improper to single out individual facts of a case and call the jury's special attention to them, provided the whole matter can be satisfactorily given to the jury in the general charge. Perovich v. United States, 205 U. S. 86, 92, 27 Sup. Ct. 456, 51 L. Ed. 722. These instructions not only were faulty in the respect that they called special attention to certain facts of the case, without giving effect to other correlated and modifying facts, but they were misleading, telling the jury that it was no violation of the law to issue "kite" drafts or checks. In itself, probably, that is correct; but to give such an instruction to the jury might mislead them, causing them to believe that one of the main facts of the case constituting the offense charged against the defendants might practically be ignored by the jury. Moreover, the substance of both of them, so far as they contained correct propositions of law, was given to the jury fully and fairly in the main charge; hence there was no occasion for repeating them. There was no error in refusing to give either of these instructions.

[7] It is next assigned for error that the court erred in admitting certain exhibits in evidence in the nature of other drafts drawn during the month of June, 1910, by Harry Rochau, the assistant cashier, payable to the order of the National Reserve Bank of Kansas City, and admitting a sight draft purporting to be signed by R. H. Hoss, and naming C. M. Hoss as payee, for $14,250, on the ground that they were in no way connected with any of the items or transactions involved in either of the counts of the indictment. Other exhibits tending to show the conduct of business on the part of C. M. Hoss, made also during the month of June, 1910, were admitted in evidence, to which defendant C. M. Hoss took exceptions.

The court is of opinion that those items of evidence were all so related to the transactions involved in the indictment in this case as to be admissible under the general rule, which permits transactions of like general nature occurring at about the same time that the transactions involved in the case on trial occurred, with a view of disclosing the intent with which the transactions under inquiry were had. We think no error occurred in the introduction of any of this testimony.

Some other incidental points were argued by counsel, but, finding in them no prejudicial error, the judgment of the District Court is affirmed.

PACIFIC MUT. LIFE INS. CO. OF CALIFORNIA v. VOGEL.

(Circuit Court of Appeals, Third Circuit. May 3, 1916. Rehearing Denied June 17, 1916.)

No. 2079.

1. INSURANCE ⟸145(3)—RENEWAL RECEIPT—EFFECT OF DELIVERY.
Where an accident insurance company, without a demand for payment of the premium, delivered a renewal premium receipt to the insured, which provided for extension of the insurance, such delivery does not, without acceptance by the insured or payment of the premium, extend the insurance, on the theory that the company is estopped to deny liability until cancellation of the receipt.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 284–286; Dec. Dig. ⟸145(3).]

2. INSURANCE ⟸145(3)—ACCIDENT INSURANCE—POLICY—CONSTRUCTION.
A renewal premium receipt, purporting to continue a policy in force, delivered pursuant to a custom which permits the payment of the premium within 60 days, fixes liability upon the insurer from the date of its acceptance by the insured, and not from the date of the payment of the premium.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 284–286; Dec. Dig. ⟸145(3).]

3. INSURANCE ⟸145(1)—ACCIDENT INSURANCE—RENEWAL PREMIUM RECEIPT—DELIVERY.
An accident insurance company delivered to a policy holder a renewal premium receipt, duly countersigned, which purported to extend the policy for another year. At this time there had been no request by the policy holder for an extension of the insurance, nor was the premium paid for some time. It was the custom of the company to extend credit to policy holders in the matter of payment of premiums. *Held* that, while the mere delivery of the renewal premium receipt did not create a contractual obligation on the part of the company to maintain the policy in force, it was an offer to do so which the insured might accept by signifying intention within a reasonable time, or by payment within the period for which the credit was extended.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 278–283, 287–291; Dec. Dig. ⟸145(1).]

4. TRIAL ⟸142—JURY QUESTION—PROVINCE OF JURY.
Where the evidence as to a fact in issue is such that reasonable minds may differ, the matter must be submitted to the jury.
[Ed. Note.—For other cases, see Trial, Cent. Dig. § 337; Dec. Dig. ⟸142.]

5. INSURANCE ⟸668(3)—ACCIDENT INSURANCE—EXTENSION OF INSURANCE.
In an action on an accident policy, which the insurer claimed had expired before the accident, the question whether, the renewal premium having been paid and accepted, the insurance was extended by the insured's acceptance of the renewal premium receipt, so that it covered an accident occurring before payment and after the premium became due, *held* under the evidence for the jury.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1734, 1755; Dec. Dig. ⟸668(3).]

In Error to the District Court of the United States for the Western District of Pennsylvania; W. H. Seward Thomson, Judge.

Action by Julia B. Vogel against the Pacific Mutual Life Insurance

Company of California. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Benjamin J. Jarrett and Willis F. McCook, both of Pittsburgh, Pa., for plaintiff in error.

John E. Laughlin and F. C. McGirr, both of Pittsburgh, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This action was brought on a policy of accident insurance by the widow of the insured, who, in the event of her husband's death by accident, was the designated beneficiary. The defendant admitted the execution and delivery of the policy, but for defense maintained, that the policy had expired before the accident and had not been renewed; or if renewed, the failure of the insured to pay the renewal premium before the accident, relieved it of liability, and that a premium subsequently paid merely reinstated the policy as to injuries thereafter sustained. The jury rendered a verdict for the plaintiff; whereupon the defendant sued out this writ.

The errors assigned are directed mainly to the court's rulings upon the evidence, to its refusal to direct a verdict for the defendant and to the charge to the jury, so far as they were in opposition to the defendant's theory of the insurance transaction out of which the action arose. Error is also charged to the court in admitting certain testimony as a part of the res gestæ and in refusing to direct a verdict for the defendant on the ground that the deceased came to his death by natural causes. With respect to the former, we discover no error, and with regard to the latter, we find that the evidence, while conflicting, was sufficient to submit to the jury and to support the verdict.

The real questions for review are, whether there was evidence upon which the jury, in rendering a verdict for the plaintiff, could find that a contract of insurance had been consummated between the insurance company and the insured by the delivery and acceptance of a renewal premium receipt, involving an extension of credit as to payment of premium, under which the company was liable for injuries sustained before payment was made, or whether the court erred in refusing to direct a verdict for the defendant on the ground that no contract of renewal had been consummated, that the original policy had expired before the accident, and that payment of premium after the accident reinstated the policy only as to injuries thereafter sustained. The trial court submitted both these questions to the jury with appropriate instructions as to the verdict.

The Insurance Company issued to Joseph Vogel, Jr. (hereinafter referred to as the insured), a policy of accident insurance "for the term of twelve months from the sixth day of December, 1912." On December 1, 1913, a few days before the expiration of the term, the company issued and caused to be delivered to the insured a renewal premium receipt purporting to continue the policy in force for another term of twelve months. On March 2, 1914, being nearly three months after the date of the expiration of the original term, the in-

sured met with an accident and sustained injuries from which he died. Between the date of the accident and the date of his death, the renewal premium was paid and accepted.

The plaintiff bases her right of recovery upon several grounds. The first is that the company charged the renewal premium to its agent pursuant to an established course of dealing, whereby it treated its agent as its debtor, and thereby waived payment of premium by the insured as a prerequisite to liability, invoking a familiar principle of law appearing in Fidelity & Casualty Co. v. Willey, 80 Fed. 497, 25 C. C. A. 593 (C. C. A. 3d); Lebanon Mutual Ins. Co. v. Hoover, 113 Pa. 591, 8 Atl. 163, 57 Am. Rep. 511; Essington Enamel Co. v. Granite State Fire Ins. Co., 45 Pa. Super. Ct. 550, 557, and cases cited. We are not satisfied that the evidence supports this contention.

[1] The next position of the plaintiff is, that the delivery of a renewal premium receipt, without a demand for prepayment of the premium and without circumstances from which its acceptance is to be inferred, creates a liability which the company is estopped to deny, raises the implication of an extension of credit and continues liability until the receipt is cancelled. The logical deduction from this proposition is that the insurance company, by the mere delivery of a renewal premium receipt, waives the right not only to demand prepayment of premium, but to have the receipt accepted or rejected by the insured, which in legal effect amounts to an extension of credit without limit and a continuance of liability without consideration. This is hardly tenable.

[2] On the other hand, the defendant company relies upon a clause of the policy which provides, that:

"If a *past-due premium* shall be accepted on this policy by the company, * * * such acceptance *shall reinstate* the policy in force as to disability resulting from accidental bodily injuries *thereafter sustained.*"

It maintains that a renewal premium receipt purporting to continue a policy in force, delivered pursuant to a custom which permits the payment of the premium within sixty days, is effective only from the date of actual payment, and raises a liability of indemnity only for accidents occurring thereafter, without regard to whether a contract of renewal had theretofore been consummated, embracing an extension of credit as to the payment of premium. We feel that this position is no more tenable than that of the plaintiff. It would be a violent construction of a contract of insurance renewal to hold, that the giving of credit for sixty days for the payment of the premium, postponed to the end of that period the time when the policy should be effective as a liability of the company, or in other words, that when a contract of insurance is made between the insurer and the insured, including an extension of credit to the latter for a given period within which to pay the premium, the payment of the premium becomes a condition precedent to an obligation on the part of the insurer, determined in point of time not by the date of the contract but by the date of the payment. What motive would the insured have in making such a contract? The credit given would be useless to him, for during the period of credit and until the premium was actually paid, he would not

be insured. Connecticut General Life Insurance Co. v. Mullen, 197 Fed. 299, 302, 118 C. C. A. 345, 43 L. R. A. (N. S.) 725 (C. C. A. 3rd). This position is likewise unsound. We must therefore inquire upon what theory the liability of the insurer and the right of the insured to recovery in such a transaction as this, are to be determined.

[3-5] It is clear, that, in the absence of statute upon the subject, the mere delivery of a renewal premium receipt does not create a contractual obligation on the part of an insurance company, though by its terms it purports to continue the policy in force. The renewal of a policy of insurance is in itself a contract of insurance, which, like any other contract, cannot be consummated without the mutual assent of the parties. Such a contract has its inception in a proposal, and its completion in the acceptance of the proposal. Until by some word or act of the insured, acceptance of the offer is expressly made, or from evidence of an established course of dealing between the parties, acceptance is necessarily inferred, no contract of renewal is created. When an offer to renew is accepted it becomes a contract of renewal upon the terms agreed upon, whatever they may be. The insurer may demand payment of premium upon the delivery of the receipt. Then there is no contract of insurance until the premium is paid. Or the insurer may waive its right to payment of premium before assuming liability, give a credit as to payment and enter into a contract complete in all respects, the subsequent payment of premium being a matter of performance and not a condition of the contract. Then liability exists from the consummation of the contract, though payment of the consideration for the liability be deferred to a future day.

Pursuing this line of thought, we are of opinion that the delivery of the renewal premium receipt in this case was merely an offer by the insurance company to the insured to enter into a new contract continuing for another year the insurance that was about to expire, Richmond v. Travelers' Ins. Co., 123 Tenn. 307, 130 S. W. 790, 30 L. R. A. (N. S.) 954, and that this offer raised in the insurance company no liability to indemnify the insured against accidents until it was accepted. Therefore, the pertinent inquiry is, as discerned by the learned trial judge and embodied in his submission of the case to the jury, whether there was evidence that the offer was accepted and the contract of renewal completed in terms which embraced an extension of credit for the payment of the premium beyond the date of the accident. Pender v. North State Ins. Co., 163 N. C. 98, 79 S. E. 293; Mutual Reserve Life Ins. Co. v. Heidel, 161 Fed. 535, 88 C. C. A. 477 (C. C. A. 8th).

The circumstances of the transaction given in summary disclose that it had its inception in the renewal premium receipt delivered by the company to the insured, and received its first coloring from the language there employed. This receipt is in the following words:

"Received of Joseph Vogel, Jr. $70, *continuing in force* policy 1,115,218 from the 6th day of December, 1913, to the 6th day of December, 1914, at twelve o'clock noon, subject to all the conditions and agreements in the original policy. Not valid unless countersigned by the company's agent.

"Countersigned at Pittsburgh, Pa., the first day of December, 1913.

"Joseph A. Butler, General Agent."

The receipt is in the form used by other companies. Richmond v. Travelers' Ins. Co., supra. It was evidently used for a definite purpose, with an intended legal purport. While by its terms it was not valid unless countersigned by the company's agent, it was in this instance so signed and made valid within the company's meaning. Being thus deliberately framed and validated, it was delivered by the company, through its usual channels, to its general agent at Pittsburgh, by whom it was delivered to the firm of Horner and Ladley, insurance brokers and sub-agents to the general agent, by whom in turn it was delivered to the insured, without the intention on the part of anyone then to demand or to receive payment of the premium, although by its terms the company acknowledged payment.

It was testified that the delivery was made under a general custom of the company allowing an insured sixty days within which to pay the premium, and that from time to time and as exigencies arose, the time for payment of renewal premiums had been extended even beyond that period. The extension of credit by general custom or in certain instances by special contract, was obviously done to induce hesitating patrons to renew their insurance. It appears that Vogel had been insured by the defendant company for several years and was familiar with and had received the benefit of these practices. He was a soliciting agent of Horner and Ladley, the sub-agents to the general agent. He had received his renewal premium receipts and made premium payments to the company through that firm. As we have already stated, it does not satisfactorily appear that between Butler, the general agent, and Horner and Ladley, sub-agents, accounts were kept by which premiums were charged by the former against the latter. When Horner and Ladley placed insurance or when the company delivered renewal premium receipts to the customers of Horner and Ladley and the sixty day period of credit was about to expire or had expired, the practice of the general agency was to call upon the sub-agents, either by telephone or by the presentation of statements, asking for the payment of outstanding premiums. These demands generally preceded the date upon which the general agency was required to make settlement with the home office, being the last day of the month in which the credit period of sixty days expired. It appears in this case, that pursuant to that practice, the general agency, possibly at a date within the sixty day period but more probably at a date beyond it, followed up its offer to Vogel by calling upon Horner and Ladley for payment of Vogel's premium. This was sometime before the last day of February, 1914. Horner and Ladley communicated this call to Vogel, who immediately responded by saying that he would make payment in the early part of the next week, that is, sometime presumably during the first week in March. To this promise the company made no response, either by word or by cancellation of the outstanding receipt. It left the receipt in Vogel's hands, and permitted the matter to drag along until, on the second day of March, Vogel met with an accident. On the next day, formal notice of the accident was given both the sub-agency and the general agency. On the seventh day of March the premium was paid to the sub-agency by the son of the insured, and on the ninth day of March it was received by the gen-

eral agency and transmitted to the company, which accepted and retained it. Five days later Vogel died.

So the question is whether the evidence discloses a consummated contract. That question can be determined only by ascertaining what the parties did and said. Their acts and utterances constitute the facts upon which the existence and the terms of a contract are to be determined. When evidence of these facts is in conflict or of a nature from which reasonable men may honestly draw different inferences, the existence of the contract and its terms are matters of fact to be determined by a jury. In this case, the trial court was called upon to decide whether the evidence was of a nature and in such conflict as to require submission to a jury, or disclosed a transaction susceptible of but one construction, to be determined by the court as a matter of law. In approaching this question, what did the trial judge have before him? There was evidence of an unequivocal offer to continue in force a policy of insurance about to expire, a custom to extend credit for the payment of the premium for a given period, a practice to make further extensions to procure business, knowledge thereof and conduct thereunder by the insured in previous years, actual extension of credit in this instance beyond the customary period, a call for payment after the period of extension had been enlarged, a promise by the insured, perhaps in the nature of a counter-offer, to pay a few days later, no verbal response or act by the company either rejecting the counter-offer or withdrawing its original offer, an accident to the insured inferably within the period of the counter-proposition with the renewal premium receipt in his hands uncancelled, immediate and formal notice of the accident to the company, no response or inquiry on its part, subsequent payment of the premium and its acceptance and retention.

Is this testimony susceptible of but one construction, and with regard to that construction, is it of that certainty which is required when a court assumes to pass upon a fact as a matter of law? This testimony fairly raises the issue whether the payment of premium after the accident was in pursuance of a credit extended by a contract consummated before the accident, or was payment of a past-due premium upon a policy which had previously expired, by which the policy was reinstated only as to injuries thereafter sustained. Article 29. Upon this issue, we are of opinion, intelligent men may honestly differ. If they may, it is because the evidence presents different aspects. If in these aspects two theories are evolved and the evidence is sufficient to support either, then who but a jury can determine upon which theory the case must be decided? We concur with the trial court that the evidence was sufficient to support a verdict either for the plaintiff or for the defendant according as the jury found the payment had been made pursuant to a previously consummated contract, or for a past-due premium. Upon this question the jury was sufficiently instructed, and its finding, as evidenced by its verdict, is binding.

The judgment below is affirmed.

McPHERSON, Circuit Judge. I concur in the foregoing opinion, although with some hesitation on one point only. I am heartily in

agreement with the legal principles that have been so clearly stated; the renewal receipt was a mere offer, or option, and could not become a contract until it had been accepted by Vogel. It seems to me therefore that the principal subject of inquiry should be the conduct of Vogel rather than the conduct of the company. The company had made its position clear by offering to renew, and its offer should certainly be taken in connection with the custom to allow the insured 60 days, or perhaps even longer, to make up his mind. But, as I read the evidence, the court should have instructed the jury that Vogel never did make up his mind, and therefore that no contract of renewal was ever made. Upon this point, however, the other members of the court hold a different opinion, and believe that enough evidence was offered to go to the jury. I accept their view as more likely to be correct than my own, and I file this memorandum merely to emphasize the legal proposition upon which we are all agreed—that the renewal receipt was only an offer and had no binding force until Vogel accepted it.

DAVIS & PLEASANTS v. COTTON STATES LIFE INS. CO.

(Circuit Court of Appeals, Fifth Circuit. March 27, 1916.)

No. 2846.

PRINCIPAL AND AGENT ⊂⊃41—BREACH OF CONTRACT—SUFFICIENCY OF DECLARATION.

A declaration in an action for breach of a contract by which plaintiffs were employed as agents to sell an issue of stock of defendant corporation on commission *held* to state a cause of action, where the contract as set out contained provisions making time of essence, and it was alleged that defendant failed to make advances and to pay commissions earned when due under the contract, and which were necessary to enable plaintiffs to prosecute the work, and that afterward defendant terminated the contract on the ground that satisfactory progress had not been made by plaintiffs.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. ⊂⊃41.]

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

Action at law by Davis & Pleasants against the Cotton States Life Insurance Company. Judgment for defendant, and plaintiffs bring error. Reversed.

On July 12, 1913, the parties entered into a contract as follows:

"This agreement, made and entered into this day by and between the Cotton States Life Insurance Company, of Tupelo, Mississippi, a corporation duly chartered and organized under and by virtue of the laws of the state of Mississippi, hereinafter referred to as the 'Insurance Company,' and Davis & Pleasants, a copartnership composed of Frank P. Davis, of Tupelo, Mississippi, and Dan G. Pleasants, of Atlanta, Georgia, hereinafter referred to as 'special agents,' witnesseth:

"(1) That the said Insurance Company has, by due and legal process and by proper action and approval of its officers and board of directors, been authorized to increase its capital stock fifty thousand dollars ($50,000.00), making a total capital stock of one hundred and fifty thousand dollars ($150,000.00), the par value of the shares being ten dollars ($10.00) each.

"(2) That the said Insurance Company is desirous of selling the said additional stock for not less than twenty-five dollars ($25.00) per share, receiving the amount of $4.50 for each share that is approved and accepted by said Insurance Company, and also upon further conditions, terms, and stipulations hereinafter contained."

"(4) The said Insurance Company and the said special agents therefore hereby mutually agree as follows: That the said Insurance Company does hereby appoint said Davis & Pleasants its special agents, and agrees that said special agents shall have the exclusive sale of five thousand shares of said new issue of stock, provided the sales are satisfactory to the said Insurance Company. Said stock to be sold by said special agents at twenty-five dollars ($25.00) per share. It is further agreed that said Insurance Company will not accept or approve of any subscriptions or settlements sent in by the said special agents that show less than one-fourth (¼) in cash, and note or notes for any portion of said subscription due later than six months after date. The said special agents also agree to remit the full settlement of not less than one-fourth (¼) cash and promissory notes made payable to the order of said Insurance Company in accordance with the conditions and agreements as shows by our installment subscription blank.

"(5) It is especially agreed that the Insurance Company is to pay said special agents, for a period of five weeks from date, weekly, forty dollars ($40.00), or a total of two hundred dollars ($200.00), said amounts being an extra allowance additional to and exclusive of said above set forth commissions of $4.50 per share; that the Insurance Company is to furnish office and desk room and necessary furniture, and all necessary supplies, literature, date, information, and blanks needed in the prosecution of selling of said stock; that the office of said special agents shall be in the same building with the home office of said Insurance Company, and shall not be removed therefrom without the consent of the said Insurance Company; that the supplies and furniture furnished are and shall continue to be the property of the said Insurance Company; that no stock shall be issued until the full purchase price thereof shall have been paid by cash; and that the said Insurance Company will issue stock when so paid for, as aforesaid, to all persons whose applications shall have been received by said special agents and approved by the proper officer of said Insurance Company.

"(6) That the said special agents shall prosecute the sale of said stock with due diligence, giving their entire time to the sale of said stock.

"(7) It is understood and agreed that all applications for the sale and handling of said stock, and also all inquiries and matters pertaining in any way to said stock department, received by said Insurance Company, shall forthwith be referred to said special agents.

"(8) It is agreed that any cash advances, other than set forth in section 5, made to special agents, shall be repaid by said special agents from all accepted stock sales until existing indebtedness due to such shall have been liquidated.

"(9) It is expressly agreed that the following advances shall be made the said special agents, to wit: $160.00 on this date, receipt hereby acknowledged, and a further sum weekly of $60.00 for a period of four additional weeks. This advance is over and above the allowance set forth in clause 5 above.

"(10) It is expressly understood that this contract has nothing to do with any unfinished business of our old issue of $100,000.00 capital stock, and any old issue offered for sale, except such amount as shall be sold by the president shall be effected through the said special agents."

Thereafter, on November 6, 1913, the following letter was written by the president of the Insurance Company to the special agents:

"Tupelo, Miss., Nov. 6, 1913.

"Messrs. Davis & Pleasants, Calhoun City, Miss.—Gentlemen: Since talking with you Monday I have received our stock sales record. The poor showing I find, and approach of the examination day, compels me to get busy doing all I can to increase our stock sales. I wrote you under date of September 22d calling your attention to the slow progress you were making in selling the new issue of stock, advising that sales were not satisfactory, and

unless you arranged to increase these sales to something like $30,000 per month we would be forced to cancel the contract made with you under date of July 12, 1913, on the grounds of your sales not being satisfactory. During the past month our record show sales of only $2,750. So you are advised that from and after this date your contract with the Cotton States Life Insurance Company, of Tupelo, Mississippi, under date of July 12, 1913, to act as special agents to sell $50,000 of it [the] capital stock for the total sum of $125.00, is this day canceled.

"You are further advised you can continue sales as long as they are satisfactory with the company at $25.00 per share—full settlement to be sent in to the home office that show not less than one-fourth in cash and note or notes for balance in accordance with the conditions and agreements as shown by our installment subscription blanks. All sales and settlements sent in to be subject to the approval of the company. You are to receive the amount of $4.50 for each share personally sold that is approved and accepted by the company, but without any commission claim against the company on sales made through salesmen employed by the company.

"Yours resp., E. C. Hinds, President."

Following this letter, purporting to cancel the contract, the parties on November 15, 1913, made an amendatory agreement as follows:

"Whereas, a controversy has arisen between the parties to this contract as to the respective rights and obligations of the respective parties thereto; and whereas, such controversy and difference has been settled and compromised; Now, therefore, to that end this compromise agreement is made, the terms of which are as follows:

"The contract of July 12, 1913, made and entered into by the parties hereto, is hereby amended in the following respects:

"First. That said special agents agree that said Insurance Company shall have the right to employ direct as many stock salesmen as it may see fit: Provided, said Insurance Company shall be responsible for such employment, and finance such stock salesman when they may deem advisable, and said special agents shall be without responsibility in any respect with reference to stock salesmen so employed by said Insurance Company. The territory to be occupied by said stock salesmen shall be subject to the approval of said special agents.

"Second. Said special agents are to have the right to employ stock salesmen, and finance them, and be responsible for them, and fix the territory in which they shall operate.

"Third. All stock salesmen, whether employed by said Insurance Company or by said special agents, shall receive as compensation for their services four dollars ($4.00) per share on all stock sold by them, and said Insurance Company agrees to pay said special agents on all such stock so sold by said stock salesmen an additional overwriting commission of seventy-five cents ($0.75) per share; on all stock sold by said special agents they are to receive a commission of four dollars and fifty cents ($4.50) per share as per original contract of July 12, 1913.

"Fourth. It is agreed by the parties hereto that all sales made by said stock salesmen, whether employed by said Insurance Company or said special agents, shall be reported to said special agents at the end of each week by said Insurance Company, with complete specifications with reference thereto.

"Fifth. Except herein modified by this contract, said contract entered into on the 12th day of July, 1913, between the parties hereto stands; this amendment taking effect on November 17, 1913.

"This contract signed in triplicate this the 15th day of November, 1913."

On December 24, 1913, the special agents instituted suit against the Insurance Company, assigning breaches of contract and claiming damages. To their declaration, the Insurance Company filed a general demurrer, which, coming on to be heard, was on April 19, 1914, sustained by the court, with leave to file an amended declaration within 60 days; and thereafter an amended declaration was filed, which was again demurred to, and on October

4, 1915, was sustained, and, the plaintiff declining to further amend, the suit was dismissed.

The plaintiffs in error, who will be hereinafter referred to as plaintiffs, sued the defendant in error, who will be designated as defendant, for damages for breach of the aforesaid contract. The defendant interposed a demurrer to the plaintiff's declaration, which was sustained by the court, and leave given the plaintiffs to file an amended declaration, which was accordingly done, to which amended declaration defendant demurred again, which demurrer was sustained by the court, with leave to file an amended declaration, which leave the plaintiffs declined to take advantage of, and thereupon final judgment was entered dismissing plaintiffs' suit, from which judgment this writ of error is prosecuted.

In the amended declaration, after setting out the contract hereinbefore given, plaintiffs aver and assign breaches of the same as follows:

"First. In the beginning of their efforts to sell said stock, and covering the period that the defendant was to advance and pay to the plaintiffs said weekly installments of $100, it was absolutely necessary plaintiffs should receive said weekly installments promptly, in order to pay their expenses incident to the sale of said stock, and which defendant agreed to pay promptly, because plaintiffs had no means of their own and could get none elsewhere, but failed to do so, delaying such remittances from one to six days after they were due, thereby delaying and retarding the plaintiffs in their efforts to sell said stock, against which delay they time and again protested to the defendant; such delays causing plaintiffs much loss of time and unnecessary expenses.

"Second. The defendant breached said contract by authorizing and permitting one Edward De Zonia, Jr., employed in the defendant's insurance department and who was not a licensed stock salesman, and therefore had no authority so to do, to sell eight shares of said stock to Dr. C. Moore, eight shares to A. J. Moore, both of Itta Bena, Mississippi, such sales having been made on the 28th day of October, 1913, and accepted by the defendant, because by the terms of said contract, Exhibit A, the plaintiffs had the exclusive right and authority to sell said entire additional stock of $50,000, as well as the 700 shares of the original stock, which had been surrendered by the purchasers thereof and turned back to the defendant, as hereinbefore set out, except what was sold to the latter by the president of said defendant company personally.

"Third. The defendant breached the fourth paragraph of said contract, which provided, among other things, that the defendant would not receive or appropriate stock sales and settlements therefor, that showed less than one-fourth of the amount of such sales paid in cash, and notes for the balance due not later than six months after such sales, by permitting one G. Exum, a stock salesman, to make settlements for stock sales by taking notes for unpaid balances running longer than said period of six months.

"Fourth. The defendant breached paragraph VII of said contract, which provided that all applications for the sale and handling of said stock, and all inquiries and matters pertaining in any way to said stock department, received by the defendant, should be immediately referred to the plaintiffs, by persistently refusing so to do, although the plaintiffs time and again demanded that this paragraph of the contract be complied with by the defendant.

"Fifth. The defendant breached said contract on the 6th day of November, 1913, by undertaking to discharge the plaintiffs from their employment, as shown by the defendant's letter of that date to the plaintiffs, a copy of which is hereto attached, marked Exhibit B, as a part of this declaration; the defendant basing its right to cancel said contract on the ground that the volume of stock sales made by the plaintiffs was not satisfactory, when in truth and in fact such stock sales were satisfactory, and furthermore, if not, said contract did not authorize a cancellation on that ground.

"Sixth. After receiving said letter, Exhibit B, from the defendant, the plaintiffs and the defendant entered into what the plaintiffs supposed was a settlement of their difference at that time, which settlement and adjustment

was evidenced by an amendment to said original contract, Exhibit A, which was entered into by the plaintiffs and the defendant on the 15th day of November, 1913, a copy of which amendment to said original contract is hereto attached, marked Exhibit C, as a part hereof. After the execution of said amendment to said contract plaintiffs in good faith went to work for the purpose of completing the sale of said stock, and continued therein until December 8, 1913, when plaintiffs aver that the defendant breached and put an end to said contract, both the original and amendment, in this, to wit:

"(a) The breach numbered second above to the original contract was a breach to the entire contract as amended, because said stock sales so made by said De Zonia were concealed by the defendant from the plaintiff prior to and at the time said amended contract was made, and not ascertained by the plaintiffs until about December 8, 1913, notwithstanding such conduct was a violation by the defendant of paragraph VII of said original contract, Exhibit A, as well as paragraph IV of the amendment, Exhibit C, which paragraph IV provides that all sales of stock made by stock salesmen, whether employed by the defendant or the plaintiffs, should be reported at the end of each week by the defendant to the plaintiffs, with complete specifications with reference thereto.

"(b) The defendant breached said contract, original and amended, by refusing to pay the plaintiffs their commissions as provided in said contract on the following stock sales: N. A. Cramer, on whose stock purchase plaintiffs' commissions were $180; ——— Johnson, on whose stock purchase plaintiffs' commissions were $30; Dr. C. C. Moore and A. J. Moore, on whose stock purchase plaintiffs' commissions were $72—aggregating $282, which sums they demanded of the defendant, and which the defendant refused to pay, although under the terms of said contract said sums of money have long since been due and payable to the plaintiffs, and plaintiffs were thereby prevented from going on with said stock sales for the want of sufficient means, which they had not themselves, nor could get from any other source. Up to the 8th day of December, 1913, when the defendant finally put an end to said contract, there had been sold 1,318 shares of said additional stock covered by the plaintiffs' said contract, and there remained to be sold under said contract 3,682 shares, which the defendant by its breach of said contract wrongfully and unlawfully prevented the plaintiff from selling and receiving their commissions thereon as provided in said contract, although plaintiffs were ready and willing to carry out said contract, and would have done so except for said breaches. Therefore by virtue of defendant's breach of its said contract as aforesaid the plaintiffs have lost their commissions as provided on the said 3,682 shares of stock, which amounts to the sum of $16,569, for which amount the plaintiffs sue, and demand judgment of the defendant, with the costs of this cause."

The demurrer to the amended declaration is as follows:

"Now comes the defendant, by its attorneys, and demurs to the amended declaration filed in this cause, and for grounds of demurrer assign the following:

"First. The contract sued on makes it a condition precedent to plaintiffs' right to the compensation sued for to have sold the said additional stock, and they fail to aver how or in what manner the several alleged breaches, or either of them, prevented said plaintiffs from performing said conditions precedent.

"Second. No breach of the contract sued on is definitely and specifically alleged, nor is any renunciation of said contract by defendant, by either word or conduct, averred.

"Third. No special, definite, and certain damage to plaintiffs is alleged.

"Fourth. If there be any certain, definite, or special damage alleged, it is only to the amount of $282, while this suit is brought in the United States District Court on the grounds of diverse citizenship, and the amount in controversy must be $3,000 to give the court jurisdiction.

"Fifth. The damages claimed are not shown to have naturally and approximately resulted from the alleged breaches complained of, nor any of them.

"Sixth. This seems to be an effort in a court of law to modify and reform a written contract.

"Seventh. It is not shown how defendant put an end to said amended contract on December 8, 1913, nor how defendant prevented plaintiffs from performing said contract.

"Eighth. It is not shown what it would have cost plaintiffs to have sold said additional stock, nor what the expense of said sale would have been to them, nor what the profits to plaintiffs would have been, had they performed said contract by selling said additional stock, nor what time it would have required to have sold said additional stock, nor what plaintiffs could or should have earned during said time, nor are any facts alleged from which these several things can be ascertained, or determined.

"Ninth. As to all that part of the declaration which sets out breaches of the first contract, and particularly breaches particularized in the amended declaration under first, second, third, fourth, fifth, and sixth alleged breaches, because all this is immaterial, irrelevant, and tends to becloud and confuse the issue, and because none of these alleged breaches of the contract, before the amended contract was made, constitute any breach of the contract as amended, and because the declaration, and the contracts made a part thereof, show that all these matters were compromised and settled in the making of the new or amended contract, and that the old contract was merged into the new supplemental contract, and all the alleged breaches theretofore occurring before the making of the supplemental contract were compromised and settled by the parties."

The opinion of the court below, found in the transcript, is as follows:

"Upon careful reading of the amended declaration, in connection with the interesting briefs of counsel for the respective parties to this suit, and review of the authorities cited, the court is forced to the conclusion that the demurrer to the amended declaration should be sustained, as the said amended declaration does not cure the uncertainties and defects of the original declaration, as it cannot be understood how defendant could be liable in the sum of some $16,000 for loss of profits, when from the declaration and contracts, at least from the court's viewpoint, such loss was occasioned by defendant's failure to pay plaintiffs $282 as commissions, the only definite liability disclosed; the contract as to time of payment of such commissions being silent.

"Counsel for opposing parties cite the case of Roehm v. Horst et al., 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953, in support of their contentions, which authority, in the judgment of the court, is in favor of defendant in the case at bar."

W. D. Anderson, of Tupelo, Miss., for plaintiff in error.

J. Q. Robins and J. M. Thomas, both of Tupelo, Miss., for defendant in error.

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

PARDEE, Circuit Judge (after stating the facts as above). The contract involved in this case is interdependent. Its successful execution required co-operation and the prompt performance of the covenants therein by each party. It is apparent from the subject-matter of the whole contract, and particularly from the covenants in the fourth, fifth, seventh, and ninth clauses of the original contract, that time was of essence in the performance of the undertakings of both parties.

Without considering alleged breaches of the original contract, claimed to have been condoned by the compromise and agreements in the amendment, we find that clear and unequivocal breaches of the contract as amended are assigned in the sixth paragraph of the amended declaration, to wit: The failure to pay when due and the refusal to pay

on demand the earned commissions of $282 on sales of stock to Cramer and the Moores, and the allegation that on the 8th day of December the defendant finally put an end to the contract. These breaches, admitted by the demurrer, give the plaintiffs a clear right of action.

Their prayer is for the sum of $16,569, the amount of commissions they would have earned if the defendant had not breached the contract. How much of this they may be able to prove to the satisfaction of the court and jury remains to be seen. The ad damnum is sufficiently alleged to give the court jurisdiction, and it is not necessary to determine whether the plaintiffs can recover any damages under the provision in the amended contract:

"That on all stock sold by the defendant's stock salesmen the plaintiffs should be paid a commission of 75 cents per share."

The judgment of the District Court is reversed, and the cause is remanded, with instructions to overrule the demurrer and thereafter proceed as the law requires.

ST. JOSEPH & G. I. RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 9, 1916.)

No. 4523.

1. MASTER AND SERVANT ⟸13—STATUTORY REGULATION—HOURS OF SERVICE—CONSTRUCTION OF STATUTE.

The Hours of Service Act (Act March 4, 1907, c. 2939, 34 Stat. 1415 [Comp. St. 1913, §§ 8677–8680]) is a remedial statute, intended to promote the safety of employés and travelers on trains moving in interstate commerce, and should be liberally construed to effect its purpose.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. ⟸13.]

2. COMMERCE ⟸27—REGULATION—HOURS OF SERVICE—"INTERSTATE COMMERCE."

A train composed of cars loaded with material to repair the roadbed, which originated in another state and had arrived in the state in which it was to be used, but had not yet arrived at its destination, was still in "interstate commerce," and the employés thereon governed by the Hours of Service Act.

[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.]

3. COMMERCE ⟸27—REGULATION—HOURS OF SERVICE—INTERSTATE COMMERCE.

A fireman on a work train engaged in hauling cinders to be used in the repair of the roadbed of an interstate railroad is engaged in interstate commerce, and subject to the Hours of Service Act.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. ⟸27.]

4. MASTER AND SERVANT ⟸13—STATUTORY REGULATION—HOURS OF SERVICE—WATCHMAN.

Where a fireman, after a work train was run onto a siding, was required to keep watch of the engine and keep up steam therein until more than 16 hours after he began work, the Hours of Service Act was violated.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. ⟸13.]

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5. MASTER AND SERVANT ⊜13—STATUTORY REGULATION—HOURS OF SERVICE —WORK TRAIN.

The Hours of Service Act, which forbids an interstate carrier keeping an employé engaged in or connected with the movement of any train on duty more than 16 hours, applies to a work train.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. ⊜13.]

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

Action by the United States against the St. Joseph & Grand Island Railway Company. Judgment for the plaintiff on an agreed statement of facts, and defendant brings error. Affirmed.

The United States, plaintiff in the court below, instituted a civil action against the defendant, plaintiff in error, to recover penalties for violations of the Hours of Service Act of Congress, approved March 4, 1907. 34 Stat. 1415. There were two counts in the complaint for two violations; but the defendant confessed the first count, which is, therefore, eliminated from present consideration.

The second count charged the defendant with having required one J. Kramer, employed as a locomotive fireman by the defendant, regularly and generally engaged in and connected with the movement of defendant's trains engaged in interstate commerce, and while so engaged required and permitted him to remain on duty 20 hours; that the train was then used exclusively in the hauling of company material, to wit, ties and cinders, transported from a point without the state of Kansas to a point in the state of Kansas, said ties and cinders to be used in repairing and maintaining the defendant's line of railway between Hiawatha and Seneca, in the state of Kansas, which was then and there a through highway of interstate commerce.

The answer admitted the formal allegations of the complaint, and pleaded a general denial of the facts which charge the violation of the statute. A trial by jury was waived, and the cause submitted to the court upon the following agreed statement of facts:

"It is agreed between the parties hereto that a jury shall be waived and the above-entitled cause submitted to the court and determined upon the following facts, which are agreed by the parties to be true:

"First. The defendant is a railroad corporation organized under the laws of the state of Kansas, and is engaged in business as a common carrier of interstate commerce by railroad in the state of Kansas.

"Second. That its line of railroad extends from Kansas City, Mo., through and across a portion of said state, and into the state of Kansas, through and across a portion of the state of Kansas, and into the state of Nebraska, where it terminates.

"Third. That on the 25th day of February, 1913, and upon the defendant's line of railroad at and between the stations of Hiawatha, in the state of Kansas, and Seneca, in said state, the defendant's certain fireman and employé, to wit, J. Kramer, entered upon his duties as a locomotive fireman at the hour of 4:30 o'clock a. m. on the said 25th day of February, 1913, and continued on duty as such fireman until the hour of 7:30 o'clock p. m. of said date.

"Fourth. That at the hour of 7:30 p. m., as specified in paragraph 3 hereof, the defendant placed the train upon which the said J. Kramer was acting as locomotive fireman on the siding at the city of Seneca, in the state of Kansas, whereupon the members of the crew of said train ceased the performance of their regular duties, and all of the members of said crew, except the said J. Kramer, retired for rest under the provisions of the act of Congress mentioned in plaintiff's petition.

"Fifth. There being no competent person at the city of Seneca to whom the care of the engine on which the said J. Kramer was employed as fireman

could be intrusted, the defendant employed said J. Kramer to watch said engine, and as a part of his duties as such watchman he was required to maintain a certain amount of steam in said engine, to keep sufficient water pumped into the boiler, to prevent said engine from running away, which occasionally happens on account of leakage of steam, and to otherwise care for and protect said engine, and to protect the persons and property contiguous thereto from injury by said engine.

"Sixth. That the said J. Kramer as such watchman entered upon his duties at the hour of 7:30 p. m. on said 25th day of February, 1913, and continued as such watchman until the hour of 12:40 a. m. on February 26, 1913, when he was relieved by another competent watchman.

"Seventh. It is further stipulated and agreed that the train upon which the said J. Kramer was employed on the said 25th day of February, 1913, as fireman, and which he was employed to watch as heretofore set forth, was known as 'work extra,' and was drawn by defendant's locomotive engine No. 41; that said train consisted of one plow or dredge car, one car of ties and 20 cars of cinders; that all of the contents of every car contained in said train consisted of company material, to wit, ties and cinders, and was designed for use in repairing and maintaining the track and roadbed of the railroad belonging to the defendant between the stations of Hiawatha and Seneca in said state of Kansas.

"Eighth. That the car of ties and the 20 cars of cinders, which constituted a part of said train, originated outside of the state of Kansas, and were transported by the defendant into the state of Kansas as company material; that the plow or dredge car forming a part of said train belonged to the defendant, and was one of its implements used in repairing and maintaining its track; that the said cars of material were assembled from time to time at convenient sidings near the station of Hiawatha, in the state of Kansas, and were on the said 25th day of February, 1913, placed in said 'work extra' drawn by engine No. 41 as aforesaid to be distributed along the line of the defendant's railway between the stations heretofore mentioned and to be used in repairing and maintaining said track between said stations.

"Ninth. That the line of railroad between said stations of Hiawatha and Seneca over which said 'work extra' was hauled, and for which said ties and cinders were to be used in repairing and maintaining said track, was at the time mentioned in said petition a through highway of interstate commerce.

"Tenth. That at the times mentioned in plaintiff's petition, and for some time prior and subsequent thereto, said J. Kramer was an employé of the defendant regularly and generally engaged in and connected with the movements of defendant's trains engaged in interstate commerce."

Upon these facts the court found the defendant guilty on this count, and from the judgment entered on this finding the defendant prosecutes this writ of error.

Lucian J. Eastin, of St. Joseph, Mo. (Robert A. Brown, of St. Joseph, Mo., on the brief), for plaintiff in error.

Philip J. Doherty, of Washington, D. C. (Fred Robertson, U. S. Atty., of Kansas City, Kan., on the brief), for the United States.

Before ADAMS and CARLAND, Circuit Judges, and TRIEBER, District Judge.

TRIEBER, District Judge (after stating the facts as above). The contention of the defendant is that the act of Congress does not apply to an employé on a work train, operated wholly within one state, although the train was brought from another state and the material transported was intended for use on the roadbed of the defendant beyond the point where the offense was committed, the road being a through highway of interstate commerce.

[1] In our opinion this is too narrow a view to take of this act, which was intended, as has been repeatedly held by the Supreme Court, as well as the inferior courts of the United States, as have the other Safety Appliance Acts, to be a remedial statute, intended to promote the safety of employés and travelers on trains moving in interstate commerce, and should be liberally construed to effect its purpose. Johnson v. Southern P. Co., 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363; Schlemmer v. Buffalo Railroad Co., 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681; Southern Railway Co. v. United States, 222 U. S. 20, 32 Sup. Ct. 2, 56 L. Ed. 72; San Pedro, etc., R. Co. v. United States, 213 Fed. 326, 130 C. C. A. 28; Great Northern Ry. Co. v. United States, 218 Fed. 302, 134 C. C. A. 98, L. R. A. 1915D, 408.

[2] That the fireman on an interstate train is within the meaning of the act is not questioned, and cannot well be, but it is claimed that the interstate movement had ceased, as the material in the cars was to be used on the tracks of the defendant in the state of Kansas only, the train was no longer in interstate commerce. This contention is untenable, as the train had not yet reached its destination, and was to be carried further. McNeill v. Southern Ry. Co., 202 U. S. 543, 26 Sup. Ct. 722, 50 L. Ed. 1142.

[3] Nor can the contention of the defendant that, as the material was to be used on its tracks, although it is an interstate highway, the employé was not engaged in interstate commerce, be sustained. In Pedersen v. Delaware, etc., Ry. Co., 229 U. S. 156, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153, it was held that one carrying material to be used in repairing tracks, bridges, engines or cars, after they have become and during their use as instrumentalities of interstate commerce, is engaged in interstate commerce within the meaning of the act. In North Carolina Ry. Co. v. Zachary, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159, it was held that when a freight train from an intrastate point is being made up of cars, some from a train which started in another state, an employé preparing an engine to move such a train is engaged in interstate commerce, even if the interstate cars had not yet been coupled up.

In Johnson v. Great Northern Ry. Co., 178 Fed. 643, 102 C. C. A. 89, this court held that one engaged in examining the air couplings of cars of a train while on a switch track, some of the cars containing interstate freight shipments, is employed in interstate commerce. In Lamphere v. Oregon Ry. & Nav. Co., 196 Fed. 336, 116 C. C. A. 156, 47 L. R. A. (N. S.) 1, it was held that a locomotive fireman, struck and killed by a train while crossing a track on his way to the station, to be transported to another place in the same state, to relieve there a fireman engaged on an interstate train, was employed in interstate commerce at the time. This case was cited with approval by the Supreme Court in the Pedersen Case.

In Illinois Central R. Co. v. Porter, 207 Fed. 311, 125 C. C. A. 55, one engaged in carrying interstate freight from the freight house to the cars with a hand truck was held to be engaged in interstate commerce. A track walker repairing a switch in a terminal yard, used for interstate as well as intrastate traffic, was held, in Central Railroad v. Colasurdo, 192 Fed. 901, 113 C. C. A. 379, to be employed in inter-

state commerce. One engaged in making repairs on an engine used for interstate commerce, after it had reached the end of the run, and placed on the fire track to await the time for the return trip to another state, was held in Baltimore & Ohio R. R. Co. v. Darr, 204 Fed. 751, 124 C. C. A. 565, 47 L. R. A. (N. S.) 4, to be engaged in interstate commerce. Telegraph operators, receiving or transmitting dispatches affecting the movement of interstate trains have been held to be engaged in interstate commerce. Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission, 221 U. S. 612, 31 Sup. Ct. 621, 55 L. Ed. 878.

[4] That the fireman, in this instance, had been detailed to watch the locomotive engine during the excess hours, does not affect the result. This was expressly decided by this court in San Pedro, etc., Ry. Co. v. United States, supra, and Great Northern Ry. Co. v. United States, supra, where the facts were identical with those in this case.

[5] The fact that this fireman was employed on a work train was wholly immaterial, if it was in fact an interstate train. The act of Congress makes no such exception, and the courts certainly are powerless to do so. The gist of the offense is that the carrier is engaged in the transportation of passengers or property by railroad from one state to another, and that the employé is actually engaged in or connected with the movement of *any* train. "Any train" is certainly broad enough to include a work train.

As the agreed statement of facts shows that the employé was required to remain on duty over 20 hours, that the train on which he was employed had been brought from another state, and had not yet reached its final destination, as the material was intended to be carried further, that the material was to be used in repairing the track, which was an interstate highway, the employé was, at the time, engaged in interstate commerce, in connection with the movement of an interstate train. The judgment of the court below was right, and is affirmed.

CANADIAN PAC. RY. CO. v. THOMPSON.

(Circuit Court of Appeals, First Circuit. April 28, 1916.)

No. 1171.

1. MASTER AND SERVANT ⟸265(2)—INJURIES TO SERVANT—BURDEN OF PROOF—NEGLIGENCE OF MASTER.

   In an action for the death of a railroad brakeman in a collision between a work train and a hand car, the burden is on the plaintiff to prove negligence of the railroad company. Whitney v. New York, N. H & H. R. Co., 102 Fed. 850, 43 C. C. A. 19, 50 L. R. A. 615, applied.

   [Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 878, 895, 896; Dec. Dig. ⟸265(2).]

2. COMMERCE ⟸27—FEDERAL EMPLOYERS' LIABILITY ACT—"EMPLOYED IN INTERSTATE COMMERCE."

   A brakeman on a work train of an interstate and foreign railroad which was engaged in picking up rails along tracks used for interstate traffic, to transport them to other points on the interstate tracks, was

"employed in interstate commerce," within 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.]

In Error to the District Court of the United States for the District of Maine; Clarence Hale, Judge.

Action by Barbara Thompson, administratrix, against the Canadian Pacific Railway Company. Judgment for the plaintiff, and defendant brings error. Affirmed.

E. C. Ryder, of Bangor, Me. (Ryder & Simpson, of Bangor, Me., on the brief), for plaintiff in error.

Raymond Fellows, of Bangor, Me. (J. A. Cahners, Oscar F. Fellows, and Fellows & Fellows, all of Bangor, Me., on the brief), for defendant in error.

Before PUTNAM and DODGE, of Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. It is the view of the court that the judgment in this case in the District Court, in favor of the original plaintiff, should be affirmed. Suit was brought under the Employers' Liability Act, and the circumstances are told by the defendant in error, the original plaintiff, as follows:

"This is an action brought by Barbara Thompson, administratrix, under the Employers' Liability Act of April 22, 1908, in the District Court of the United States for the District of Maine, to recover damages for the negligent killing of Edgar E. Thompson, a brakeman in the employ of the Canadian Pacific Railway, on November 24, 1913, near Greenville Junction, Me., on the main track running between the state of Maine and the Dominion of Canada. The jury found for the plaintiff, defendant in error, in the sum of $5,000.

"Edgar E. Thompson, the intestate of plaintiff, defendant in error, was 27 years old at the time of his death, a man of good health, earning $3.25 a day, the sole support of the widow, Barbara Thompson, for whose benefit this action was brought. He had been employed by the Canadian Pacific Railway nine years as conductor and brakeman, running on trains between Brownville, within the state of Maine, to Megantic and McAdam Junction, in the Dominion of Canada.

"On the morning of Monday, November 24, 1913, he was a member of the train crew engaged in track work; train of the company consisting of engine, caboose, rail loader, and two empty flat cars. The testimony of Kenneth McLeod, track foreman, who had charge of the rail loader, was that he covered the territory from Greenville Junction, Me., to Megantic, Dominion of Canada; that the crew, of which the deceased was one member, started to load the 'four-spot' rails, so called, for the purpose of clearing the track and roadbed, and to transport and distribute these rails along the main track between Brownville Junction and Holeb, some 30 to 40 miles, where these 'four-spot' rails were to be put onto rail racks for the repair of the main track. It appears that, at the scene of the accident, new rails had been put into the track. The old rails had been removed, and this crew, engaged in loading rails, was picking out from these rails that had been removed the best grade of rails, or, as they were called, 'four-spot' rails, to be used in the repair of the track, between Maine and Canada. The rails which were being loaded onto this flat car were scattered along on the roadbed and beside the track. These

rails, which were picked up on the morning of November 24th, were distributed, under the direction of Mr. McLeod, to be used in the repair of this international track, wherever and whenever it became necessary to replace worn or broken rails."

Also it appears:

"The train was operating on Monday morning, November 24th, on the main international line, and between Squaw Brook and Greenville Junction, in the state of Maine. The work was interrupted three different times, because this work train had to take side tracks in order to clear through passenger and freight trains. Mr. Thompson, the deceased, was in charge of the train when it was loading the 'four-spot' rails, in that he had charge of giving the signals to move the train back and forth opposite the particular rails to be loaded. At the instant of the accident one car had been loaded with the rails, and the train crew was carrying this car of rails to Greenville, to be there set on a side track on its way to the distributing points of the rails. The train was backing. The empty flat car was therefore the front end of the train. The intestate was standing, as his duties required him to stand, on this empty flat car. The train was proceeding at a speed of about 10 miles an hour. As this empty flat car reached a high and narrow cut at the point of a sharp curve in the track, it struck a hand car on the track. The crew of the hand car had given no warning by stationing a man ahead, as required by the rules. Before the flat car struck the hand car, Thompson gave the signal to stop. The brakes were applied, but the train had sufficient momentum, so that the hand car was demolished and the flat car was derailed, and Thompson was thrown under the car, receiving injuries from which he died.

"It appears that up to the time of the accident men had been working for the company in putting in ties at this point. One of these men on the hand car was a man named Duquette, who was employed by the Canadian Pacific on this track work. At the time he was seen by the witness McLeod, he was standing near the ruins of the hand car, crying. The men on the hand car, at the time of the accident, were going in the direction of the tools that had been left beside the track."

One defense was a claim that the men on the hand car had been discharged on Saturday, a day and a half previous to the accident. The evidence of discharge was, however, that the roadmaster had discharged one Michaud, whom he says had charge of a section gang of 15 or 18 men. There was no evidence introduced to show that these men on the hand car had been discharged, or (if they belonged to this extra crew) had been informed that their foreman was discharged. In fact, Berger, the roadmaster, testified that he had sent a section man down to collect the tools.

[1] The ground of this defense appears to be that, as this was a suit representing an employé, and not representing a mere passenger or a stranger, the burden rested on the plaintiff to show that the defendant, the Canadian Pacific Railway Company, had been guilty of negligence. On this point, and also on the main point of the case, fully covered by what we have stated, the matters as we have stated them are not substantially in dispute. Inasmuch as the suit was brought by a representative of an employé, the burden did rest on the plaintiff to show that the condition of the hand car which was destroyed, in connection with the circumstances which we have related, represented negligence on the part of the Canadian Pacific Railway Company, as fully explained by us in Whitney v. New York, New Haven & Hartford Railroad Company, 102 Fed. 850, 43 C. C. A. 19,

50 L. R. A. 615. The facts, however, show an obstruction on the main track of the Canadian Pacific Railway Company which presumptively should not have been there. They also show that, when the hand car was left where the accident occurred, it was presumptively left there by a working crew of the Canadian Pacific Railway Company, which had just been using it. There was sufficient in the facts connected with the case to justify its submission to the jury, even in accordance with the rules explained, as we have said, in Whitney v. New York, New Haven & Hartford Railroad Company.

[2] The main defense, of course, was either that the Canadian Pacific Railway Company was not engaged in interstate commerce so far as this transaction was concerned, or that the intestate was not so engaged at the time when the accident occurred. The proofs, as we say, do not contravene the facts substantially as we have stated them. If there are any variances, they are too unimportant to be commented on so far as this case is concerned. In all this class of cases, the effort by the defendant corporations has been to split into fragments what was in fact a unit, and what was in fact a unitary occupation or enterprise. The Canadian Pacific Railway Company is notoriously and presumably a single enterprise, extending from the Atlantic Ocean to the Pacific Ocean, in part through the United States, but in the greater part through Canada. Both in the inherent purposes of the organization, and in its operation, there is one, single, consolidated, unitary essence; and so far as any person connected with trains operating thereon, in any way contributed to produce the result aimed at by the corporation, the corporation was a single, consolidated, international, interstate enterprise; and in all its essential aspects the train of cars employed in the present case for the present purpose, connecting, as it did international points, and all the persons employed on that train, were engaged in an international enterprise and operation. In this aspect there were no fragments, but all was combined in a consolidated and single purpose.

This rule was illustrated emphatically and positively in the striking and leading case, referred to so often as the Pedersen Case, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153, where a mechanic who, for all that the case showed, had never been out of the state of New Jersey, was engaged in carrying material to be used in repairing a bridge on an interstate commerce railroad. In the Shanks Case, decided by the Supreme Court on January 10, 1916, 239 U. S. 556, 36 Sup. Ct. 188, 60 L. Ed. ——, while it was held that at the time of the injury the prosecutor, as well as the corporation, must be engaged in interstate commerce, a mechanic engaged solely in taking down and putting up an overhead countershaft was not necessarily so engaged. In the persent case the intestate was employed as a conductor or brakeman running trains between Brownville, in the state of Maine, and Megantic and McAdam Junction, in Canada, being east and west terminals in a foreign country, and where the train in which he was engaged was especially set up for and engaged in gathering up rails from interstate tracks, to be taken to other parts of the interstate tracks; and this was being done with-

out any suggestion that they were to be left at intrastate points. It is therefore evident that the deceased was directly employed in an interstate enterprise, which the Canadian Pacific Railway Company as a unit had undertaken.

Beyond this it is sufficient that we refer to St. Joseph & Grand Island Railway Company v. United States, 232 Fed. 349, — C. C. A. —, decided in the Circuit Court of Appeals for the Eighth Circuit on March 9, 1916. When analyzed, the cases are so strikingly alike that the authority of the decision in the Eighth Circuit completely fits and covers the corresponding conclusion reached by the District Court in the present case. Every possible feature for claiming that the case in the Eighth Circuit was not within the federal statutes, which can possibly be urged in the present case, was met and disposed of adversely to the transportation corporation; and, after stating the facts as we have stated them, we would have no occasion to do otherwise than follow the Eighth Circuit in the case referred to.

The judgment of the District Court is affirmed, with interest, and the defendant in error recovers her costs of appeal.

OWEN v. ALFORD et al.

(Circuit Court of Appeals, Fifth Circuit. May 8, 1916.)

No. 2872.

INJUNCTION ⊂=118(1)—SUBJECTS OF RELIEF—ACTIONS AT LAW.

A bill in equity by receiver of railroad to restrain defendants from prosecuting actions at law for damages caused by the overflow, during times of excessive rains, of their respective lands, due to a fill of embankment erected by the railroad, alleging that the natural flowage of water in the bed of the stream has not been obstructed, and that plaintiff does not know of any negligence in the construction or maintenance of the roadbed, and failing to show that the plaintiffs in the actions at law have not good causes of action, is properly dismissed.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 223–232, 234; Dec. Dig. ⊂=118(1).]

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

Bill in equity by W. F. Owen, receiver of the New Orleans, Mobile & Chicago Railroad Company, against L. J. Alford and others. From a decree for defendants, plaintiff appeals. Modified and affirmed.

James N. Flowers, of Jackson, Miss., and Joseph C. Rich, of Mobile, Ala. (Flowers, Brown, Chambers & Cooper, of Jackson, Miss., on the brief), for appellant.

George J. Leftwich, of Aberdeen, Miss. (Adams, Dobbs & Pinson, of Ackerman, Miss., and Leftwich & Tubb, of Aberdeen, Miss., on the brief), for appellees.

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

WALKER, Circuit Judge. This is an appeal from a decree dismissing a bill in equity filed by the appellant, suing as the receiver of the property of the New Orleans, Mobile & Chicago Railroad Company, against two individuals and a partnership, to restrain the defendants from prosecuting three certain actions at law which they severally had commenced against the railroad company before the receiver of its property was appointed, and to enjoin them from instituting other actions to recover damages caused by the overflow, during times of excessive rains, of their respective lands, due to a fill or embankment erected by the railroad company and maintained by it, and subsequently by the plaintiff as receiver, near a stream which runs by or through the several parcels of land of the three defendants. The bill, after averring the institution and pendency of the three suits, that every heavy rainfall furnishes a pretext for another claim for damages, and that the several defendants were preparing to bring other suits for further alleged damage attributed to the same cause, averred as follows:

"Your orator shows that the embankment is slight; that no natural water course has been obstructed; that the opening under the track where the said stream passes is several times larger than the bed of the stream; that the natural flowage of the water in the bed of the said stream has in no manner been obstructed; that the said stream is one with well-defined bed and banks; that the said railroad is trestled over the said stream and on the sides thereof, and a much larger opening is left than is necessary to accommodate the water in the bed of the said stream.

"Your orator further shows that he knows of no negligence in the construction of said roadbed or in the manner in which it is maintained; that he is willing now to make such change as may be necessary to make the maintenance and use of the said railroad lawful with respect to the rights of these defendants; that he does not know what is necessary to be done, or what would satisfy the law, or these defendants and other persons who may be interested east and west of the said line; that this issue as to the rightfulness of the said construction of the said line and of the maintenance of the same in its established condition lies at the root of the controversies now on and of those to be hereinafter instituted."

It seems that the dismissal of the bill would be sustainable under the rule that a bill of peace to prevent multiplicity of actions, where the parties are not numerous and before the rights of such parties have been established at law, is not maintainable, especially where the question of right is in litigation in another court of concurrent jurisdiction. Woodward v. Seely, 11 Ill. 157, 50 Am. Dec. 445; Eldridge v. Hill & Murray, 2 Johns. Ch. (N. Y.) 281; Pennsylvania Coal Co. v. Delaware & Hudson Canal Co., 31 N. Y. 91; Paterson & Hudson R. Co. v. Jersey City, 9 N. J. Eq. 434; Moses v. Mayor, etc., 52 Ala. 198; Orton v. Smith, 18 How. 263, 15 L. Ed. 393.

But the bill is open to the further criticism that its averments fail to show that the railroad company was within its rights in constructing and maintaining the fill or embankment as it did, or that either of the pending suits was unfounded, or that those alleged to be in contemplation would not be based upon good causes of action arising since the pending suits were brought. The averments above quoted, to the effect that the natural flowage of the water in the bed of the stream has not been obstructed, and that the plaintiff does not know of any negligence

in the construction of the roadbed or in the manner in which it is maintained, by no means show that the wrongs complained of in the pending suits were not committed, or that the roadbed as it was constructed and is maintained does not amount to an actionable nuisance, a continuation of which gives rise to a new cause of action whenever in times of excessive rain the lands of the defendants are subjected to destructive overflows due to the structure complained of. The absence of negligence in the construction and maintenance of the roadbed is not alleged, even upon information and belief. The plaintiff avers merely his ignorance of any negligence in that regard, without showing that he has such knowledge or information of the subject-matter referred to as would enable him to recognize negligence if it existed.

But one's use of his property may make it a nuisance to others, though there is no negligence. 29 Cyc. 1161. The bill discloses nothing which stands in the way of the conclusion that the suits at law which are pending and those which are alleged to be contemplated are all well founded on the fact that an actionable nuisance has been created and is continued to be maintained. A court of equity well may refuse to protect from the harassment of a number of suits one who alleges nothing inconsistent with the conclusion that wrongful conduct of himself or his privy makes justifiable the bringing of each of the suits sought to be enjoined. Turner v. City of Mobile, 135 Ala. 73, 33 South. 132; 1 Pomeroy's Equity Jur. § 250.

The decree appealed from is affirmed, except that it is so modified as to make the dismissal of the bill one without prejudice.

MAXEY, District Judge, concurs in the result.

PATERLINI et ux. v. MEMORIAL HOSPITAL ASS'N OF MONONGAHELA CITY, PA., et al.

(Circuit Court of Appeals, Third Circuit. May 6, 1916.)

No. 2064.

CHARITIES ⊂=45(2)—HOSPITALS—ACTIONS FOR DEATH—SUFFICIENCY OF STATEMENT.

In an action against a hospital and its trustees for the death of a patient, the statement alleged that defendants, in conducting the process of removing the activities of the hospital from one building to another, were guilty of negligence in keeping poisons in such circumstances that a nurse, through mistake, administered poison to plaintiffs' son. The statement averred no negligence on the part of the nurse, but raised questions concerning the administration of charitable foundations, of which the hospital was one. *Held* that, despite the vagueness of the statement, it was good against demurrer.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 103; Dec. Dig. ⊂=45(2).]

Appeal from the District Court of the United States for the Western District of Pennsylvania.

Action by John Paterlini and wife against the Memorial Hospital Association of Monongahela City, Pa., and others. From a judgment

(229 Fed. 838) sustaining a demurrer to the statement, plaintiffs appeal. Reversed and remanded.

Arthur O. Fording, of Pittsburgh, Pa., for appellants.

McIlvain, Murphy, Day & Witherspoon, of Pittsburgh, Pa., Carl E. Gibson, of Monongahela, Pa., C. G. McIlvain, of Pittsburgh, Pa., and Andrew M. Linn, of Washington, Pa., for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

PER CURIAM. In this case John Paterlini and his wife, citizens of Italy, brought suit against certain citizens of Pennsylvania, to wit, the hospital named and certain individuals, who were its trustees. On demurrer to the amended statement, the court below entered a judgment in favor of the defendants. The action was brought to recover damages for the financial loss caused the plaintiffs by the alleged negligence of the said hospital and the said individuals, which it is claimed resulted in the death of their son, who was a patient in the hospital. The averred negligence of the said hospital and the said individuals consisted in keeping a certain poison, "in such circumstances as to allow a nurse, whether careful or negligent, to make a mistake," and "in so conducting the process of removing the activities of the same hospital from one building to another as to make such mistake possible," and "in the employment of persons charged with the direct management of the said hospital and especially of those charged with the duty of said removal," and "in failing to provide for the said patient's safe environment for his care." The allegation is that the joint negligence of said corporate defendant and said individual defendants caused the injury complained of. The action is not based on any alleged negligence of the nurse who administered the draft to said patient. In view of the allegations of the pleadings and of the fact that the questions involved in this case so closely concern the administration of charitable foundations in Pennsylvania, we are unwilling to pass upon the liability of such institutions and their trustees for negligence, until by the proofs, rather than from the uncertain averments of pleadings, we are precisely informed of the facts upon which our judgment should rest. Without, therefore, expressing in any way, any view upon these questions, we deem it the exercise of wise discretion to overrule the demurrer and allow the proofs to be placed on record before the case is reviewed by this court.

Accordingly, we will reverse the judgment below, remand the cause, with directions to overrule the demurrer, without prejudice to later raising the questions raised by it, and that the cause proceed in due course.

YOUNG v. HERMAN.

(Circuit Court of Appeals, Sixth Circuit. April 4, 1916.)

No. 2826.

1. PATENTS ⟸318(1)—INFRINGEMENT—LIABILITY FOR PROFITS.
There may be a separate personal liability for profits on the part of successive owners of an infringing business, covering the periods of their respective ownership, although the infringement was sufficiently continuous to justify uniting both periods in one suit.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566–568; Dec. Dig. ⟸318(1).]

2. LIS PENDENS ⟸24(1)—PURCHASER OF BUSINESS PENDENTE LITE.
A purchaser of an infringing business pendente lite, after entry of an interlocutory decree on the mandate of an appellate court granting an injunction is bound by the injunction, and by the findings of validity and infringement on which the decree is based, and in further proceedings can present a new defense on either of those issues only by permission of the appellate court.
[Ed. Note.—For other cases, see Lis Pendens, Cent. Dig. §§ 38, 42, 44; Dec. Dig. ⟸24(1).]

3. LIS PENDENS ⟸26(1)—PURCHASER PENDENTE LITE—ACCOUNTING FOR PROFITS.
Such purchaser, however, is not bound by findings of fact or law on which a decree for profits against his predecessor was based, and is entitled to be heard as to the amount of profits made by himself after his purchase.
[Ed. Note.—For other cases, see Lis Pendens, Cent. Dig. §§ 58, 62; Dec. Dig. ⟸26(1).]

Appeal from the District Court of the United States for the Northern District of Ohio; Clarke, Judge.

Suit in equity by Reinhold Herman against the Youngstown Car Manufacturing Company and John P. Young, impleaded. From a decree against defendant Young, he appeals. Reversed.

See, also, 191 Fed. 579, 112 C. C. A. 185, and 216 Fed. 604, — C. C. A. —.

F. W. H. Clay, of Pittsburgh, Pa., for appellant.

T. A. Connolly and Joseph B. Connolly, both of Washington, D. C., for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. For the progress of this litigation, see the opinions on the former appeals in the same case. Herman v. Youngstown Car Mfg. Co., 191 Fed. 579, 112 C. C. A. 185, and 216 Fed. 604, 610, — C. C. A. —. A supplemental bill, filed against Young, resulted in a decree against him for profits, and he appeals. As we think there must be further proceedings before a final disposition, we now state merely our conclusions:

1. The order permitting the filing of the supplemental bill was within the discretion of the trial court, and should not be disturbed.

[1] 2. The supplemental bill, while inartificial, tenders clearly enough the issue whether Young must respond personally for profits for infringements after he took over the business. In connection with the original, it amounts to a claim of several liability, by periods, for the profits of a continuous infringement, and we think this permissible, under the peculiar facts here present.

[2] 3. As a purchaser of the business pendente lite, Young is bound by the interlocutory decree against the corporation, and so, as concerns his acts in carrying on the same business, is bound by the findings of fact and law on which that decree depends, viz., that the patent was valid and was infringed. The decree to this effect having been entered pursuant to the mandate of this court, Young, like the defendant corporation, can be allowed to present a new defense on either of these issues only after application made to and granted by this court.

[3] 4. Young, as an individual, and with reference to profits on infringements committed by him after the corporation ceased, is not necessarily bound by the findings of fact or conclusions of law which led to the former decree for profits against the corporation; the only issue involved was as to the profits the corporation had made. Prima facie, Young is entitled to be heard, as to the amount of his profits, in proofs as to the facts, and in argument as to the law. The record in the former proceedings may or may not be persuasive that he was so completely identified with the corporation as to make it unseemly to let him escape from the measure of liability fixed upon it; but upon that proposition, as well as upon the fact of the amount of profits made by him and the possibility of and the rule of apportionment, he is entitled to answer and to be heard after he has become, personally, a party to the case.

The decree must be reversed, with costs, and the case remanded for proceedings in accordance herewith.

KAWNEER MFG. CO. v. TOLEDO PLATE & WINDOW GLASS CO.

(District Court, E. D. Michigan, S. D. July 23, 1915.)

1. PATENTS ⟸328—VALIDITY AND INVENTION—STRUCTURE FOR HOLDING PLATE GLASS.

The Plym patent, No. 852,450, for a structure for holding heavy plate glass in position, was not anticipated and discloses patentable invention; also *held* infringed.

2. PATENTS ⟸66—ANTICIPATION—PRIOR PATENT TO SAME INVENTOR.

The test to be applied as to the validity of a patent with reference to an earlier patent to the same inventor is a comparison of the scope and breadth of the claims of the two patents.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 79, 81; Dec. Dig. ⟸66.]

3. PATENTS ⟸35—EVIDENCE OF INVENTION—COMMERCIAL SUCCESS.

Difficulties encountered by a patentee in attempting to introduce his patented device, followed by its later commercial success, are persuasive evidence of invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 39; Dec. Dig. ⟸35.]

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4. PATENTS ⇐227—SUIT FOR INFRINGEMENT—DEFENSES.
The intention of a defendant is immaterial on the question of infringement.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 358; Dec. Dig. ⇐ 227.]

5. PATENTS ⇐234—INFRINGEMENT—IMPAIRMENT OF FUNCTION OF DEVICE.
Infringement is not avoided by impairment of the functions of a patented device in degree, if the features are retained.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 370, 381; Dec. Dig. ⇐234.]

6. PATENTS ⇐327—SUITS FOR INFRINGEMENT—EFFECT OF PRIOR DECISIONS.
Decisions respecting the validity of a patent are entitled to consideration in a subsequent suit in a court of equal jurisdiction, the weight to be given them depending on the circumstances in each case.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 620–625; Dec. Dig. ⇐327.]

In Equity. Suit by the Kawneer Manufacturing Company against the Toledo Plate & Window Glass Company. On final hearing. Decree for complainant.

Wallace R. Lane, of Chicago, Ill., for plaintiff.

Wilber Owen, of Toledo, Ohio, Phillip C. Dyrenforth and Robert Lewis Ames, both of Chicago, Ill., Paul Bakewell, of St. Louis, Mo., Edwin C Lewis, of Detroit, Mich., and Jones, Addington, Ames & Seibold, of Chicago, Ill., for defendant.

TUTTLE, District Judge. This is the ordinary patent suit in that the plaintiff asks for an accounting and injunction against the defendant for infringing patent, and also usual in that the defense offered is lack of validity of the patent and lack of infringement by the defendant's structure.

[1] The patent in suit is No. 852,450 to Plym, May 7, 1907, for a structure for holding heavy plate glass in position for show windows, or for any similar purpose. The objects to be attained are several. It should be held in such a way as not to mar the beauty of the window, by supports in the center or through the pane of glass. Because of the fact that glass expands and contracts when subjected to different temperatures, it makes it necessary that the holding shall yield sufficiently so that it will not break the glass when it expands, and at the same time not hold the glass too loosely when it contracts. In order to lessen the danger in this regard it is desirable that there should be ventilation from the outer side of the pane of glass to the inner side, so that the cool air from the outside can pass in and spread over the inner surface of the glass, and equalize the temperature so far as possible, and avoid unequal expansion and contraction, which is dangerous to the glass.

The glass is subjected to pressure by currents of air, as well as liable to be subjected to pressure from persons who might lean against the glass. These pressures may be exerted from either side, but are more likely to occur from the outer side. It is therefore desirable to have the glass so set that it shall be held with sufficient rigidity to resist these

pressures, and at the same time in a manner sufficiently yielding so that it will not break at the holding point. If it is held absolutely rigid at the holding point, then, when strains are exerted upon the glass by the wind, it could not bend in at its central portion without breaking at or near the holding point.

It is also desirable that moisture which may accumulate on the inner surface of the glass, either from the atmosphere or when the window is washed, should be taken care of by some form of gutter at the base, and that the water so collected in the gutter at the base of the glass should be disposed of in such a way as not to leave the inside window sill wet or rot the wood near the base of the glass. It is of course to be desired that the structure used to hold and ventilate the glass and dispose of moisture be easy of installation, and it should be easy to remove it for replacement or for cleaning out the structure.

Numerous parties had made efforts to accomplish these various results. As is usual in the different arts, the early inventors had some particular one of these desirable results in mind, and their efforts were exerted for the accomplishment of that particular result. As the art developed they began to combine the objects which they hoped to attain. Inventive genius had sufficiently developed at the time of Strayer patent, No. 416,080, November 26, 1889, so that the holding of the glass was attempted, if not accomplished, by substantially three elements, a stool or rest to support the glass at its bottom, a gutter supporting it at the back or inner side, and a brace, holding it at its front or outer edge.

The plaintiff's patent in suit contemplates the use of these three elements, but in my opinion not in such a way that they can be said to be the same elements as those of Strayer. The front holding element is different in some respects; but the particular difference, and the one which to my mind is controlling, is the difference in the inner member. The inner gutter, which Strayer shows as rigid, has no provision for ventilation, and, while it might have resiliency at a portion of its holding contacts, the method of fastening in position is such that it would be rigid at the corners of the glass. There seems to have been no thought on the part of Strayer to have this gutter resilient, and his structure was such that, even though it was in fact resilient at points away from the ends of the glass, that would be a misfortune rather than a benefit, because it was certainly not resilient at the ends. So it seems to me that he must have had in mind, so far as he contemplated that phase of the matter at all, to make it rigid. He certainly did not have the combination of elements called for by the Plym claims, and his device is but a modification of the former improvised type made by village carpenters, with a tube soldered to one end of the gutter for carrying off the water from the inner surface of the window. In the Strayer construction there is no provision for the subgutter, by which the water is carried to the outside of the setting immediately beneath the glass in such a way as to allow for ventilation by the same means which dispose of the water, as in the Plym patented device.

The change of the inner holding member from a rigid one to a resilient one was an important step in the development of the art, and I think it, together with the combination of elements of plaintiff's de-

vice, goes beyond what would be mechanical skill. While in some other combinations of elements, very different from Strayer, a resilient inner member had been shown, those other devices and structures were so different from plaintiff's device that it seems to me that it rises beyond mechanical skill to have made this inner gutter retaining member of such form, material, and structure as could be yielding and resilient and so combined with the other elements as to produce the desired results.

As I understand the development of the art and the earlier patents, Plym was the first to use in any practical way the yielding inner member, so that on pressure from the outside, where pressure is most likely to occur, the glass would be so firmly held as to keep it in place, and yet at the same time would yield sufficiently wherever the strains were exerted, so that it would not break at the edges near the holding points. Out of this invention a new combination and useful structure seems to have been created, and one that has been of real benefit and assistance to the public generally and is now in general use.

It is urged that Plym's first patent, No. 846,343, patented March 5, 1907, the application for which was copending at the Patent Office with the application for the patent in suit, covers the structure described in the patent in suit so fully and in such a way that the subsequent patent, the patent in suit, is void; the contention of the defendant in that regard being that not only should the test be applied as to whether or not the claims of the patent in suit add enough of inventive genius over the claims of Plym's prior patent to warrant the issuing of a patent, but it is claimed in addition that if from the drawings or description, or anything contained in any way in the prior patent, enough is shown of the structure of the patent in suit, so that by the use of mechanical skill, added to what is disclosed by Plym's first patent, the structure of the patent in suit could be made, then the second patent is void. In other words, defendant claims that all that Plym shows that he knew about a structure of this kind prior to the time that he filed the application for the patent in suit should be construed against him and against the patent in suit in the same way that it would be if that information had been obtained by him, prior to the time of his filing his application for the patent in suit, from some outside source, and the information had not been acquired by his own genius.

[2] I hold that the test to be applied as to the validity of the patent in suit with reference to the earlier patent is the scope and breadth of the claims of the two patents. The claim of the earlier Plym patent is for an entirely different combination of elements from the claims in suit, and hence does not affect the validity or scope of the claims of the Plym patent in suit. Century Electric Co. v. Westinghouse Electric & Mfg. Co., 191 Fed. 350, 352, 112 C. C. A. 8; Anderson v. Collins, 122 Fed. 451, 457, 58 C. C. A. 669; Bates v. Coe, 98 U S. 31, 25 L. Ed. 68.

I think it is plain from the earlier Plym patent that Plym had then conceived the idea of a resilient inner retaining gutter, but at that time he thought to accomplish the results by using that resilient inner gutter support in connection with a different combination than that shown by the claims in suit. In the first patent he shows an outer retaining

member which is rigid. It was necessary that it should be rigid, because the earlier Plym patent contains, as a part of its entire scheme, the holding of the glass on a shelf made out of and a part of the outer retaining member. It was quite a different structure from the structure of the patent in suit. I am satisfied from the record and the best thought I can give to the earlier Plym patent that it would not be a successful structure. I do not think that any structure with a resilient inner retaining member and a rigid outer retaining member would be practical. The strains from the wind on the outside of the pane would press the glass back against the resilient part which would yield, while the outer rigid member would remain firm, resulting in the glass leaving the outer rigid member on pressure of the wind, and when the pressure is withdrawn, the glass would come back and rattle against the rigid outer member. If I am correct in my views in this regard, it would make a very undesirable and impracticable structure.

In a less degree the same thing would be true if the outer member was resilient and the inner member rigid. The only reason why it would not be so objectionable would be because pressure was not exerted against it from the inside. If wind currents or other strains should come against the inside of the structure, then the same objection and unfortunate results which I have pointed out would follow, if the outer retaining member was resilient and the inner member was rigid. But I take it in actual use these wind currents and the usual pressure is upon the outside. So there would not be so much objection to a rigid inner member and a resilient outer member, so far as this disadvantageous result is concerned. I do not think there in anything in the prior art or in the earlier patents, including Plym's, that would void the patent in suit.

[3] While the art had been quite thoroughly canvassed, it seems to me that it remained for some one to find the particular combination which was necessary for practical success. I think that the patent in suit of Plym first shows the particular combination which resulted in that success which had been sought by so many and for so long. The early difficulties of the patentee, Plym, while attempting to introduce the patented device, and its subsequent commercial success, are particularly persuasive that the creation of the device of the Plym patent in suit required inventive genius. Diamond Rubber Co. v. Consolidated Rubber Tire Co., 220 U. S. 428, 31 Sup. Ct. 444, 55 L. Ed. 527; Grever v. Hoffman (C. C. A. Sixth Cir.) 202 Fed. 923, 121 C. C. A. 281; Sly Mfg. Co. v. Russell Co., 189 Fed. 61, 110 C. C. A. 625. It remains to determine as to whether the defendant's structure infringes the claims in suit. To my mind that is not so difficult a question as the question of validity.

Defendant's only contention of noninfringement is that the inner member of defendant's construction is not resilient, but, on the contrary, is rigid. Plaintiff is not entitled to insist on absolute rigidity, such as would result from direct contact of the glass with cast iron. We all know that, before any of these inventive minds gave their energy and attention to the subject, glass was supported by wood and putty, and the plaintiff cannot claim any right to exclude the use of such yielding force as comes from the materials themselves, whether

it be wood, putty, rubber, or other material. But the resiliency which the patentee Plym discovered and claimed in his patent and inherent in his device was the resiliency which comes from the shape and arrangement of material rather than the compression or indentation of the material which is used in the device.

On the other hand, the plaintiff ought not to be limited to a retaining member so resilient that it could be easily pressed aside. There is nothing in the claims that would indicate that he intended to hold the glass by a weak spring, or something that would yield easily. One little experienced in the art would recognize that it must be held firmly. There is nothing in the drawings of the patent in suit anywhere that would indicate that the plaintiff had in mind, nor do the claims contemplate, a weak holding such as could be easily pushed aside; but everything indicates that it should have strength sufficient to hold the glass in place, and that the glass shall only move when heavy pressure or abnormal strains are exerted against the glass. It is apparent that the device contemplated that it should hold the glass in place until, as nearly as possible, the strength of the glass had been exhausted, but that before the glass should break the holding member should yield, and then yield only sufficiently and so far as necessary to prevent the breaking of the glass. Of course, this could not be done to a strict nicety, but the device seems to have had in mind to accomplish that so far as possible. The nearer it comes to accomplishing that result, the nearer it accomplishes the desire the inventor had in mind, and the more useful it was in the art.

[4] The defendant contends that it does not desire to make use of this resilient construction at all, that the desire is to have a rigid inner wall, and one that would yield only in the manner as would putty and the old elements in the old art. The defendant's intention, however, has nothing to do with the question of infringement so long as it sold the infringing devices. Thompson v. Bushnell Co., 96 Fed. 238, 37 C. C. A. 456; Parker v. Hulme, Fed. Cas. No. 10,740. I am satisfied that the defendant's structure goes beyond what it had a right to do, and goes beyond the yielding quality of those old uses. While it may be less yielding than the plaintiff's structure, it is, nevertheless, sufficiently resilient so that it does make use of the principle. It comes within plaintiff's patent and the claims in suit. The effort of the defendant, it seems to me, has not been to see how nearly it could come to making what it claims to have desired, a rigid inner gutter, but rather how nearly it could come to getting the benefits of the combination shown by plaintiff's patent without infringing.

[5] Infringement is not avoided by impairment of the functions of a patented device in degree, if the features are retained. Murray v. Detroit Wire Spring Co. (C. C. A. Sixth Cir.) 206 Fed. 465, 124 C. C. A. 371; Penfield v. Chambers, 92 Fed. 630, 653, 34 C. C. A. 579. I hold that the gutter in defendant's device is resilient within the meaning of plaintiff's patent. It therefore follows that the defendant has infringed plaintiff's patent.

This finding is on the defendant's device of so-called scant brackets. It is shown by the record that those were used, and it is on that structure that the plaintiff bases its suit. The other subsequent structures

with the full bracket are not involved in this suit in any way. The use of those by the defendant is subsequent to the filing of the bill in this case, and so far as the determination of the issues before the court at this time is concerned it is irrelevant and immaterial. I have no occasion to decide whether the subsequent structure with the so-called full brackets is an infringement of plaintiff's patent.

Plaintiff is entitled to the injunction and accounting prayed, and a reference will be made to William S. Sayres, Jr., as special master, for such accounting. A decree will be entered in accordance with this opinion.

[6] I have not overlooked the decisions in other districts, all of which hold this patent valid. Some of those were consent decrees, and of course their force is greatly weakened by that fact. Others were interlocutory injunctions, and ought not to have as great weight with the court ordinarily as final hearings; yet in cases of this kind the presentation is often nearly as complete on the application for temporary injunction as on the final hearing, and the judges who have written opinions in the matters of temporary injunctions seem to have given careful attention to the question of validity. There have been two decisions on contested final hearing sustaining the validity of the plaintiff's patent. So that, in addition to my own conclusions in regard to the matter, I give weight to the previous adjudications of this patent by another District Court in this circuit and by district judges in other circuits. Murray v. Detroit Wire Spring Co., supra; Dowagiac Mfg. Co. v. Brennan, 127 Fed. 143, 145, 62 C. C. A. 257, 259; Doelger v. German-American Filter Co., 204 Fed. 274, 122 C. C. A. 472.

In re LESSER.

Ex parte INTERNATIONAL TRUST CO.

(District Court, S. D. New York. February 11, 1916.)

BANKRUPTCY ⊂=408(1)—DISCHARGE—GROUNDS FOR REFUSAL—PERJURY IN OTHER PROCEEDINGS.

No perjury committed by a bankrupt in any bankruptcy proceedings except those against himself is ground for refusal of a discharge, notwithstanding the literal reading of Bankr. Act July 1, 1898, c. 541, § 14, 30 Stat. 550 (Comp. St. 1913, § 9598), denying a discharge to one who has committed an offense punishable by imprisonment as therein provided, and section 29 (section 9613), making it an offense punishable by imprisonment to make a false oath in relation to any proceedings in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 732; Dec. Dig. ⊂=408(1).]

In Bankruptcy. Proceeding against Joseph S. Lesser. On exceptions to specifications of objections to discharge by the International Trust Company. Exceptions sustained in part, and overruled in part.

This cause comes up on exceptions to specifications of objection. The creditor has filed eight specifications of objection, to all of which exceptions have been filed. The first, second, and third relate to false oaths of the bankrupt; the first two in these proceedings, and the third in other bankruptcy proceed-

ings in which he was examined as a witness. One of these bankruptcy proceedings was against the St. Gallen Manufacturing Company, and the other against M. G. Samuels & Co. At one time he had been a director in the St. Gallen Manufacturing Company, and his testimony was material because of his connection therewith. He also had financial relations with M. G. Samuels & Co. The fourth specification was because the bankrupt had concealed assets from his trustee in bankruptcy; the fifth, sixth, and seventh specifications were that he had destroyed, concealed, and failed to keep his books of account; the eighth, that he had obtained money from certain persons for the purpose of obtaining credit, and that he obtained money on a materially false statement in writing.

Leonard J. Obermeier, of New York City, for exceptant.
Saul S. Myers, of New York City, for objecting creditor.

LEARNED HAND, District Judge (after stating the facts as above). I sustain the exceptions to the first and second specifications, because it is not alleged that the bankrupt, at the time of committing the false oaths, knew that they were false, and that he made the oaths knowingly and fraudulently; also because it is not set forth that they were material to the inquiry. The creditor may amend these two specifications within ten days after the entry of the order upon the exceptions.

The second specification should likewise state in what respects his schedules were false.

I sustain the exceptions to the third specification, on the ground that no perjury in a bankruptcy proceeding other than that of the bankrupt himself is ground for opposition to the discharge. In re Blalock (D. C.) 118 Fed. 679. I am satisfied that, although it is a crime to make any false oath in any proceeding in bankruptcy, it is not a ground for denial of a discharge unless the oath be made in the bankruptcy proceedings of the bankrupt himself. I admit that a mere literal reading of the two sections (Bankr. Act, §§ 14 and 29) might lead to a contrary result; but it is perfectly obvious that the bankrupt's discharge depends upon his conduct toward his own creditors, and not upon his general truthfulness, even in other independent proceedings. The Circuit Court of Appeals for this Circuit, in Re Fiegenbaum, 121 Fed. 69, 57 C. C. A. 409, had before it the question whether a second bankruptcy petition should be stayed, and on page 71 of 121 Fed. (57 C. C. A. 411) raised the question whether an offense committed in the first proceeding would be available in the second. They did not decide this question, but one reason for staying the second proceeding was the possibility that offenses committed in the first could not be used in the second. So far as the case goes it seems in accord with my understanding. The exception is sustained to this specification, without leave to amend.

The exception to the fourth specification is sustained, because it fails to state the nature and kind of property which was concealed, and that the concealment was done knowingly and fraudulently, and also because it does not state with what persons the concealment was effected. The creditor may amend the specification within the same time as specifications 1 and 2.

Exceptions to specifications 5 and 6 are sustained until the creditor states what books of account and records the bankrupt destroyed and concealed and with whom he concealed the same. These specifications may be amended within the same time as provided respecting specifications 1 and 2.

Exception to specification 7 is overruled.

Exception to specification 8 is sustained, because the specification does not state what money or property had been obtained, and also because it does not state the time and place of uttering the false statement. If the utterance of any false statement is relied upon, other than those made to the persons mentioned in the specification, such person must be set forth. The phrase "various other banks in the United States and Switzerland and to various other persons" will be stricken from the specification unless they are indicated subsequently. Amendment to this specification may be made within the same time as provided with respect to specifications 1 and 2.

No further time for filing specifications will be granted than as contained above. The creditor has already had ample time in which to present any objections to the discharge. Settle order on notice.

In re BONVILLAIN.

(District Court, E. D. Louisiana. April 5, 1916.)

No. 2054.

1. BANKRUPTCY ⟸400(1)—POWERS OF TRUSTEE—EXEMPTIONS.

While a trustee in bankruptcy cannot arbitrarily refuse to set aside an exemption to which the bankrupt is entitled, he has discretion, and represents all the creditors, and may in a proper case himself raise the question of the bankrupt's right to a claimed exemption.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 671, 673; Dec. Dig. ⟸400(1).]

2. BANKRUPTCY ⟸143(12)—PROPERTY PASSING TO TRUSTEE—LIFE INSURANCE POLICY.

Life insurance policies, originally payable to the insured or his estate, but later assigned to his wife, with full reservation of right to change the beneficiary at will, and which had cash surrender values at the time of the bankruptcy of the insured, pass to the trustee, unless exempt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 201; Dec. Dig. ⟸143(12).]

3. EXEMPTIONS ⟸50(1)—STATUTE—RETROACTIVE OPERATION.

Act La. No. 189 of 1914, exempting the proceeds of life insurance policies from execution for debts, could not constitutionally be given retroactive effect, so as to exempt life insurance policies which could have been seized by creditors whose claims originate prior to the enactment of that statute.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 75; Dec. Dig. ⟸50(1).]

4. BANKRUPTCY ⟸143(12) — EXEMPTIONS ⟸50(1) — PROPERTY PASSING TO TRUSTEE—LIFE INSURANCE POLICY.

Prior to the enactment of Act La. No. 189 of 1914, exempting the proceeds of policies on the life of a bankrupt of which his wife was bene-

ficiary, one which gave the insured the power to change the beneficiary, and which had a cash surrender value, could, under Civ. Code La. art. 3183, making all the property of a debtor the common pledge of his creditors, and Code Prac. La. art. 647, providing that an incorporeal right might be seized under execution, be seized under execution, and therefore passed to the trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 201; Dec. Dig. ⟸143(12); Exemptions, Cent. Dig. § 75; Dec. Dig. ⟸50(1).]

In Bankruptcy. In the matter of Arthur A. Bonvillain, bankrupt. On an application by the bankrupt for a review of an order of the referee declining to set aside as exempt certain policies on the life of the bankrupt surrendered by him to the trustee. Order affirmed.

Borah, Himel & Bloch, of Franklin, La., for bankrupt.

FOSTER, District Judge. In this matter the bankrupt surrendered certain policies of life insurance, but claimed them as exempt by virtue of Bankr. Act July 1, 1898, c. 541, § 6, 30 Stat. 548 (Comp. St. 1913, § 9590), and the law of Louisiana (Act 189, adopted July 9, 1914). The trustee declined to set aside the policies as exempt, and the bankrupt applied to the referee for an order to compel him to do so. The referee, however, approved the action of the trustee, on the ground that Act 189 of 1914 is unconstitutional with regard to debts existing before its passage, and therefore without application to the said policies. It is this order that is asked to be reviewed.

[1] The bankrupt contends that the trustee is without discretion, and is obliged to set aside and make a report of all property claimed as exempt, leaving it to the creditors to except to the report, if so minded, and hence that the trustee should be ordered to allow the exception. This is entirely too technical a view to take of the matter. The trustee could not arbitrarily refuse to set aside property to which the bankrupt was clearly entitled by law; but he represents all of the creditors, and is vested with some discretion. In a proper case questions regarding the bankrupt's right to exemptions may as well be raised by the trustee as by the creditor, and it is immaterial how this is done, provided all parties have their day in court.

[2] There is no dispute as to the facts. Bonvillain was adjudicated a bankrupt on July 28, 1915. He scheduled unsecured debts amounting to over $47,000 and no assets, except the policies in question, which at the date of the adjudication had net cash surrender values of about $4,000. All of the debts scheduled had matured before the passage of Act 189 of 1914. The policies had all been in existence at least 15 years. They were originally payable to Bonvillain, the insured, or his estate, but some years before bankruptcy had been assigned by him to his wife, with full reservation of his right to change the beneficiary at will. Undoubtedly the policies are such as would pass to the trustee, unless exempt. In re Herr (D. C.) 182 Fed. 716; In re Jamison Bros. (D. C.) 222 Fed. 93; In re Shoemaker (D. C.) 225 Fed. 330; Hiscock v. Mertens, 205 U. S. 202, 27 Sup. Ct. 488, 51 L. Ed. 771.

[3] And while it may be conceded Act 189 of 1914 is valid, and not in conflict with either the state or federal Constitutions (Holden v. Stratton, 198 U. S. 202, 25 Sup. Ct. 656, 49 L. Ed. 1018), it could not

be, and was not intended to be, retroactive. Therefore, if the ordinary creditors could have looked to the policies for the payment of their debts, the act would have no effect as to them. Louisiana Constitutions, 1898 and 1913, art. 245; Lloyd v. Hamilton, 52 La. Ann. 861, 27 South. 275; Blouin v. Ledet, 109 La. 711, 33 South. 741; Taylor v. Saloy, 38 La. Ann. 65; Martin v. Kirkpatrick, 30 La. Ann. 1214; Sturges v. Crowninshield, 4 Wheat. 122, 4 L. Ed. 529; Gunn v. Barry, 15 Wall. 610, 21 L. Ed. 212; Edwards v. Kearzey, 96 U. S. 595, 24 L. Ed. 793.

[4] Could the creditors of the bankrupt have realized on these particular policies by execution or otherwise. The solution of the question depends on the law of Louisiana. Nichol v. Levy, 5 Wall. 433, 18 L. Ed. 596. There are no Louisiana decisions directly in point, and very few from other jurisdictions. Policies of life insurance are, however, by the modern jurisprudence, treated as property, though of a peculiar kind, and as choses in action, which, though not subject to execution at common law and in the absence of a statute, may be reached in equity by creditors. Kratzenstein v. Lehman, 18 Misc. Rep. 590, 42 N. Y. Supp. 237; Rice v. Smith, 72 Miss. 42, 16 South. 417; Biggert v. Straub, 193 Mass. 77, 78 N. E. 770, 118 Am. St. Rep. 449; Heilbron's Estate, 14 Wash. 536, 45 Pac. 153, 35 L. R. A. 602; Skinner v. Holt, 9 S. D. 427, 69 N. W. 595, 62 Am. St. Rep. 878; Burlingham v. Crouse, 228 U. S. 459, 33 Sup. Ct. 564, 57 L. Ed. 920, 46 L. R. A. (N. S.) 148.

With regard to the policies herein claimed it will be noted they are at present payable to the wife. By an unbroken line of decisions in Louisiana it is settled that an ordinary policy of life insurance payable to the wife is her separate property, not subject to the community debts, and unassignable without her consent. See Succession of Emonot, 109 La. at page 365, 33 South. 368. But the Supreme Court of Louisiana also recognizes the general rule that a policy is a chose in action and assignable (Lake v. New York Life Ins. Co., 120 La. 974, 45 South. 959), and that, where the husband reserves the right to change the beneficiary at will, the wife has no vested interest in the policy, and may be disregarded, and the policy assigned without her consent (Alba v. Provident Savings Life Ins. Co., 118 La. 1021, 43 South. 663).

Under the law of Louisiana all the property of a debtor is the common pledge of his creditors (Civil Code, art. 3183), and an incorporeal right may be seized under execution (Code of Practice, art. 647). In this instance the bankrupt's rights in the policies are somewhat clouded by his designation of his wife as beneficiary, and in order to realize the cash surrender value he would be compelled to change the designation. There are certain rights of a debtor his creditors cannot avail themselves of. Civil Code, arts. 1991 and 1992. But there is nothing in the law of Louisiana preventing the seizure of the cash surrender value of a life insurance policy: Where there is nothing specific in the law exempting them, a debtor cannot refuse to exercise his rights for the benefit of his creditors. Articles such as Civil Code, arts. 1991 and 1992, are considered exceptions to the general rule, to be strictly construed, and not extended by implication.

This doctrine is clearly enunciated by the Supreme Court of Louisiana. In Klotz v. Macready, 44 La. Ann. 169, 10 South. 706, a debtor was compelled to remove a cloud on his title to real estate for the benefit of a creditor who had no right of action in himself. In Belcher & Creswell v. Johnson, 114 La. 640, 38 South. 481, where the debtor had the right to set aside a sale for lesion beyond moiety, he was compelled to exercise the right for the benefit of his creditors. In Fay & Egan Co. v. Ouachita Excelsior Saw & Planing Mills, 50 La. Ann. 207, 23 South. 312, the seizure of an indefinite interest in a continuing contract was maintained, and the final disposition of the garnishment held in abeyance, to await the termination of the contract. There are other cases to the same effect. See authorities cited in the above cases.

In the light of these decisions and the general policy of the civil law, it is clear that the creditors of this bankrupt might well have looked to the policies herein surrendered for payment of their debts, and therefore they are not exempt under Act 189 of 1914.

The decision of the referee was right, and it will be affirmed.

HAGAR v. WATT et al.

(District Court, M. D. Pennsylvania. October Term, 1915.)

No. 219A.

1. BANKRUPTCY ⟸159—"VOIDABLE" PREFERENCE—WHAT CONSTITUTES.

To be voidable as a preferential transfer, under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (Comp. St. 1913, § 9644), it must appear that the transfer was made within four months before petition for bankruptcy was filed, that the bankrupt was insolvent, and that the transferee had reasonable cause to believe that the enforcement of the transfer would effect a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 247, 248, 262, 268–281; Dec. Dig. ⟸159.

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

2. BANKRUPTCY ⟸303(3)—PREFERENCE—EVIDENCE.

In a suit to set aside a transfer as a preference under Bankr. Act, § 60b, evidence *held* insufficient to show that the transfer occurred within four months before the filing of the petition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 462; Dec. Dig. ⟸303(3).]

3. BANKRUPTCY ⟸181—FRAUDULENT CONVEYANCE—FRAUD OF CREDITORS—WHAT CONSTITUTES.

Where a debtor, more than four months before the filing of a petition in bankruptcy, transferred corporate stock to his brother, who had made him large advances, equal to, if not in excess of, the value of the stock, the transfer was not fraudulent as to other creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 271, 273, 274; Dec. Dig. ⟸181.]

In Equity. Bill by Marshall S. Hagar, trustee in bankruptcy of James A. Watt, against Alexander Watt and James A. Watt. Bill dismissed.

S. E. Darby, of New York City, and C. B. Little, of Scranton, Pa., for complainant.

J. R. Scouton, of Wilkes-Barre, Pa., and J. W. Carpenter, of Scranton, Pa., for defendants.

WITMER, District Judge. The trustee is in this proceeding in equity attempting to recover, by virtue of section 60b of the Bankruptcy Act, from the defendant, Dr. Alexander Watt, brother of the bankrupt, 65 shares of the capital stock of the De Hart-Watt Manufacturing Company, of the par value of $100 each, transferred to him by the bankrupt.

[1, 2] In order to establish a preferential transfer, voidable under this section, it must be made to appear: First, that the transfer was made within four months before the petition in bankruptcy was filed; second, that the bankrupt was insolvent; and, third, that the transferee had reasonable cause to believe that the enforcement of the transfer would effect a preference. The plaintiff has failed to furnish the required proof to establish the first requisite. The petition was filed on the 19th day of March, 1915, and the assignment on the certificate of stock bears date as of the 14th day of November, 1914, exceeding by five days the time limit, and thus excluding the transaction from the operation of the provisions of the act, if the date correctly recites the time when the transfer was made. Plaintiff insists, however, that it does not, calling attention to the testimony of the bankrupt, who, when examined by his creditors, stated that he had assigned and transferred this stock on the 24th day of November, which, if correct, would bring the transaction within the four months period.

After a careful examination of the testimony, and having heard most of the witnesses and observed their manner of testifying, I have not been convinced that the date of the assignment in writing does not correctly report the actual transfer. While it is true that the bankrupt, during a long general examination, stated that he had made such transfer to his brother on the 24th of November, he did so without reference to any data, and when his attention was afterwards called to the writing, he corrected his statement and insisted that he was in error. His brother also corroborated the date of the assignment. However, laying aside and ignoring the testimony of both of the parties to it, the testimony of the subscribing witness impressed the court as absolutely trustworthy and entitled to confidence. She told her story in that straightforward and sincerely open and confident manner, leaving no reason to doubt her statement; and, though there should be a doubt, the plaintiff has failed in his undertaking.

[3] Then, again, it is without dispute that the consideration for the assignment consisted of the bona fide advancements, during several years, of large sums of money to assist the brother, who is now bankrupt, in the development of certain patents, equal to, if not largely in excess of, the value of the stock transferred; hence it could not be argued, were it even alleged in the bill, that the transaction in fact

or in law amounted to a fraud on creditors. This conclusion is so well affirmed, I take it, that it calls for no citation of authorities.

The bill is dismissed, at the costs of plaintiff.

In re BREAKWATER CO.

(District Court, E. D. Pennsylvania. May 4, 1916.)

No. 5029.

1. BANKRUPTCY ⊂=314(5)—PROCEEDINGS—CLAIMS.
   Assignees of claims against the estate of a bankrupt have the right to prove them against the estate, subject to the same limitations as to time as other creditors.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 484; Dec. Dig. ⊂=314(5).]

2. BANKRUPTCY ⊂=337—PROOF OF CLAIMS—RIGHTS OF ASSIGNEES.
   While General Order No. 21, § 3 (89 Fed. ix, 32 C. C. A. xxii), provides that upon the filing of satisfactory proof of the assignment of a claim proved the referee shall immediately give notice by mail to original claimant, an assignee of a proved claimant need not again prove the claim, though the original claimant and assignor attacks the assignment, for the controversy is only between those two, and a second proof of claim is unnecessary.
   [Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⊂=337.]

3. BANKRUPTCY ⊂=337—CLAIMS—ASSIGNMENT—EFFECT.
   While Bankr. Act July 1, 1898, c. 541, § 57n, 30 Stat. 560 (Comp. St. 1913, § 9641), declares that claims shall not be proved against a bankrupt estate, after one year from an adjudication, etc., such section does not prevent the assignee of a proven claim from asserting his rights against the assignor after the expiration of that time.
   [Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⊂=337.]

In Bankruptcy. In the matter of the bankruptcy of the Breakwater Company. Sur certificate of referee of order striking off proof of claim of Tony D'Allessandro. Order affirmed, and cause remanded to referee.

See, also, 220 Fed. 226.

Leo Belmont, of Philadelphia, Pa., for petitioner.

Conlen, Brinton & Acker, of Philadelphia, Pa., opposed.

DICKINSON, District Judge. The order of the referee in this case was properly made. The petitioner for this review mistook his rights and has mischosen the means of asserting whatever rights he has.

[1] A claim known as that of the Delaware Commissary Company, or the Joseph De Luca claim, against the bankrupt estate, was duly made and allowed. The allowance was in part of a preferred claim. The petitioner was in fact a creditor, not of the bankrupt, but of the claimant. The only right he can possibly assert is that of an owner of part of the proven claim. Assignees of claims have the right, under the provisions of the bankruptcy law, to prove them against the estate just as other claims may be proven. The same limitation of time in

which to make the proofs applies. This claimant delayed availing himself of the right thus given until the statute closed upon it. The right, in consequence, no longer exists. This is what the referee ruled and in this there was no error.

[2] It is manifest that there was no need for such proof of claim, even if it had not been barred by the statute. The claim as against the estate had already been proven and allowed. There would have been neither need nor propriety in proving the claim over again. The petitioner, if he belongs anywhere, is clearly not in the proofs of claims class, but in the order class. The controversy, if there be any, is just as clearly not between the petitioner and the estate, but between the petitioner and the claimant. Neither the estate nor the other creditors are concerned in the dispute. General Order No. 21, section 3 (89 Fed. ix, 32 C. C. A. xxii), has application to assignees of proven claims. Section 57n applies only to claims against the estate. The petitioner, if he can succeed in proving that he holds an assignment of the De Luca claim, may be subrogated as such assignee to the rights of the original claimant. So far as the record discloses, this he has not asked to have done. We do not feel at liberty at this time to pass upon the right of the petitioner to subrogation. If he deems himself entitled to such right, it cannot in any orderly or satisfactory way be determined until he claims it. It may then be passed upon by the referee.

[3] In view of the discussion by counsel of the question of the application of the limitation in section 57n, we feel justified in expressing the opinion that it has no application. As already observed, the clause is so confined to claims "against the bankrupt estate." In all the cases to which we have been referred, the claims held to be barred out were of this kind. In re Sanderson (D. C.) 160 Fed. 278; In re Rhodes (D. C.) 105 Fed. 231; In re Moebius (D. C.) 116 Fed. 47; In re Meyer (D. C.) 181 Fed. 904; In re Knsco (D. C.) 208 Fed. 201. Beyond this we see no present occasion to go.

The cause is remanded to the referee for its further proceeding.

Ex parte MOMO TOMIMATSU.

(District Court, N. D. California, First Division. April 26, 1916.)

No. 15970.

1. ALIENS ⊂=42—IMMIGRATION—BOARD OF SPECIAL INQUIRY—"OFFICIAL."
Immigration Act Feb. 20, 1907, c. 1134, § 24, 34 Stat. 906 (Comp. St. 1913, § 4273), provides that immigration inspectors and other immigration officers, clerks, and employés may thereafter be appointed and their compensation fixed by the Secretary of Labor. Section 25 (section 4274) provides that each board of special inquiry shall consist of three members selected from such of the immigrant officials as the Commissioner General of Immigration shall designate as qualified to serve, provided that at ports where there are fewer than three immigrant inspectors the Secretary of Labor may designate other United States officials for service on such boards. At a place where there were more than three immigrant inspectors a clerk in the immigration service was designated to serve on a

board of special inquiry which refused admission to petitioner. *Held*, that the term "officials," in the latter section, is not used in contradistinction to "clerks," as is the term "officers" in the former section, and the construction by the department that it includes clerks will be valid.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 101; Dec. Dig. ⊂⊃42.

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

2. ALIENS ⊂⊃53—IMMIGRATION—WIFE OF RESIDENT ALIEN—HOSPITAL TREATMENT.

The wife of a Japanese domiciled in this country, who had not and could not file his declaration of intention to become a citizen, is not entitled, as a matter of right, to hospital treatment under Immigration Act, § 37 (Comp. St. 1913, § 4286), providing that if the wife of an alien, who has taken up his permanent residence and filed his declaration of intention to become a citizen, is found affected with any contagious disorder, she shall be held until it shall be determined whether she can be cured or permitted to land without danger to others.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. ⊂⊃53.]

Habeas corpus by Momo Tomimatsu. On return to the petition for the writ. Writ denied, and petitioner remanded.

Earl H. Pier, of San Francisco, Cal., for petitioner.

John W. Preston, U. S. Atty., and Casper A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal., for respondent.

DOOLING, District Judge. [1] Petitioner, a Japanese woman, came here with a passport from the Japanese government, to join her husband, who is a Japanese domiciled in this country. She was refused admission by a board of special inquiry because afflicted with trachoma, a dangerous contagious disease. It is urged on her behalf that this board was not legally constituted, because its members were not all immigration officials; one of them being a clerk in the immigration service. Section 25 of the Immigration Act provides:

"Each board [of special inquiry] shall consist of three members, who shall be selected from such of the immigrant officials in the service as the Commissioner General of Immigration * * * shall from time to time designate as qualified to serve on such boards: Provided, that at ports where there are fewer than three immigrant inspectors, the Secretary of Labor * * * may designate other United States officials for service on such boards." Comp. St. 1913, § 4274.

At San Francisco, where the board of inquiry in the present case acted, there are more than three immigrant inspectors. It is to be noted that the members of such boards are not necessarily to be selected from immigrant inspectors, but from immigrant officials. Section 24 of the same act makes a distinction between immigration *officers* and clerks by the use of the following language:

"Immigrant inspectors and other immigration officers, clerks, and employés shall hereafter be appointed," etc. Comp. St. 1913, § 4273.

But section 25, which provides for the creation of boards of special inquiry, does not use the word "officers," but the word "officials." And

while the act does distinguish between officers and clerks, there is nothing therein to indicate that the words "immigrant officials in the service" may not include clerks. Congress, having used the word "officers" throughout section 24, substitutes the word "officials" in the next section, when providing for the creation of boards of special inquiry. I am not prepared to say that this was not done designedly, and because of an intended distinction between the meanings of the two words as thus employed. The department having regarded a clerk as an official within the meaning of section 25, I cannot import the word "officer" from the preceding section, where alone the distinction between officer and clerk is indicated.

[2] It is further claimed that petitioner's application for hospital treatment was not properly forwarded. But petitioner was not entitled to hospital treatment as a matter of right, under section 37, as her husband had not filed his declaration of intention to become a citizen, and indeed was incapable of so doing. In any event a sufficient synopsis of the application for hospital treatment was telegraphed to the Secretary to enable him to grant the application, had he so desired. The petitioner is not injured by a failure to comply strictly with a rule made to cover cases falling within the statute, and designed only for the benefit of the wives of such aliens as have declared their intention to become citizens.

The petition for writ will therefore be denied, and the petitioner remanded.

In re HAIMOWICH.

(District Court, E. D. Pennsylvania. April 12, 1916.)

No. 4601.

1. BANKRUPTCY ⟸414(1)—DISCHARGE—REFUSAL—BURDEN OF PROOF.

Under Bankr. Act July 1, 1898, c. 541, § 14b, 30 Stat. 550 (Comp. St. 1913, § 9598), providing that the judge shall discharge the applicant unless he has, among other things, obtained money or property on credit upon a materially false statement in writing for the purpose of obtaining credit, the burden is on the creditor, objecting to discharge, to sustain the allegations in his specifications of objection.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 720; Dec. Dig. ⟸414(1).]

2. BANKRUPTCY ⟸407(5)—DISCHARGE—REFUSAL—FALSE STATEMENT.

One who made a materially false statement of his assets and liabilities to a mercantile agency, and who testified that he made it for the purpose of having the agency distribute it among his creditors, made the agency his agent to circulate the false statement, and where it was sent to a creditor, who sold goods in reliance thereon, the discharge in bankruptcy will be refused.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 760, 761; Dec. Dig. ⟸407(5).]

In Bankruptcy. In the matter of Jacob Haimowich, bankrupt. On exceptions to the report of the special referee, sustaining specifications of objection to discharge and recommending that discharge be refused. Exceptions dismissed, and report confirmed.

Julius C. Levi, of Philadelphia, Pa., for objecting creditors and trustee.

Israeli & Blieden and Alfred Aarons, both of Philadelphia, Pa., for bankrupt.

THOMPSON, District Judge. Seven specifications of objection were filed and referred to the referee. He reports that, in his opinion, the third and fourth specifications should be sustained, and he recommends that the bankrupt's petition be refused, and the remaining five specifications be dismissed.

No exceptions were filed by the trustee, and the case comes before the court upon exceptions of the bankrupt to the referee's findings sustaining the third and fourth specifications, and to the recommendation that the petition for discharge should be refused. The report of the referee does not contain any findings of fact nor a summary of the evidence. It is necessary, therefore, to determine whether the evidence would sustain findings of facts sufficient to support the general conclusion of the referee.

[1] The Bankruptcy Act (section 14b) provides that:

"The judge shall * * * discharge the applicant unless he has * * * (3) obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person."

The specifications, which, in the referee's opinion, should be sustained, are based upon obtaining money or property upon credit upon a materially false statement in writing made to certain named creditors for the purpose of obtaining credit from such persons, in that during the month of March, 1912, the applicant made a written statement to the commercial agency of R. G. Dun & Co., which is alleged to be materially false in stating that his merchandise at cost amounted to $8,227, that his accounts receivable at actual value amounted to $6,440, that his liabilities on accounts amounted to $1,430, and that he had a surplus over all his liabilities of $16,348. The act provides that the judge shall discharge the applicant unless he has done one or more of the prohibited things. The burden is therefore upon the objector to sustain the allegations in his specifications of objection.

[2] It appears from an examination of the evidence that it was sufficient to justify the referee in finding that the statement in writing made to Dun & Co. was materially false, and also in the conclusion that:

"His [the bankrupt's] attempt to explain his conduct in giving to his creditors a false statement of his financial condition in order to obtain credit is so flagrantly evasive and false that the referee cannot treat his testimony with any degree of seriousness whatever."

The testimony also justifies the conclusion that the statement was made for the purpose of obtaining credit from the bankrupt's creditors. The bankrupt testified as follows:

"Q. I want to direct your attention to the statement which you made to the mercantile agency of R. G. Dun & Co. during March, 1912, which is a

signed statement as per inventory of March 9, 1912, as follows: [Here follows the statement of the assets, liabilities, sales, etc., signed by the bankrupt.] That statement was given by you? A. Yes. Q. And you knew it was given for the purpose of getting credit? A. Yes. Q. And you wanted R. G. Dun & Co. to give that information to anybody who would inquire about your standing, so you could get credit for merchandise you would buy during the year 1912. That is true, isn't it? A. Yes. Q. And the purpose of giving this financial statement to R. G. Dun & Co. was to enable them to distribute it among your different creditors whenever they would ask for information. You knew that, didn't you? A. Yes."

The testimony shows that the information contained in the statement was given to the firm of Cross, Engel & Co., in a report of the bankrupt from the Dun agency in September, 1912, and that, relying upon that report, their creditman authorized the firm's salesman to sell goods to the bankrupt, and that in accordance with such instructions the goods were sold and shipped to him during October and November, 1912, amounting to $703.75. The purpose of giving this statement, the bankrupt's own testimony shows, was not merely to obtain a rating, but to obtain credit through R. G. Dun & Co. The bankrupt made R. G. Dun & Co. his duly authorized agent to circulate the falsehoods concerning his financial condition among his different creditors whenever they should ask for information, and the case therefore falls directly within the terms of section 14b of the Bankruptcy Act. The Engel transaction is sufficient upon that point to sustain the recommendations of the referee.

The exceptions will therefore be dismissed, and the report confirmed.

In re DUBOSKY.

(District Court, E. D. Pennsylvania. February 15, 1916.)

No. 4919.

COURTS ⟸116(1)—RECORDS—CORRECTION.

Where a mechanic's lien creditor of a bankrupt was entitled to priority over a judgment creditor, if there was filed of record in time an affidavit of service of notice of the filing of the lien, and the mechanic's lien creditor claimed that the record of the state court did not declare the facts and asked the referee in bankruptcy to make a new record to accord with the parol proofs, the referee could not correct the record of the state court, but the claimant was entitled to an opportunity to apply to the state court to correct the records.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 369; Dec. Dig. ⟸116(1).]

In Bankruptcy. In the matter of the bankruptcy of Anthony Dubosky. On petition for review of order of referee denying priority to a mechanic's lien claimant. Petition allowed, and order revoked, with instructions.

Arthur L. Shay, of Pottsville, Pa., for petitioner.

Charles E. Berger and James B. Reilly, both of Pottsville, Pa., opposed.

DICKINSON, District Judge. The fact part of this controversy is soon told. The controversy is between a judgment and a mechanic's lien creditor of the bankrupt. The referee has found the mechanic's lien claim to have priority, if its lien has not been lost. It is claimed it has been lost by (among other things) the failure to file "of record" in time an affidavit of the service of notice of the filing of the lien, as required by the act of assembly. The claimant concedes such failure to be fatal to its claim. It asserts, however, that the affidavit was filed within the time limited by law.

The act of assembly of June 4, 1901 (P. L. 431), requires the claimant to give notice of the filing of his lien and prescribes the form of the notice. It further provides that within one month of the filing of the lien he "shall file of record in said proceedings an affidavit of the fact and manner of such service." Under the concessions made it is obvious that the only question before us is: Was the required affidavit filed of record? It is just as obvious that the question can only be answered by an appeal to the record. Instead of an appeal to the record as it is, the mechanic's lien creditor asked the referee to make a new record to accord with the parol proofs of what the record should be. This the referee declined to do. In this he was correct.

Inasmuch, however, as it is averred the filing date on the affidavit is an error, and that the affidavit was filed of record within the required limit of time, we think an opportunity should be given the claimant to apply to the court whose record it is to amend it so as to conform to the fact. Comity, if nothing else, would dissuade one court from finding that the record of another court was not of the verity which all records import. There would be the highest impropriety in even discussing what amendments another court should make of its records, or what measure of proof would satisfy it that an error had been made. It might be that it would be less or more exacting than the discussion before the referee suggests.

The petition for review is allowed, and the order disallowing the mechanic's lien claim is revoked, with instructions to make such order in the premises in accordance with this opinion as the referee may deem proper.

In re LAMPITOE.

(District Court, S. D. New York. April 12, 1916.)

ALIENS ⟸61—NATURALIZATION—"WHITE PERSON."

The son of a Filipino mother and a father who was half Filipino and half Spanish is not a "white person," and is not entitled to naturalization, even though he had served one full term in the Navy and was serving another.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 119–122; Dec. Dig. ⟸61.

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

Petition for naturalization by one Lampitoe. Petition denied.

The petitioner is the son of a Filipino mother and of a father whose mother was a Filipino and whose father was a full-blooded Spaniard, resident in Manila. The petitioner has served one full term of enlistment in the United States Navy and is now serving another; he is in every way qualified for citizenship, unless his race prevents.

LEARNED HAND, District Judge. The case falls exactly within In re Alverto, 198 Fed. 688, and needs no other consideration. There may be doubt about such cases as In re Camille (C. C.) 6 Fed. 256, or In re Knight, 171 Fed. 299; but where the Malay blood predominates it would be a perversion of language to say that the descendant is a "white person." Certainly any white ancestor, no matter how remote, does not make all his descendants white.

Petition denied.

THE BENJAMIN NOBLE.

(District Court, E. D. Michigan, S. D. February 23, 1916.)

1. SHIPPING ⟸137—LIMITATION OF LIABILITY—DUE CARE IN SELECTION OF OFFICERS.

That the captain of a vessel for the voyage on which she was lost had never before served in that capacity is not of itself sufficient to charge the owner with negligence which will debar him from the right to limit his liability.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 492; Dec. Dig. ⟸137.]

2. SHIPPING ⟸209(8)—LOSS OF CARGO—LIABILITY OF VESSEL—BURDEN OF PROOF.

Proof that a cargo was delivered on board in good condition, and that it was not delivered to the consignee, casts on the owner of the vessel the burden of proof to show that the loss was within one of the exceptions for which it is relieved from liability under the bill of lading or the Harter Act.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 652; Dec. Dig. ⟸209(3).]

3. SHIPPING ⟸137—LIABILITY FOR LOSS OF CARGO—"SEAWORTHINESS."

The question of the seaworthiness of a vessel includes the question of whether or not she was overloaded.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 492; Dec. Dig. ⟸137.]

4. SHIPPING ⊂=209(3)—LIABILITY FOR LOSS OF CARGO—SEAWORTHINESS.
On an issue as to the liability of a shipowner for loss of cargo, any doubt as to the seaworthiness of the vessel must be resolved in favor of the shipper.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 1652; Dec. Dig. ⊂=209(3).]

5. SHIPPING ⊂=138—LIMITATION OF LIABILITY—UNSEAWORTHINESS—OVERLOADING.
The steamer Noble left Conneaut, Ohio, for Superior, Wis., in April, for her first trip of the season, with a cargo of 2,951 tons of steel rails, and was lost in the went end of Lake Superior in a gale with all on board. She was a steel vessel, 5 years old, built for carrying pulp wood, and having bulwarks with gates opening outward. She was designed for a draft of 14½ feet when loaded, but she was loaded on this voyage to a depth of 18 feet and almost "decks to," having a freeboard of no more than 2 inches. She had never before carried so heavy a cargo, except perhaps on two occasions in the summer season. There were other vessels in the gale, some larger and some smaller, but none were lost. *Held*, that in view of the season, when gales such as the one encountered were reasonably to be anticipated, the Noble was overloaded and for that reason unseaworthy for the voyage, and that her owner, which was responsible for the overloading, was not entitled to a limitation of liability.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 492; Dec. Dig. ⊂=138.]

6. SHIPPING ⊂=138—LOSS OF CARGO—SEAWORTHINESS—OVERLOADING.
In determining the safe loading of a vessel as to weight of cargo, the guiding thing should be her draft.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 492; Dec. Dig. ⊂=138.]

7. SHIPPING ⊂=137—LIMITATION OF LIABILITY—OVERLOADING VESSEL—CUSTOM.
A shipowner is not relieved from responsibility for overloading his vessel to the point which renders her unseaworthy by the fact that other owners habitually do the same thing.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 492; Dec. Dig. ⊂=137.]

8. SHIPPING ⊂=74—CORPORATION OWNER—REPRESENTATION BY MANAGING AGENT.
A corporation shipowner is responsible for the acts of its managing agent done in his capacity as such agent.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 320; Dec. Dig. ⊂=74.]

In Admiralty. In the matter of the petition of the Capitol Transportation Company, as owner of the steamer Benjamin Noble, for limitation of liability. Claim of the Cambria Steel Company, cargo owner. Limitation denied, and decree for claimant.

Sherwin A. Hill and Carl V. Essery, both of Detroit, Mich., and Francis S. Laws, of Philadelphia, Pa., for claimant.

George L. Canfield, of Detroit, Mich., and Frank S. Masten and Fred L. Leckie, both of Cleveland, Ohio, for petitioner.

TUTTLE, District Judge. The steamer Benjamin Noble was built at the Detroit Shipbuilding Company's plant in 1909, and was 240 feet between perpendiculars, 255 feet over all, 42 feet beam, and 18 feet

molded depth. She was built for the so-called "canal trade" and for the particular trade of carrying pulp wood. The maximum draft for the Welland Canal, through which she was intended to operate, is 14–6. She had a speed of 10¼ miles an hour. She was a steel boat with steel houses and wooden hatch covers. She was what is known as very sheer, in that her deck raised very rapidly as you went forward from No. 5 hatch, being about 6 feet higher at her extreme bow than at the lowest point in her deck. Her deck was also crowned, being 10 inches higher in the middle of the beam than at the edge of the deck. It was intended that she would carry a large portion of her cargo of pulp wood on deck, and her decks were correspondingly well and strongly constructed. She had bulwarks, and at intervals there were gates swinging outward for the purpose of discharging water which might come on deck. She engaged in trade on the Great Lakes in the year 1909, and each year thereafter until the unfortunate trip in question, when in April, 1914, with the 20 men constituting her crew, she was lost on Upper Superior.

During her entire existence she was owned by the Capitol Transportation Company and was managed by its agent, Mr. Francombe, of Detroit, a man of many years' experience on the Lakes, as a chief engineer on steamboats, and also of many years' experience as a managing agent of boats on the Great Lakes. The local vessel agent at Cleveland for the Noble was Mitchell & Co., and she had local vessel agents in other lake ports.

Prior to the opening of navigation in the spring of 1914, the Cambria Steel Company of Pittsburgh, Pa., communicated with Hanna & Co. of Cleveland, who are brokers for freight business, and advised them that they had 3,000 tons of steel rails which they wished to ship from Conneaut, Ohio, to Superior, Wis., as soon as navigation opened in the spring. Thereupon, a representative of Hanna & Co. called up Mitchell & Co. and asked them whether they could furnish a boat to carry 3,000 tons of steel rails. Mitchell & Co. communicated with Mr. Francombe, and a contract was made between the Capitol Transportation Company, represented by Mr. Francome, and the Cambria Steel Company, represented by Hanna & Co., for the transporting of these rails on the Noble at a rate of 80 cents per ton.

[1] Among other duties intrusted to Mr. Francombe as the managing agent of the Noble was the duty of selecting a master, and he selected for the season of 1914 Capt. Eisenhardt, who had been employed on boats somewhat similar to the Noble. While he had never been master of a ship, he had many years of experience in all of the minor positions, at the forward end of the ship, and he was well qualified for advancement from mate to master. He was not only recommended at this time to Mr. Francombe, but in advance of the season of 1913 he had made application to Mr. Francombe for a position and was at that time well recommended, so no fault can be found with the Capitol Transportation Company because of Mr. Francombe's selection of a master. To say that vessel owners were negligent because they selected a man who had never before been a master would make it almost impossible for men to advance in their work, and secure ulti-

mately the highest position on a ship. On the other hand, in considering this case and the relations of the parties and the duties which the owners of the ship owed to the master, crew, and cargo, it should be borne in mind that the master was for the first time to take command of a ship, and that he had never served upon the Noble in any capacity. So we start in with this well-built and seaworthy ship (as to condition of hull and construction) at Conneaut, with a master and crew qualified for their positions; with the owner of the ship having made a personal contract with the owner of the cargo to carry 3,000 tons of steel rails on the first trip of the season from Conneaut to Superior.

There is nothing in the situation to show that the Cambria Steel Company or any of its agents undertook in any way to select the ship. They had a cargo which they wished to transport, and they conveyed this information to those engaged in the trade of carrying on the Lakes. The owners of the Noble, learning of the freight to be carried, undertook with the owners of the cargo to transport it and offered and contracted for the Noble as a suitable carrier.

The steel rails were brought to Conneaut in gondola cars. The captain was in charge of his ship. The men on the dock began to unload the rails from the cars to the boat by means of whirleys. While that work continued, the captain of the Noble called up Mr. Mitchell, of Mitchell & Co., each day at 11 o'clock, to let him know how the work was progressing. On Friday, April 17, 1914, Capt. Eisenhardt from Conneaut telegraphed to Mr. Francombe, the managing owner at Detroit, as follows: "Will be loaded Saturday noon. Mitchell wants 3,000 tons to go if possible. Please advise." To this telegram Mr. Francombe promptly replied: "Think 3,000 tons too much. Best take all you possibly can." Capt. Eisenhardt took 2,951 gross tons of the rails, leaving one carload, which would be about 50 tons.

The Noble had wintered at Cleveland and was only partially inspected at Cleveland before leaving for Conneaut, arrangements having been made that the spring inspection would be completed at Detroit, in order to avoid delay at Cleveland.

The Noble left Conneaut Saturday, April 18th, reaching Detroit shortly after noon on Sunday, April 19th. She remained at the dock in Detroit until Thursday morning, April 23d, during which time her inspection was completed, and repairs were made to her steering gear. While she was at Detroit, Mr. Francombe was aboard several times, looking over the ship and cargo, and talking with the captain, and he was familiar with the entire situation.

On Thursday, April 23d, she continued her up-bound trip, and we hear of her next at the Soo, where she was locked through the Poe Lock late Saturday afternoon, April 25th. We next hear of her at 2 o'clock on the afternoon of Monday, April 27th, somewhere about 20 miles off Portage Canal. This would make her about a day late, considering the time she passed the Soo, provided she had at all times continued at normal speed on her course. Nothing has been shown to explain why she should have been delayed the 24 hours. However, that is not a matter of any importance in this controversy, because when

seen at 2 o'clock on the afternoon of Monday, April 27th, she was continuing on her course, evidently at her usual speed. Possibly it can be accounted for, in this, that her barometer may have shown some evidence of the storm that was approaching or some other storm, and she may have remained anchored until such time as she thought the weather conditions were favorable. No one is able to identify the Noble as having been seen thereafter.

As to what occurred thereafter, we are compelled to rely upon an accumulation of evidence from various outside sources for our conclusions, and, of necessity, the particular things which happened to the Noble thereafter are shrouded in some mystery and doubt. We do know that a heavy storm came on from the northeast, beginning at about 3 o'clock in the afternoon of April 27th, gradually increasing in severity until the wind had reached its maximum velocity, about 7 o'clock in the morning of the 28th, continued during the entire day of the 28th, and that on Wednesday morning, April 29th, pieces of hatch covers, a piece of oar, cordage, and a life raft from the Noble were washed ashore at Minnesota Point, between the Duluth and Superior entrances, giving unmistakable evidence that the Noble had been lost. None of the bodies of the 20 men constituting the crew have ever been found. No additional portions of the wreckage have ever been found, except on Thursday, April 30th, when the life-saving crew at Minnesota Point worked with their boat back and forth over the west end of Lake Superior and in their search found, at a point about 3 miles off the north shore and about 10 miles to the eastward of Minnesota Point, three pieces of wreckage, viz., a hook with a piece of wood attached to it, which evidently had come out of one of the cabins, a piece of the bridge, and a piece of a strong back from one of the hatches.

I should not want to be understood as feeling sufficiently certain about the exact time or place that the Noble went down, to make a positive finding in that regard. No one of the particular bits of evidence offered are conclusive; but, taking all of them together, we can be reasonably certain as to the time and locality in which the final misfortune came. The wreckage is of some assistance in this determination. There is a backset to the water when the wind is sufficiently high to raise the water at Minnesota Point, and that backset is not so great while the wind continues as it is when the wind goes down, and while the wind continues that backset is probably below the surface of the water rather than at the surface. I doubt that the three pieces of wreckage found on April 30th had ever been down to the beach at Minnesota Point. I think the wreck occurred somewhere to the eastward of where this wreckage was picked up on the 30th. Undoubtedly, the wreckage which came ashore on the morning of the 29th at Minnesota Point left the Noble at the same time and place as the wreckage which was found on the 30th, 10 miles down the Lake. The fact that neither the lifeboats from the Noble nor any of the bodies of the crew were found leads me to think that the Noble went down quickly and while the men were inside. No wreckage was found except the things that wind and water would knock off. I am satisfied

the boat was lost some considerable time before the wreckage came ashore at Minnesota Point.

What was seen by the different boats is not out of harmony with what little is told us by the wreckage. The mate and wheelsman of the Lakeport, going to Duluth, saw some boat coming out and saw it cross the course of the Lakeport some three or four miles ahead, turn northward, and then lost the lights about a quarter after 4 in the morning of the 28th. They made an entry of that fact in the log-book, and I think the boat they saw was the Noble. The place at which they saw the boat disappear off Two Harbors would not be inconsistent with the wreckage.

We can be reasonably positive from the testimony that at 2 o'clock in the afternoon of Monday the Noble was 20 miles off Portage Canal. This was some 13 or 14 hours, at her speed, out from Duluth; so we would expect to see the steamer off Two Harbors at about this time.

Again, we have the testimony of the lighthouse keepers at Two Harbors. I feel confident that the boat they saw was the Noble coming out from toward Duluth and evidently trying to make Two Harbors. She was not approaching the harbor in such a way as the lighthouse keeper thought was safe and prudent; so he blew the fog whistle, and she evidently accepted that as wise advice because she turned out into the lake. I have no way of knowing that this was the Noble, except that she was in that locality, and all other boats have explained that they were not there.

The court is grateful to counsel for the effort exerted to advise the court of everything that occurred that night in that end of the lake, so far as can be learned from entrances, clearances, and by the testimony of witnesses from all of the ships that might be in that locality at that particular time.

I think the following is undoubtedly what occurred: That passing on her course to Superior and getting into this storm, and having passed a short distance beyond abreast of Two Harbors, the Noble decided it would be safer to enter Two Harbors and seek protection from the wind and sea at that place, rather than to continue on her course and try to enter Duluth; that she could not have gone far beyond Two Harbors, because time did not permit her to have reached the immediate vicinity of Duluth and then come back to Two Harbors; that she turned and came back near the entrance of Two Harbors, and, hearing the warning signal from Two Harbors, she turned and went out into the Lake; that, having failed in the first effort to make Two Harbors, she turned and again went down the lake towards Duluth, rather than run into the wind or in the trough of the sea; and that, having navigated in this westerly direction for a short distance, she came back again hoping to make the entrance at Two Harbors by a better approach at this time; and that she was the boat seen coming to the eastward, crossing astern of the Morrell and ahead of the Lakeport; and that then having turned to the northward again, seeking entrance at Two Harbors, she foundered and sank at the point seen by the mate and wheelsman on the Lakeport.

Again, we are assisted somewhat in reaching that conclusion by the

velocities of the wind. I am satisfied that all the witnesses on this phase of the case have tried to tell the court as best they could the velocity of the wind and the force of the sea. There is great opportunity for these witnesses to honestly differ in their estimates. The safest guide for the court in this case is the government record, interpreted in the light of the testimony of the witnesses who have observed the effect of the wind.

The contentions of the respective parties in this case are in harmony to the effect that, whatever may have been the proximate cause of the disaster, the wind and the sea had something to do with it. No one contends that if there had been no sea or wind this boat might not have gone safely across Lake Superior and into her harbor at either the Duluth or the Superior entrance. So for the purpose of trying to find when the wind became severe, we look at the records of the Weather Bureau for the velocities at Duluth, and, having in mind the testimony of the witnesses that wind is not accounted a gale until it reaches 40 miles an hour, we find the first recorded average hourly velocity of wind reaching 40 miles velocity is from 5 to 6 o'clock on the morning of April 28th. Of course, this is the velocity at Duluth, and the wind was from the northeast, so that the high velocity would have reached opposite Two Harbors, which is 22 miles to the eastward, at least half an hour earlier than at Duluth; so that, about the time the lights were seen by the Lakeport to disappear from the ship opposite Two Harbors, we find that the wind had reached this high velocity. The storm had been in the making long enough so there would be some heavy sea, and it did not depend entirely on the wind at that particular time.

The Noble was lost, ship, cargo, and crew. The owners of the Noble have filed this petition for limitation of liability, and the cargo appears here as a claimant. The Cambria Steel Company had secured insurance on the cargo from the Insurance Company of North America. I have admitted evidence in regard to that insurance, and the claim made by the cargo for the insurance. The claimant in this case is asking to recover against the owners of the ship on the theory that the ship was unseaworthy because she was overloaded. It is the contention of the owners of the Noble, the petitioners, that the Cambria Steel Company had recovered the insurance money on the theory and on the claim that the loss occurred because of the perils of the sea. I admitted the proof relative to the insurance in order that I might determine whether or not that had been done. The thing for which the owners of the vessel are liable to the cargo and the things against which the insurance company insured are different. Of course, the law would not be so unjust as to permit a claimant to come into court and recover on the theory that it was the negligence of the owners in not having a seaworthy ship, and at the same time recover from the insurance company on the ground that the loss occurred because of the perils of the sea. The two claims would be entirely inconsistent, and, in order that such a thing might not occur, I admitted that proof. It appears that no such claim has been made, and no money paid on any such claim or theory. The cargo and insurance company have protected themselves against any such situation as that, and at the same time have treated

each other with business fairness and honesty. The insurers have paid the money to the owners of the cargo under a proper arrangement and in order that their relations with their clients and customers might not be unpleasant. There is nothing in the agreement between the insurance company and the owners of the cargo in any way inconsistent with the claim here made. So having ascertained that fact, and having so found, there is nothing about the insurance which ought in any way to influence this court or affect the ultimate findings in the case.

[2] The claimants having shown that they made this contract directly with the owners of the vessel, to carry these rails, and that they were actually delivered in good order to the carrier, and that they received a bill of lading and receipt therefor, and then having proven that the cargo never reached its destination and was never delivered to the consignee, the claimant could then have rested its case, and the burden would have shifted to the petitioner in this case to prove the competency of its crew, the seaworthiness of its vessel, and that the loss occurred within one of the exceptions, such as perils of the sea, for which it is relieved of liability under the bill of lading and the so-called Harter Act (Act Cong. Feb. 13, 1893, c. 105, 27 Stat. 445 [Comp. St. 1913, §§ 8029–8035]).

The law implies on the part of every carrier, whether common or special, a warranty of seaworthiness in the absence of express agreement, and the burden of proving seaworthiness is upon the carrier.

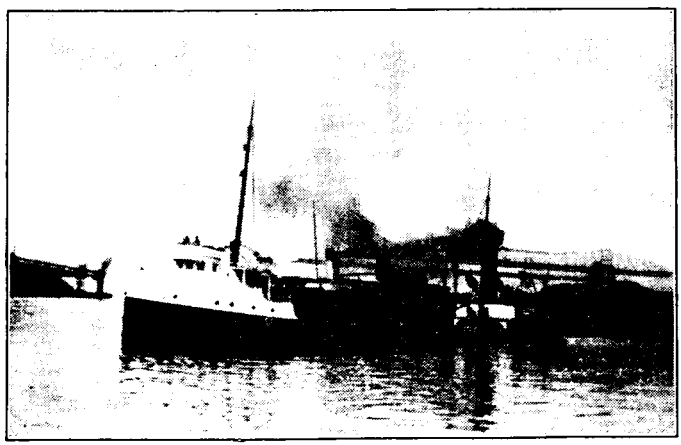
"Such is the implied contract where the contrary does not appear." Work v. Leathers, 97 U. S. 379–380, 24 L. Ed. 1012.

See the recent case of The Fitzgerald, 212 Fed. 678, 129 C. C. A. 214 (C. C. A. Sixth Circuit, 1914), decided by the Circuit Court of Appeals of this circuit, in which the authorities upon seaworthiness and the burden resting upon the carrier are carefully discussed. See, also, Benner Line v. Pendleton et al., 217 Fed. 497, 133 C. C. A. 349 (C. C. A. Second Circuit, 1914); The Rappahannock, 184 Fed. 291, 107 C. C. A. 74; C. W. Elphicke, 122 Fed. 439, 58 C. C. A. 421; The Presque Isle (D. C.) 140 Fed. 202; Edwin I. Morrison, 153 U. S. 199, 211, 14 Sup. Ct. 823, 38 L. Ed. 688; The Carib Prince, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181; The Caledonia, 157 U. S. 124, 15 Sup. Ct. 537, 39 L. Ed. 644; The Lillie Hamilton (D. C.) 18 Fed. 327; Neilson v. Coal Company, 122 Fed. 617, 60 C. C. A. 175; Sumner v. Caswell (D. C.) 20 Fed. 249.

[3-5] Seaworthiness should include the question of whether or not the vessel was overloaded. In the actual trial of the case, and in order to avoid confusion, I requested and directed the claimant to put in its full case, that then the petitioners put in their case, and that then the claimant put in its rebuttal, and that course was pursued. While the law places the burden of proving seaworthiness upon the petitioner, in a case of this kind it does not make very much difference. The court, after hearing the large number of witnesses which I have heard, will have an opinion one way or the other upon the subject, and I have a decided opinion in this case. If there was any doubt upon the question of seaworthiness, such doubt must be resolved in favor of the

shipper. See The Fitzgerald, supra. See, also, The Wildcroft, 201 U. S. 378, 389, 26 Sup. Ct. 467, 469, 50 L. Ed. 794; The Edwin I. Morrison, supra. But there can be no question of doubt in this case, as the shipper by direct and convincing evidence has proved the unseaworthiness of the carrier.

It would be impossible in this case for a court to feel positive about the depth to which the ship was loaded or ought to be loaded, if it was a question of an inch or half an inch. The issue is not such a narrow one, and I reach the conclusion and make the finding that this boat was overloaded. I will not stop with that finding, but will do the best I can to reach a conclusion as to the depth she was loaded, and as to how deep she could have been loaded without being unseaworthy. First, as to the depth to which she was loaded. She was almost "decks to." The witnesses who saw her at Conneaut, almost all, placed her down practically "decks to." While I recognize the danger of relying on witnesses who are not seafaring men, yet those men who spend their lives working there on those docks, loading these vessels day in and day out, come to have almost unconsciously a good eye for judging a proper trim and load. At the same time, I must keep in mind that they did not have any particular reason for observing it; it was not a part of their duty. If that was the only testimony in the case, I would feel some hesitancy about following it. Some saw her when she was moving out. Her movement might affect her draft. A witness might look at her and say she had eight inches of freeboard, and he might look at a place where there was more than the minimum freeboard. In other words, there is more chance for honest witnesses to put her freeboard too much, rather than the other way, although she might be listed, and make her freeboard on the lower side appear less than it actually was. One witness at Conneaut took a kodak picture of her as she was leaving the harbor, and this shows her "decks to" as nearly as I can determine. The picture is reproduced in the following cut:



The electrician and his companion at Detroit, who observed her as she was lying at the dock, did not look with any degree of accuracy. They were entirely confused about the gates and scuppers, and at the same time I think they are honest witnesses. They saw water on the deck, but that is about all I can gather from their testimony. They thought the water came in through the gates, but it is plain from their own testimony that it must have come through the scupper. I am convinced that the water came on deck while the Noble was lying at Detroit. Whether she was listed, or how high the waves were, I do not know; but it leads me to think she was loaded close down to the water's edge. Other witnesses who were casual observers at Detroit estimate her decks as being higher. Perhaps they looked at a place where the freeboard was greater than the minimum. As soon as you go further forward on the ship there would be more freeboard. The water came on, of course, only at the lowest place, while at the dock in Detroit. The government inspector was there, but he was only a casual observer so far as her draft was concerned, or so far as her cargo was concerned. I was glad to hear him say that if he had reached the conclusion that she was not seaworthy he would not have permitted her to leave the dock. He had never inspected a boat before with cargo in her, and it was not the cargo or draft of ships he was there to look after. He had not had experience in matters of that kind, and expressly said so. He was equally frank in saying he did not think he could tell when a boat was overloaded. The testimony as to her draft at Detroit is even more unsatisfactory than that at Conneaut, but it should be considered by the court along with all the rest. We next hear of her draft at the Soo, and there for the first time we have her draft taken by men who are in the business of taking drafts. The only men shown to have looked at her for the purpose of taking her draft were the government officials at the Soo.

[6] Speaking from the cases I have heard, and from such knowledge as I have regarding the loading of vessels, I have never known of a boat being loaded with an eye so solely to the amount of the cargo being put on her, as the Noble. The thing which is generally considered is the draft of the boat. The thing which the owners' agent and the master were talking about in loading the Noble was tons of cargo. What a captain usually does when he wants to know whether the ship is being overloaded, or not, is to watch her draft. If the owners want to advise a new captain, they tell him the safe draft. There are liable to be grave mistakes if anything else determines. Owners of freight, owners of vessels, and members of the crew may be anxious to carry large cargoes. By intention or mistake there may be errors as to the tonnage. The guiding thing ought to be the draft, rather than the cargo.

We come to the Soo, and there find witnesses who are employed by the government whose duty it is to watch the draft of vessels. They are experienced in doing that very work, and that is what they were looking at the Noble for, and they make a record of it for the government. We have the record showing that the Noble drew 18–3 aft. A government employé testified that her forward draft was 18–1, but

no record was made of that and there is more opportunity for mistakes on that account. While he was more competent to judge than the men who saw her at Detroit, I do not rely upon that so much as I would the government employé whose sole duty it was to record her draft, and did record her draft aft.

I have examined petitioner's records and bills of lading. Some of the loads she had carried were combination loads of pulp wood and steel rails. The computation which is submitted to me is based on the theory that a cord of pulp wood will weigh 2½ tons. I do not know how accurate that is, and I do not think I can rely on those figures. No record has been shown to me in which she ever carried a load of steel rails which weighed any more than this load.

It is called to my attention that she had one load of 2,935 gross tons of steel rails. This still falls 16 tons short of the load she had on the trip in question, and that load was carried on June 28, 1912. One load of April 19, 1911, was called to my attention, in which they compute the total tonnage as 2,916, but 2,035 tons of this was coal, and coal is measured in short tons. If I am to take short tons, then the Noble had on the trip in question 3,246 short tons, which would exceed the cargo called to my attention by 330 tons.

These bills of lading are not claimed to be accurate; sometimes the figures have been obtained from the railroad weights, and some of them are boat weights. The load in question was as heavy a load as she ever carried, if not the heaviest. All of the other loads which came anywhere near being as heavy as this one were carried during the months of June, July, and August, which are freest from storms.

Again, taking the recorded draft of this particular boat at the Soo, I find she was never recorded with a deeper draft than on this particular occasion, and never, with the exception of two other trips, was she recorded with as deep a draft as 18–3. I have before me the record of all of her trips through the Soo Locks. There is one on June 13th from South Chicago to Ft. William, showing a draft of 18–3 aft, and on June 30th from South Chicago to Ft. William a draft of 18–3 aft. All the others show a lighter draft. So, again, the records of draft at the Soo check up and coincide with the conclusion reached from the bills of lading, that she had never before carried any heavier load, and that the only occasion when she did carry loads substantially as heavy as this were during the midsummer months.

Again, to check up the matter from another source, the government makes a record in short tons of the freightage carried through the Locks, and they get this by asking the captain how many tons he has aboard. In this particular case we know with reasonable certainty how many tons this boat had on, which was 2,951 long tons, or 3,246 net or short tons. Now, examining the records of the steamer Noble for her passages at the Soo, we find that never before did she pass through the Soo Locks with a load recorded so high as 3,246 net tons. So, whether I try to check this up by the witnesses who have seen this boat and have tried to tell me how deep she was in the water, or whether I look at the kodak picture taken as she was leaving the dock at Conneaut, or whether I examine the petitioner's own record, from

their own office, as to the tonnage she has carried in years past, or whether I take the government records for the draft, or the government records for the tonnage, it all leads to the same conclusions, and helps me to feel satisfied that the result obtained is correct, viz., that she was loaded to the maximum depth she had ever been loaded, and that she was loaded almost to the "decks to" point. In order to place on the record just the best estimate I can give from the testimony, and wishing to be understood, however, that when it comes to the nicety of an inch, I am not certain, I would estimate her draft, when she left Conneaut, at 2 inches of mean freeboard or a mean draft of 17–10.

It is not sufficient simply to determine how deep she was loaded, but it is also necessary for the court to reach a conclusion as to whether or not with such a load, such a draft, such a freeboard, and such a ship, at that season of the year, she was seaworthy. Did the master and managing agent have reason to anticipate that she would meet with the gale, and that if she did the loss and damage would result? It involves a consideration of what the wind and sea were likely to be. I have in mind, not only the ship that is undertaking the voyage, but the kind and quantity of cargo, the length of the trip, the waters to be passed over, and the winds and seas likely to be experienced.

The cargo was destined for the head of Lake Superior, and this was the first trip in the year. The records show that in the past 10 years there have been 33 so-called gales (a wind of 40 miles or more per hour) at the west end of Lake Superior during the month of April. It is urged that many of these occur early in April, and before navigation is opened. The records show that the last of April has many gales. If the record had been continued into the month of May, it would have shown a good many gales occurring in May. It is the experience of men on the Lakes that the month of May furnishes some high winds on Lake Superior. This was a heavy storm. There is no question about it. Severe storms occur and are to be expected on Lake Superior at that season of the year. Some of the witnesses, it is true, have said that this was more severe than any other storm in many years; but the testimony of the men from the boats out in the sea that night leads me to think that the public records fairly show the extent of that storm and the velocity of the wind. Of course, the longer the wind blows the heavier the sea gets, if it continues from the same direction. As already found, the Noble was lost early in the storm, and the storm during the daytime on Tuesday, the 28th, had nothing to do with the disaster. I feel very certain that the witnesses who have said that this was the worst storm they had seen in many years, and who described the extent of that storm, were describing what occurred on the 28th. The picture which they have in their minds is naturally the maximum of the storm. It is what they saw when this high wind had been blowing a long time that gave them the picture and has given character to their testimony.

Two mates from boats in the storm stated that they did not call their captains (the customary practice in severe weather); that they did not change the course of their boats on account of the storm. So the conclusion which I reach with reference to the wind and sea is that,

while it was a very heavy wind and a very heavy sea, the weather reports are not in conflict with the testimony of the oral witnesses, and that such a storm was not unusual, but was to be expected in that locality at that season of the year. The Noble, her master and owners, should have anticipated all these things including velocity and direction of the wind and the resulting sea.

Now, was the Noble seaworthy when loaded down so that her decks were within two inches of the water? Upon this branch of the case, petitioner has called many witnesses, masters of experience, and the court gladly joins with counsel in what has been said about the courage and sturdy qualities of these men. I appreciate the responsibility which I am taking when I find contrary to what these men say is seaworthy. After listening to all of the testimony, I must make my own findings and reach my own conclusions. I must do it from the testimony. At the same time, we cannot help but be impressed with certain things. I think it is only fair to the record that I express myself freely. They are brave men, but they are afraid of their owners. Take the men on the ship; they are not afraid of the elements, but they are afraid of the captain. It is not the fault of the owners, and it is not the fault of the captains; but that is ship life. That rigid discipline is necessary. It has grown up with all of these years of doing things in that way. Of all the men who come into court, I think none are more brave than the sailors, and at the same time none stand in greater fear of their boss. Undoubtedly, it is a virtue rather than a fault. In any event, it is the situation. It applies as much to the relations between the master and the managing agent (or shore captains) as it does to the orders from captain to mate. That fear, boat discipline, or whatever name it may be known by, unfortunately follows them into the courtroom, and the wishes of the boss are often more controlling than the oath. The sailor does not dare tell what occurs without permission of the captain, and the captain would not think of making a statement before communicating with the office. So long as this condition exists, it is necessary for courts to have it in mind in weighing testimony, particularly where only opinions of witnesses are to be considered. I am satisfied that this class of boats are often overloaded. I refer particularly to this class of small boats with bulwarks. The scuppers would discharge the water for washing down the decks; but, when it comes to a storm and the waves coming over the top of the bulwarks, the amount of water the scuppers could carry off is not worth figuring on, and the gates are almost as deficient even if they were open. The gates open outward, the intention being that as the wind gets fresh and the sea gets high and the boat ships water, as she rolls to the starboard side the water will rush to the starboard side of the ship, and this gate which is hung at the top will swing out and the water run out, and that, when she swings to port, the water will rush over to the port side, and the gate will swing to port and let the water run out that way. That is the theory.

This boat, as stated, was built for the canal trade, 14½-foot draft. The blueprint made of her by the man who designed her shows 14½-foot draft when loaded. There is testimony to indicate that as the

ideal draft. Any draft which puts this boat down so that she cannot discharge the water from her decks makes her dangerous and unseaworthy. If she gets out in any sea that is worthy of consideration at all (any sea that can be called a gale, like any one of these 33 gales in the month of April on the west end of Lake Superior in the last 10 years), she is going to ship water in immense quantities, and she has got to discharge it if she continues to float. It will readily be seen that as soon as you put her down with 2 inches of freeboard or even 10 inches of freeboard, that as soon as she rolls to starboard and the water tries to be discharged from the starboard side of the ship, the starboard bulwarks are down in the water, and the water holds the gates shut, and the water cannot be discharged from her decks; the same thing results when she rolls to port. So she might just as well have bulwarks without gates as with them, and the gates in my judgment are not sufficient in size to carry off the water that would be shipped on her if you were going to put her down even to the maximum amount of freeboard described by any witness in this case. If they are going to load a boat like this down anywhere near "decks to," she certainly ought not to have any bulwarks. She was built with bulwarks because she was intended to carry pulp wood with a cargo upon decks, and the pulp wood, piled many feet high on the decks, would work along with the bulwarks to keep her from shipping seas. For the draft she was intended, 14½ feet, and with the cargo she was intended, pulp wood, the bulwarks were all right and proper; but the bulwarks are not proper and of no assistance and are an absolute detriment to her when loaded with her decks near to the water. No use has been ascribed to them, and every witness who expressed himself upon that subject states that they were a detriment rather than a help. Again, not wishing to be understood as being able to be accurate, when I come to the exact figures, but in order that this record may show as accurately as I can, I fix the very least freeboard that this vessel ought to have, if she was to encounter a gale (and by that I mean 40-mile wind, and the sea that goes with it) at 18 inches of freeboard. I am not undertaking to decide what is proper freeboard for any boat or time except the one in issue, but, when a gale was reasonably to be expected, then the Noble should not have been loaded deeper than a mean draft of 16½ feet, which means a freeboard of 18 inches. So I find she was overloaded, that she encountered heavy seas and a storm, but no heavier and no greater than should have been reasonably anticipated and expected at that season of the year. The record shows that other vessels, both loaded and light, some of which were larger, some smaller, some built of wood, and some of steel, were in the vicinity of the Noble in the same storm, and came through without difficulty or damage. There is no evidence of any other vessel having suffered mishap on this occasion.

[7] I am satisfied that the captains who testified that the Noble was seaworthy have sailed their boats down where they say they have, but nearly all of them say they let them up in varying amounts in the fall of the year. Why? There is only one answer to it; that is, because of the gales and storms. Now, if they ought to expect storms in the

spring of the year, it follows that in the spring of the year these boats ought not to be loaded to their maximum, as this boat was. Moreover, the fact that other captains have been in the habit of overloading their vessels at this season, if true in fact, would not justify or relieve the owner in this case. In the case of The Fitzgerald, supra, it is said, at page 687 of 212 Fed., at page 223 of 129 C. C. A.:

"And surely it can be no defense, if true in fact, that other owners of wooden vessels were also wanting in properly protecting similar holes in the floors of their lamp rooms. It is said in The Tenedos (D. C.) 137 Fed. 443, 446, 447, affirmed 151 Fed. 1022, 82 C. C. A. 671: 'But the fact that shipowners are not in the habit of using precautions which would demonstrate unseaworthiness is immaterial. They are bound to use them'—citing The Edwin I. Morrison, 153 U. S. 199, 215, 14 Sup. Ct. 823, 38 L. Ed. 688."

Again, I am impressed with the fact that very few of the many who were called could or would say at what depth a boat becomes unseaworthy and dangerous. Counsel urge that the reason for that is because they have never loaded a boat to such a point, but know it is safe as deep as they have loaded. I am not impressed with that argument, and I think it lessens the value of their opinion to the effect that this boat was seaworthy as loaded. To tell when it is light necessitates telling when it is dark; to tell what is deep necessitates telling what is shallow; to tell what is safe necessitates telling what is unsafe. To say that a man can testify that the speed of an automobile is safe up to a certain point, but that beyond that he cannot testify what is dangerous, would not impress one with the value of the estimate placed as to safety. They qualify their ability to express an opinion in such a way that they never in any case could be witnesses for the other side and say that beyond that point it is unsafe and dangerous. I recognize the difficulty that the claimant in this case would have in getting masters to testify. In the first place, they would have to get men who were sailing boats of that kind, and I am satisfied that it would be difficult to get men who would be willing, in a case where it was simply an expression of opinion, to come into court and be witnesses against vessel owners. I think captains feel if they did that they would be jeopardizing their chances to get a boat of this class to sail the next year on the Lakes, so long as owners want their boats loaded to that depth. The record may show as my conclusion that they are sailing this class of boats down there where they have testified they do in midsummer months. No such practice has been shown for months when storms prevail. I think it is dangerous even in the summer months, and that they are unseaworthy when they are down there. They get through, if they do not get in a storm. Sometimes they get in a storm and have good luck, and then they testify that their boat is safe because it got through. Capt. Eisenhardt did not get through, and cannot be a witness on the other side in any of these lawsuits to say it is dangerous. It seems to me it should take very strong proof to satisfy a court that a boat with bulwarks can be put down in the water almost "decks to" and be safe. Even if the gates are strapped up so they are wide open, still the water would run onto the deck, and the bulwarks would hold it to a great extent and prevent it from running off as it would do if there were no bulwarks.

The same conclusion is reached from the testimony of the experts as to buoyancy. In a boat of this type the buoyancy of the poop and forecastle ought not to be taken into account. They have doors, and, if the crew want to get out and do anything on deck, they would have to open the doors.

For this type of ship, with bulwarks, we ought not to figure any buoyancy above the decks, because you cannot use that buoyancy until you get the decks under water. For safety the usual percentage of buoyancy (say 20 per cent. to 25 per cent.) ought to be found below decks, because you cannot use what is above until you get the decks down under water, and when you get the decks under water you are in trouble. If a hatch should get loose in a heavy gale, the boat would have absolutely no chance, because the men could not get back and forth on a boat like this to do anything on deck if the decks were under water. The mere fact that some get through if they do not happen to get a loose hatch, and do not part a wheel chain, and everything works fine, does not justify their captains in testifying that they were seaworthy.

[8] Now, who was to blame for the overloading? This boat was owned by a corporation, and, like all corporations, had to do business through some one representing the corporation. In this case that individual was Mr. Francombe, the managing agent of the corporation. He was a man of mature years and ripe in experience. He was, in all things pertaining to the Lakes and to the management of this boat, the corporation; he represented that corporation and handled that boat with the same authority and the same freedom that he would manage his own boat. So he stands, so far as this question is concerned, in place of the corporation, and his faults are the faults of the corporation, and binding upon the corporation. Great Lakes Towing Co. v. Mill Transportation Co. (C. C. A. Sixth Circuit, 1907) 155 Fed. 11, 83 C. C. A. 607, 22 L. R. A. (N. S.) 769; Benner Line v. Pendleton et al., supra.

In the case of Great Lakes Towing Company v. Mill Transportation Co., supra, the Court of Appeals for this circuit said:

"The contracts of the manager are the actual contracts of the owner, and are not of the same character as the contracts of the master made on a voyage or in foreign ports and which are imputed to the owner from the necessities of commerce. The acts of the managing agent within the sphere of his authority are as much the acts of the owner as if done by the owner himself. Only upon this theory could a corporation make what, for the purpose of making a distinction, is called a personal contract; that is to say one which the owner himself or itself has made."

See, also, The Loyal, 204 Fed. 930, 123 C. C. A. 252; In re Jeremiah Smith & Sons, 193 Fed. 395, 113 C. C. A. 391 (1911); The Colima (D. C.) 82 Fed. 665; Craig v. Continental Insurance Co., 141 U. S. 638, 12 Sup. Ct. 97, 35 L. Ed. 886; Parsons v. Empire Transportation Co., 111 Fed. 202, 49 C. C. A. 302; Weisshaar v. Kimball Steamship Co., 128 Fed. 397, 63 C. C. A. 139, 65 L. R. A. 84 (1904).

It is urged that it was the captain's judgment that controlled in this matter, and that he was the one who decided the cargo, and not Mr. Francombe. I cannot agree with that contention. I think that the

discretion which the captain used was no more than as to the trim of the ship; he decided whether he would stop at this particular car, or whether he would put on one more. But as to the great and important question here, as to whether this boat was loaded down almost "decks to," or whether she was loaded to 16–6, whether she had 3,000 tons, or whether it was much less than that, 2,500 or 2,600 tons, that was not left to his discretion; that was Mr. Francombe's discretion. In fact, the telegram which Capt. Eisenhardt sent Mr. Francombe shows he did not want to take all the rails. The telegram sent back to Capt. Eisenhardt did not mention the draft, and did not mention anything about safety. It did say, "Think 3,000 tons too much." I do not see how any other thought could have been entertained. A command from the owner to the captain is stronger than from the captain to the second mate, or the second mate to the deck hand. The telegram was not proper instructions. That was not directing a proper load to tell him to take all he could. That is just what the captain did; he just obeyed that command. He had never sailed in this boat before, and he had never been captain of any boat before. He had told Mr. Francombe that if he did not make good he need not pay him. Mr. Francombe told him if he did make good he would give him a bonus. He had 3.000 tons on the dock to take. Mr. Francombe wired him, "Take all you possibly can." He did take it. Then he got along up to Detroit, the managing agent went aboard of her, saw it, and talked with him about it, and the managing agent, with his experienced judgment, must have known she was overloaded, and yet he permitted her to go on her journey, thinking no doubt she would get through, and of course hoping she would get through.

It was the mistake and wrongdoing of the owners of the vessel, and they are not entitled to limit their liability, and they are responsible for the damages which resulted.

An interlocutory decree will be entered accordingly.

In re ROTHLEDER.

(District Court, S. D. New York. February 3, 1916.)

1. BANKRUPTCY ⟸123—TRUSTEE—ELECTION BY CREDITORS—RIGHT TO VOTE.
There is no reason in law or morals why a relative of the bankrupt who is a legitimate creditor cannot vote for a trustee the same as any other creditor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 171–179; Dec. Dig. ⟸123.]

2. BANKRUPTCY ⟸123—TRUSTEE—ELECTION BY CREDITORS—CONDUCT OF ELECTION.
The fact that the attorney for the bankrupt, when certain creditors asked him to represent them, declined to do so and referred them to an attorney in his office whom he sometimes employed but who was also engaged in practice for himself, and thereafter suggested to that attorney and the creditors that the receiver already appointed in the case would be a satisfactory trustee, does not authorize the rejection by the referee

of the votes of those creditors for the receiver as trustee; there being nothing to warrant an inference that the bankrupt was interested, in the election.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 171–179; Dec. Dig. ⊂⊃123.]

3. BANKRUPTCY ⊂⊃127—TRUSTEE—APPOINTMENT BY REFEREE.
Nor do those facts show an abuse of discretion by the referee in appointing the receiver as trustee after the failure of the creditors to elect one.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 183; Dec. Dig. ⊂⊃127.]

4. BANKRUPTCY ⊂⊃126—TRUSTEE—ELECTION BY CREDITORS—APPROVAL.
Election of a trustee will be disapproved, where it was obtained through the active efforts of the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 182, 184, 187; Dec. Dig. ⊂⊃126.]

5. BANKRUPTCY ⊂⊃126—TRUSTEE—ELECTION BY CREDITORS—APPROVAL.
No rule of action applicable to every case can be laid down to govern approval or disapproval of the trustee elected by the creditors, but each case depends upon its particular circumstances.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 182, 184, 187; Dec. Dig. ⊂⊃126.]

In Bankruptcy. In the matter of Harry Rothleder. On application by certain creditors to review the action of the referee in bankruptcy in appointing a trustee after failure of election. Appointment by referee sustained.

Stephen B. Rosenthal, of New York City, for the motion.
Charles L. Greenhall, of New York City, opposed.

MAYER, District Judge. This is an application to review the action of a referee in bankruptcy in appointing a trustee after a failure of election. The application to the referee was made more than 10 days after the referee made his order, but the referee relaxed the rule and allowed the petition.

At the outset, counsel seeking the review states in his brief:

"We desire to have it understood at the outset that no claim is made that Mr. Lesser is not qualified, both from experience and from his well-known integrity at the bar, from acting as trustee."

It is insisted, however, that the referee erred in allowing and counting certain votes cast for Mr. Lesser, and that, if these had been excluded, then the candidate of the creditors represented by Mr. Rosenthal would have been elected.

The papers which come up from the referee are meager of information in some respects, but it was stated on argument that there was no dispute between the parties in regard to the facts, and what was stated on argument, as well as what was before the referee, is referred to in the briefs of the attorneys.

To illustrate: There is nothing in the testimony before the referee to show that the creditors, whose votes were objected to, were rela-

tives of the bankrupt; but, as this is a fact, I am assuming I have it before me.

Similarly, as a certain circular letter issued by Mr. Rosenthal's firm was referred to on the argument before me, and later was read by me, and as there is no question that that letter was sent out, I am assuming that I have that before me. I am taking this course so as to obviate the necessity of sending back the matter to the referee, thus avoiding expenditure of needless time and money when everybody is agreed as to what the facts are.

At the first meeting of creditors held before the referee, two candidates were nominated for trustee. One was Henry Lesser, an attorney who had been appointed receiver by Judge Hough, and who, when appointed, was an outside disinterested person in no manner concerned with the subject-matter. In addition to what Mr. Rosenthal says about Mr. Lesser, it may be stated that Mr. Lesser is known to the court as an upright practitioner, especially experienced in the bankruptcy law. The other candidate was Harry Eisenbach, who happens also to be known to the court as a reputable and experienced fur merchant. We thus have two men, either of whom is qualified, from every standpoint that affects him personally, to act as trustee.

Ten claims aggregating $4,747.42 were voted in favor of Mr. Lesser and twelve claims aggregating $4,445.69 were voted in favor of Mr. Eisenbach. Of the latter, one creditor's claim amounted to $2,461.61. Objection was made to the voting of four claims aggregating $2,373, for Mr. Lesser upon the ground that they were voted in the interest of the bankrupt because they were voted by an attorney who was in the employ of the attorney for the bankrupt. These four claimants were relatives of the bankrupt. The validity and the correctness of their claims were not questioned. There is no evidence that they were procured by the bankrupt or his attorney for the purpose of voting for Mr. Lesser. It was not suggested that they were solicited by the bankrupt or his attorney, nor was it said or claimed that there were any transfers or preferences to be set aside, nor any property concealed to obtain, or that the trustee had anything to do in this case, except perform the usual and ordinary administrative functions.

The referee, having refused to disqualify these claims from voting, found that neither of the candidates had a majority in number and amount, and he thereupon appointed Mr. Lesser as the trustee. The only claims voted for Mr. Eisenbach were voted by Mr. Rosenthal by virtue of powers of attorney. It appeared on the argument of the motion that Mr. Rosenthal's firm had written letters to some creditors asking them to send their claims to them so that they might be filed, and some claims were received as a result of this letter and were voted, although the letter did not state that powers of attorney were also desired for the purpose of voting for the trustee.

It would seem therefore that at least some of the creditors who confided their claims to Mr. Rosenthal as their attorney in fact depended upon his judgment to vote for a competent person as trustee, the point here being that possibly some of the creditors did not exercise their

independent judgment in respect of the selection of a trustee (any more than did some of the creditors whose right to vote is challenged), but left that, as they had a right to do, to Mr. Rosenthal, who is likewise experienced in matters of procedure under the bankruptcy law (Act Cong. July 1, 1898, c. 541, 30 Stat. 544).

[1] There is no reason in law or in morals why a relative of the bankrupt, who is a legitimate creditor, shall not have the same right to vote for a trustee as any other creditor. It is true that the courts on numbers of occasions have found that relatives have interposed suspicious claims, but it is equally true that persons, in order to help their relatives, will lend them money in response to a very natural impulse, and that, when the borrower goes into bankruptcy, the relatives are just as anxious to obtain what is their just due as is any other legitimate creditor.

[2, 3] What happened in this case apparently was that Leo Rothleder, a relative of the bankrupt, came to the attorney for the bankrupt with the claims of himself and the three other relatives and wanted the attorney to vote these claims and to present them and prove them. The attorney stated it was inconsistent, as he represented the bankrupt, and suggested that he let another attorney represent him. This other attorney was in the same suite of offices with the attorney for the bankrupt and was employed by him, but also practiced on his own account—an arrangement quite familiar to those who are acquainted with the early days of many lawyers.

The attorney to whom the matter was thus referred had known Leo Rothleder for about nine or ten months, having met him at the office of the attorney for the bankrupt. The attorney for the bankrupt, when examined by the referee, stated:

"It is immaterial with me personally whether Mr. Lesser is trustee, or whether anybody else is trustee, so far as I am concerned. I have no favors to seek. I will say that all these claims I have looked up, and every dollar of money that is represented by these claims actually was loaned to the bankrupt and went into his books and into his bank, and the books of the bankrupt so show."

He was asked if he had suggested to the other attorney that the latter should vote for Mr. Lesser, as trustee, and he answered:

"I think if it came from me it was involuntary, but I think it came from Leo Rothleder. As far as I am concerned, it is absolutely immaterial to me who is trustee in this matter."

The other attorney, upon being asked whether the attorney for the bankrupt had suggested that he vote the claims for Mr. Lesser, answered:

"That was suggested to me, yes. I know Mr. Leo Rothleder came to me and gave me his claim."

The first part of this answer is ambiguous because it does not state who suggested, but I will assume that it means that it was the attorney for the bankrupt who made the suggestion.

Reading the testimony, and especially the part to which attention has been called, it is easy to infer what the attorney meant by the use of

the expression "involuntary." It is probable that the inquiry was made as to who would be a good man for trustee, and the attorney for the bankrupt may very likely have said that Mr. Lesser was already the receiver of the court and would be a proper man, or that there would be no opposition to him.

The record as it stands is fragmentary, and a great deal of emphasis is sought to be laid on the word "involuntary" in connection with the answer of the attorney for the bankrupt.

From this record, it appears that Mr. Lesser knew nothing of any suggestion to vote for him. There is not a scintilla of evidence that the bankrupt himself suggested Mr. Lesser. There is nothing to indicate, at the time Leo Rothleder came to the office of the attorney for the bankrupt, with the claims of himself and the three other relatives, that there was any question of a contest for the trusteeship. There is not in the case the slightest or most remote suggestion or inference of the character to be found in some other cases where it appears that the bankrupt either openly or secretly endeavored to control or influence the selection of a trustee.

[4] What the reported cases have held is that the election of a trustee will be disapproved where that result has been obtained through the active efforts of the bankrupt, and the reason for and wisdom of such a rule are apparent.

In the cases of In re McGill, 106 Fed. 57, 45 C. C. A. 218, and In re Hanson (D. C.) 156 Fed. 717, the language of the courts must be read in connection with the facts, and these cases show in each instance that the bankrupt was actively concerned with the election of the trustee.

[5] It is rather difficult to lay down rules of action which will be applicable in every case, because in matters of this character the facts are the controlling feature. Ordinarily, it is not hard for the court to determine whether on broad principles, or as affecting a particular situation, claims should be rejected or the election of a trustee disapproved. The question is always one of good faith, and the inquiry must be as to whether anything has been done by the bankrupt which will disqualify, or tend to disqualify, a trustee from acting in that impartial and vigorous manner which will assure the proper results for the creditors.

In Re Merritt Construction Co., 219 Fed. 555, 135 C. C. A. 323, the court said:

> "The approval by the referee and district judge of the appointment of a trustee by the creditors is a matter of discretion, depending upon the circumstances of each case. The choice of the creditors should not be overruled by the referee or district judge except for substantial reasons, and the confirmation by the district judge of such appointment should not be disturbed by this court unless an abuse of discretion appear."

Such is probably the rule everywhere, but certainly it is the rule in this circuit, and, as Judge Ward points out, the court must look into the circumstances of each case, and numerous illustrations in the books show that the decisions of the courts go to the real merit and heart of the controversy and do not deal in mere academics. In re Syracuse Paper & Pulp Co. (D. C.) 164 Fed. 275; In re Eastlack (D. C.) 145

Fed. 68; In re L. W. Day & Co., 178 Fed. 345, 101 C. C. A. 461; In re Stradley & Co. (D. C.) 187 Fed. 285; In re Fisher (D. C.) 193 Fed. 104. Had the referee excluded the claims voted for Mr. Lesser, I think he would have erred.

With a full understanding of the situation, he exercised his discretion, and I am unable to find any abuse in that exercise. Indeed, I think it would be very unfortunate if the court were to hold that a reputable member of the bar should be prevented from acting where it appears that: (1) By virtue of having been appointed a receiver he is familiar with the administration of the estate; (2) he has not in any manner requested election as a trustee; (3) his nomination was made by an attorney for some of the creditors; (4) his election was not participated in at all by the bankrupt, but at most only referred to by the attorney for the bankrupt; (5) the attorney for the bankrupt did not urge his election before the referee, but took an indifferent attitude for good reasons stated; and (6) there was not the slightest suggestion that the claims were not valid in every respect.

The referee is sustained. Settle order on one day's notice.

AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET v. REDERIAKTIEBOLAGET ATLANTEN.

(District Court, S. D. New York. February 11, 1916.)

1. ARBITRATION AND AWARD ⟸7—CONSTRUCTION OF CHARTER PARTY—ARBITRATION CLAUSE.

A provision of a charter party that in case of dispute arising it shall be settled by two referees, one to be appointed by the captain and one by the charterer, with power in the two to select an umpire, if necessary was meant to apply only to disputes which might arise during performance of the charter, and has no application where, before the charter was entered upon, the owner deliberately and without excuse repudiated the same and refused to deliver the vessel.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 28; Dec. Dig. ⟸7.]

2. ARBITRATION AND AWARD ⟸7—ARBITRATION CLAUSE IN CHARTER PARTY—CONSTRUCTION AND EFFECT.

An arbitration clause in a charter party, by which a submission to arbitration is made a condition precedent to the bringing of any suit, goes to the remedy, and not to the rights of the parties, and its effect is to be determined by the law of the forum.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 28; Dec. Dig. ⟸7.]

3. ARBITRATION AND AWARD ⟸9—ARBITRATION CLAUSE IN CHARTER PARTY—CONSTRUCTION—EFFECT.

A provision of a charter party for the submission to arbitration of any dispute between the parties *held* a collateral undertaking, and not a condition precedent.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 30; Dec. Dig. ⟸9.]

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4. SHIPPING ⟸51—CHARTERS—CONSTRUCTION OF PENALTY CLAUSE IN CHARTER PARTY.

A clause in a charter party, "Penalty for nonperformance of this agreement to be proven damages, not exceeding estimated amount of freight," cannot be construed to limit the recovery of the charterer from the owner for an entire repudiation of the charter and a refusal to enter on its performance.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 203–210; Dec. Dig. ⟸51.]

5. ADMIRALTY ⟸5—JURISDICTION OF COURT—SUIT BETWEEN FOREIGN CORPORATIONS.

It is within the discretion of a court of admiralty of the United States to take jurisdiction of a suit for breach of charter between two foreign corporations.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 69–85; Dec. Dig. ⟸5.]

In Admiralty. Suit by the Aktieselskabet Korn-Og Foderstof Kompagniet against the Rederiaktiebolaget Atlanten. Decree for libelant.

This is a libel in admiralty to recover damages for the breach of a charter party against the owner. On January 8, 1915, the owner without excuse withdrew the ship from the charter and employed her upon another voyage. Thereupon the charterer libeled her, and set up the charter party and the letter of withdrawal as part of his libel. To this the owner pleaded:

First. That the charter party had been made in Denmark, between two corporations of Sweden and Denmark, and that the charterer had made no tender of arbitration under an arbitration clause, valid in Denmark and Sweden, which read as follows: "(21) If any dispute arises, the same to be settled by two referees, one appointed by the captain and one by charterers, or their agents, and, if necessary, the arbitrators to appoint an umpire. The decision of the arbitrators or umpire, as the case may be, shall be final, and any party attempting to revoke this submission to arbitration without leave of a court shall be liable to pay to the other, or others, as liquidated damages, the estimated amount of chartered freight."

Second. The owner pleaded that the recovery, if any, must be limited to the amount of the freight under the following clause No. 24 of the charter party: "Penalty for nonperformance of this agreement to be proven damages, not exceeding estimated amount of freight."

Third. The owner pleaded that this court should not take jurisdiction of a cause between two foreign corporations.

Charles Burlingham and Roscoe H. Hupper, both of New York City, for libelant.

Clarence B. Smith, of New York City, for respondent.

LEARNED HAND, District Judge (after stating the facts as above). Were not the law of Denmark and Sweden pleaded so broadly, I think that it would be possible to dispose of the arbitration clause without recourse to the question whether such clauses go to the remedy, and not to the right. It is clear that the respondent did not intend to rely upon the clause in the letter of January 8, 1915, and did not suppose the case was one for arbitration at all. What it did rely on was the penalty clause, under which it thought itself protected, and which made it to its interest to repudiate as soon as freight got above 34 shillings. The attempt at justifying this repudiation wholly falls. The respondent violated its contract without any shadow of

excuse. It even made the proposal to the libelant to take a new charter at 60 shillings, the libelant to bear the difference between that and the supposed limitation of liability. Any effort to mitigate this violation of good faith on the score of danger to the ship is answered by this proposal to undertake the same voyage.

[1] Aside from the failure of the respondents to rely on arbitration, the clause would itself be irrelevant to the controversy, if the laws of Denmark and Sweden merely permitted arbitration. Though such a clause be valid in those countries, there is no reason to suppose that it has a different interpretation from the reasonable meaning of the words. I should suppose, therefore, that the rule would not be different, as to whether the clause survived an unconditional repudiation, from the rule in this country and Great Britain. If not, I am satisfied that the arbitration clause need not trouble the disposition of the cause, because it could not survive such a total repudiation as this, made without any excuse. This particular clause was certainly not intended to apply to such a case, because the ship's arbitrator was to be picked by her captain, and it is absurd to suppose that the captain was to pick an arbitrator over the withdrawal of her owners. The withdrawal was before the voyage began, even before the ship had been delivered. Whatever be the rule applicable to arbitration clauses of more general form, there can be no doubt that this clause was meant to apply only to disputes which might arise during the voyage, and while the parties were at least trying to go on with its execution. Indeed, the only authority upon the subject which has been cited seems to make it a general rule that such clauses do not survive a general repudiation of the contract. Jureidini v. National British Millers' Ins. Co., [1915] A. C. 499. The theory appears to be that such a provision is part of the execution of the contract, a piece of its administration, and ought not to be construed as applicable to an entire change of purpose which results in the abandonment by one party of the enterprise as a whole.

However, the allegations of the answer do not admit of this method of disposing of the point, for they contain the statements that under the law of Denmark and Sweden arbitration is the condition precedent to any suit in any court "for, upon, or by reason of any matter or dispute with respect to or arising under said charter." This, taken merely as an allegation, and it must be so taken on exceptions, would cover a suit for repudiation of the charter party as an entirety. Therefore it becomes necessary to determine whether the clause goes to the right or to the remedy, and whether it is a condition precedent under our law, if it goes only to the remedy.

[2] Such clauses, if regarded as conditions precedent to any action, have, I believe, nearly always been held to touch the remedy, and not the right. Meacham v. Jamestown, etc., Co., 211 N. Y. 346, 105 N. E. 653, Ann. Cas. 1915C, 851; U. S. Asphalt Co. v. Trinidad Lake Petroleum Co. (D. C.) 222 Fed. 1006. They do not affect to touch the obligations of the parties, as surely they do not; they prescribe how the parties must proceed to obtain any redress for their wrongs, which covers only remedies. In one sense everything which touches

the remedy touches the obligation, since the only sanction to performance rests in the remedy; but that is the speech of philosophers, not of lawyers, among whom the distinction has arisen and is real. I think we must therefore regard it as going only to the remedy.

I do not propose to consider the very vexed question whether an arbitration clause, which purports to cover all disputes, and not merely the quantum of the award, may be valid, if it be clearly meant as a condition precedent. In the state of New York it certainly is invalid. Meacham v. Jamestown, etc., Co., 211 N. Y. 346, 105 N. E. 653, Ann. Cas. 1915C, 851. And undoubtedly Scott v. Avery, 5 H. L. Cas. 811, has been understood very generally in this country as so fixing the law. The judgments in the Exchequer Chamber (8 Exch. 497) did proceed upon that distinction, but those in the House of Lords are, to say the least, subject to a different interpretation.

[3] An entirely different question is whether the arbitration clause is a collateral undertaking, or a condition precedent. The latter question itself depends upon two questions: First, whether the distinction between condition and collateral contract touches only the remedy; and, second, whether this is a case of condition or not. That the distinction is a question of remedy, concerning as it does what are the conditions upon which suit may be brought, hardly requires more discussion after what has been said above. The court of the forum must determine what impediments, if any, exist to the exercise of its jurisdiction. The second question is whether under the lex fori such a clause as this does impose a condition upon any suit. Expressly it does not do so, but instead of a condition imposes a penalty for refusal to abide by an award. Such a clause was held in Hamilton v. Home Ins. Co., 137 U. S. 370, 11 Sup. Ct. 133, 34 L. Ed. 708, to be collateral, and collateral only. This rule is no doubt extremely technical. U. S. Asphalt Co. v. Trinidad Lake Co., supra. But I cannot disregard the fact that it was the basis of the actual decision in the Supreme Court, nor is it true that that decision was wrong because no damages can be recovered under the penalty clause attached. Munson v. Straits of Dover, 102 Fed. 926, 43 C. C. A. 57.

[4] The next question is of damages; i. e., whether clause 24 is to be taken in limitation of liability, or as a penalty. An English case is directly in point for the libelant (Wall v. Rederiaktiebolaget, [1915] 3 K. B. 66); the theory of the court being that the evolution of the clause showed it to retain the same character of a penalty which it originally had. We meet it over 100 years ago in the form: "Penalty for nonperformance, £1,300." In this form it is regarded as a penalty pure and simple, and as such it is not enforceable. Harrison v. Wright, 13 East, 343. Later, in what was perhaps an effort to avoid that result, it appears as follows: "Penalty for nonperformance, estimated amount of freight"—which is its commonest form. As such it has twice been declared to be still a penalty. Watts v. Camors, 115 U. S. 363, 6 Sup. Ct. 91, 29 L. Ed. 406; Ströme Bruks Aktiebolaget v. Hutchinson, 10 Aspinall (N. S.) 138, affirming 41 Sc. L. R. 274. In the first case the court declined to enforce it as liquidated damages, and allowed the libelant only his proven damages, which were less than

the estimated freight; in the second, the court declined to enforce it as a limitation of liability. The penalty was enforceable at law even after 8 & 9 William III, c. 11, § 8; that statute merely provided that execution should go for only the amount of proved damages. Hence one could always recover his actual damages by suing under a penalty clause, except that he was in that event limited to the amount of the penalty.

However, along with the right to sue under the penalty ran collaterally the right to sue on the covenant to pay, and it was never held that the penalty affected the right of the covenant in any way. Each ran concurrently, though both could not be used simultaneously. Abbott on Shipping, pt. IV, c. 2, § 2. This was the state of the law while the clause existed in either of its two previous forms, whether as penalty in a stated sum, or as penalty for the estimated amount of freight. Yet during that period the penalty clause really added nothing to and subtracted nothing from the promisee's rights. He might sue under either the covenant or the penalty, and recover his actual damages in either event; the only difference being that, if he foolishly selected the penalty, he was limited by its amount. To add to the penalty clause the words "proven damages" changed nothing whatever; it merely made express what the law imposed in any event. There is, therefore, not the least reason for supposing that the addition of these words in the charter party was intended to effect a limitation of liability; there was as much ground when the penalty was in a stated sum to argue that its presence necessarily implied that the parties intended to limit any liability as after the words were added. Yet we see that the courts did not accept that conclusion when the clause was in its earlier form. It seems to follow, therefore, that Mr. Justice Bailache could not have reached a different result in Wall v. Rederiaktiebolaget, supra, from what he did, without disregarding the whole history of the clause.

It is quite true that the practical result is to reduce the penalty clause to a brutum fulmen, but that result did not arise after the words "proven damages" were inserted; it existed from the time when the penalty would not be enforced at all, except in limitation of the recovery of any one who selected the penalty clause to sue upon. Of course, while the practice in debt differed from that in assumpsit, there remained some real distinction, but that has long since disappeared and the clause has persisted as an archaism, such as is common enough in all branches of the law. That the parties should have really intended to limit their liability by any such inartificial and awkward paraphrase beginning with a penalty is unlikely. Such instruments are full of formal and time-honored phrases, and it is fair to look for some clear intent at so important an innovation. If they meant a limitation, they should have been more explicit. Lines v. Atlantic Transport Line, 223 Fed. 624, 139 C. C. A. 170.

Besides, the result is most arbitrary if the clause be thought to be in limitation. It does not limit the owner at all, because in no event can he recover more than his freight; it does limit the charterer, and by an amount which bears no relation to his loss. Of course, the par-

ties might have agreed to limit him; but there is no apparent reason for supposing that such a formal and mechanical equality was within their contemplation. That they should have intended to give the owner an option to repudiate merely because the bargain became very valuable to the charterer is extremely improbable; the owner might have wanted such a result, but the charterer would scarcely have agreed to it, especially in such times as the end of September, 1914.

[5] The last question is of the jurisdiction of this court. If the matter rests in discretion, as I am now bound to hold, I have no hesitation in exercising that jurisdiction in so obvious a case in the interests of justice.

Exceptions overruled. Decree for full damages, with costs. I assume that the amount of the damages will be settled by agreement.

In re INTEROCEAN TRANSP. CO. OF AMERICA, Inc.

Ex parte LEWIS.

(District Court, S. D. New York. March 7, 1916.)

1. BANKRUPTCY ⊜20(1)—JURISDICTION OF COURT—ADVERSE CLAIMS.
   Claims asserted after bankruptcy by third persons to a fund placed by the bankrupt in possession of a custodian having no claim thereto, arising out of transactions before the bankruptcy, are adverse, and the court of bankruptcy is without jurisdiction to determine the same, except by consent.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 1331; Dec. Dig. ⊜20(1).]
2. BANKRUPTCY ⊜18½, New, vol. 8 Key-No. Series—LIENS—SUIT TO ENFORCE —MARITIME LIEN.
   Where a maritime lien is claimed on property of a bankrupt, and a suit in admiralty brought for its enforcement, the better practice is to permit the trustee to intervene in such suit and have the question there adjudicated.
3. BANKRUPTCY ⊜20(1)—POWERS OF COURT—STAY OF SUIT IN STATE COURT.
   A court of bankruptcy is without power to stay a suit in a state court for money had and received, brought against a third person, who as a stakeholder has possession of a fund also claimed by the trustee in bankruptcy.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 1331; Dec. Dig. ⊜20(1).]

In Bankruptcy. In the matter of Interocean Transportation Company of America, bankrupt. On motion by Robert P. Lewis, receiver in bankruptcy, to stay suits in a state court and in a court of admiralty. Motions denied.

The facts in this case are as follows: Palin, Evans & Co., Limited, the libelant in admiralty, chartered the ship Brinkburn to the Hellenic Transatlantic Steamship Company, the plaintiff in the action in the state court, on a time charter, reserving a lien on subfreights. The Hellenic Transatlantic Steamship Company subchartered the Brinkburn to the Interocean Transportation Company, the bankrupt, who in turn chartered her to H. Baars & Co., who paid the proper balance of freight, some $25,500, to the captain of the Brinkburn. Meanwhile the bankrupt had borrowed from the Equitable Trust Company $20,000 on its note, giving as security an as-

signment of its claim under the charter party against H. Baars & Co. The captain paid the freight to a Florida bank to the credit of the Equitable Trust Company, which later, after some local legal proceedings not necessary to state, remitted to the Equitable Trust Company, which applied enough out of the fund to pay its loan, enough to pay the broker's commission, and now holds the balance, $3,648.89, subject to the claims of whom it may concern.

The petition in bankruptcy was filed on September 17, 1915, and a receiver appointed. Soon thereafter the Hellenic Transatlantic Steamship Company gave notice to the Equitable Trust Company of a claim to the fund arising from the alleged fact that the captain of the Brinkburn was by agreement to pay the freight to it, paying the bankrupt only the difference between the freight due it from H. Baars & Co. and the freight due the Hellenic Transatlantic Steamship Company on the subcharter to the bankrupt itself. This amounted to nothing, as the Hellenic Transatlantic Steamship Company asserted, because of the consent of the bankrupt to a violation of the charter by H. Baars & Co. Moreover, Palin, Evans & Co., Limited, also laid claim to the moneys against the Equitable Trust Company by virtue of its alleged lien for subfreight. In this posture of affairs the receiver served on the Equitable Trust Company a notice of motion, returnable before the referee for an order, directing the respondent to pay the money to the receiver; the motion being returnable on December 1, 1915. Before the return day Palin, Evans & Co., Limited, filed its libel and attached the fund by service of a marshal's notice on the Equitable Trust Company, and on the return day the Hellenic Transatlantic Steamship Company served the Equitable Trust Company with a summons and complaint in the state court for money had and received on a demand and refusal. The proceeding before the referee is still pending undecided. The receiver now makes a motion to stay the action in the state court, and a second motion to vacate the attachment in admiralty and to stay those proceedings.

Charles I. Greenhall, of New York City, for receiver.

Kirlin, Woolsey & Hickox and Cletus Keating, all of New York City, for Palin, Evans & Co., Limited.

Bernard Fliashnick, of New York City, for Hellenic Transatlantic S. S. Co.

Murray, Prentice & Howland, of New York City, for Equitable Trust Co.

LEARNED HAND, District Judge (after stating the facts as above). [1] On November 24, 1915, when the notice of motion was served by the receiver upon the Equitable Trust Company, it held a fund upon which it had no claim and against which there had already been made two adverse claims. Each of these arose from circumstances existing before petition filed, which distinguishes the case from Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, where the purchaser of the assignee for creditors had bought after petition filed. The question, therefore, is whether claims made after petition filed, but arising before that time, constitute adverse claims, when the fund is in possession of one who makes no adverse claim. First National Bank v. Chic. Title & Trust Co., 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051, seems to be directly in point. In that case the bankrupt had seed in storage with a warehouseman, whose receipts he had pledged. The warehouseman had no claim on the seeds, but did have possession. The Supreme Court decided that the District Court had no jurisdiction to determine the validity of the pledgees' claims. It is

true that in Whitney v. Wenman, 198 U. S. 539, 552, 25 Sup. Ct. 778, 49 L. Ed. 1157, Mr. Justice Day says that the jurisdiction exists whether the property is held by the bankrupt, "or for him"; but he mentions First National Bank v. Chic. Title & Trust Co., supra, and distinguishes it, because the District Court was not in possession of the fund. I have looked with some care for any case holding that an adverse claim against property in the possession of a stakeholder is not enough to forbid summary jurisdiction of this court, and I can find none. On the other hand, in the similar case of a claim by assignment of a chose in action the rule is against jurisdiction. Copeland v. Martin, 182 Fed. 805, 105 C. C. A. 237; In re Driggs (D. C.) 171 Fed. 897. I therefore conclude that there is no jurisdiction to determine in this proceeding the claims of Palin, Evans & Co., Limited, or of the Hellenic Transatlantic Steamship Company.

[2] There is another ground quite as conclusive, so far as concerns the claim of Palin, Evans & Co., Limited, which is that they assert a maritime lien which cannot be discharged or adjudicated, except in the admiralty (Moran v. Sturges, 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. Ed. 981), a rule equally applicable between a federal court sitting as a court of admiralty and the same court sitting in any other capacity as it is between the admiralty court and a state court (Hudson v. N. Y. & Albany Transport. Co., 180 Fed. 973, 104 C. C. A. 129). Possibly the bankruptcy court might enjoin all proceedings in admiralty until the bankruptcy was over, but that would be an idle thing to do in the case at bar, since the maritime lien of Palin, Evans & Co., Limited, would remain, and no final disposition of the res could be had till it was terminated. A much better way is for the receiver or trustee to intervene in the admiralty proceedings and claim the bankrupt's right there. In view of the length of time which has elapsed since the adjudication, I will not issue any stay to run until a trustee is appointed, assuming, which I do not, however, decide that only a trustee can intervene in the admiralty proceedings.

[3] Coming now to the motion against the Hellenic Transatlantic Steamship Company, what I have already said at the beginning is sufficient to settle the matter of any permanent stay, and I will give no temporary stay until a trustee is appointed for the reasons just given. There is, however, another reason against any stay. Even if this were an action against the receiver himself, this court would not issue any stay. In re Russell, 101 Fed. 248, 41 C. C. A. 323; In re Kanter & Cohen, 121 Fed. 984, 58 C. C. A. 260; In re Spitzer, 130 Fed. 879, 66 C. C. A. 35; In re Mertens & Co., 147 Fed. 182, 77 C. C. A. 478. These cases establish the doctrine that, even when the receiver or trustee is in possession of goods, formerly the bankrupt's, his title may be tried in the state court by the simple expedient of avoiding any possessory action and suing in conversion. Doubtless it is true that when, after his appointment, he meddles with the property of others, he is liable to action. Hebert v. Crawford, 228 U. S. 204, 33 Sup. Ct. 484, 57 L. Ed. 800. But these cases go further, and allow his mere refusal to surrender possession to be regarded as a tort for which he may be sued elsewhere. Since this is binding law for me, it must be ap-

parent that a fortiori I may not stay the prosecution of an action for money had and received against a third person, who is a stakeholder. The trustee, when appointed, may commence such an action on his own account, if he does not care to intervene in the admiralty. How the Equitable Trust Company is to protect itself in the unpleasant emergency which will result is not a question of bankruptcy.

Both motions are denied.

DE ST. AUBIN v. PAUL GUENTHER, Inc.

(District Court, S. D. New York. May 1, 1916.)

1. PLEADING ⊂=194(4)—SPECIAL TRAVERSES—EFFECT.
Where a party incorporates special traverses with matter in confession and avoidance, the traverses cannot be disregarded, and may render the plea good as against demurrer.
[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 450; Dec. Dig. ⊂=194(4).]

2. PLEADING ⊂=364(1)—MOTION TO STRIKE.
As the improper incorporation of special traverses with matter in confession and avoidance may render the plea good as against demurrer, motion to strike such traverses will be sustained.
[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1156, 1158, 1160; Dec. Dig. ⊂=364(1).]

3. PLEADING ⊂=90—TRAVERSES—ANTICIPATORY TRAVERSE—RIGHT TO.
Where the opposite party has already incorporated a traverse of a possible plea in avoidance in his own pleading, his adversary may incorporate in his plea in avoidance a traverse of such anticipatory traverse.
[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 184, 185, 187, 190, 194; Dec. Dig. ⊂=90.]

4. PLEADING ⊂=364(1)—MOTIONS TO STRIKE—TRAVERSES.
Defendant counterclaimed on the theory that plaintiff while in its employ, had delegated his authority, and had become financially interested in the business of a competitor, by which disloyalty, and his consequent inattention, defendant had been injured. The counterclaim then also averred that this was done without the knowledge or consent of defendant. The reply, in a confession and avoidance, alleged that all the acts complained of had been done with defendant's consent and then traversed the allegation that defendant had no knowledge and gave no consent to plaintiff's conduct. *Held*, that such traverse should not be stricken, for, though anomalous, it avoids the result of a plea inconsistent in substance, though not in form, with the counterclaim.
[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1156, 1158, 1160; Dec. Dig. ⊂=364(1).]

5. PLEADING ⊂=364(5)—TRAVERSES—CONCLUSIONS OF LAW.
In such case traverses of the allegations that plaintiff had acted contrary to the agreement, or in violation of his duty, and that it was because of plaintiff's violation of the agreement that defendant had rescinded the agreement, should be stricken, for, being mere conclusions of law, they raise only immaterial issues.
[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1159; Dec. Dig. ⊂=364(5).]

6. PLEADING ⊂=364(6)—STRIKING OUT TRAVERSE.
In such case, a traverse of the allegation that defendant suffered damage from plaintiff's breach is properly stricken, for, the action being in

contract, no allegation of damage is necessary to withstand demurrer; hence such traverse is unnecessary to the validity of the plea.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1161, 1162; Dec. Dig. ⊂=364(6).]

At Law. Action by Ovide De St. Aubin against Paul Guenther, Incorporated. On motion to strike certain denials from a reply to the counterclaim contained in the answer. Motion sustained to all denials save one.

Motion at law to strike out certain denials from a reply to a counterclaim contained in answer. The counterclaim was framed upon the theory that the plaintiff, while in the defendant's employ, had delegated his authority and had become financially interested in the business of a competitor, by which disloyalty and his consequent inattention the defendant had been injured. The counterclaim also alleged that this was all done without the knowledge or consent of the defendant. The reply, in confession and avoidance of the counterclaim, alleged that all the acts complained of had been done with the consent of the defendant. It then proceeded to traverse the following allegations: (1) That the plaintiff had acted contrary to the agreement or in violation of his duty; (2) that the defendant had no knowledge and gave no consent to the plaintiff's conduct; (3) that it was because of the plaintiff's violation of the agreement that the defendant rescinded the agreement; (4) that the defendant had been damaged by the plaintiff's disloyalties.

William D. McNulty, of New York City, for plaintiff.
Henry Root Stern, of New York City, for defendant.

LEARNED HAND, District Judge. [1-3] It is settled in New York that, when a party incorporates special traverses along with matter in confession and avoidance, the traverses cannot be disregarded. Uggla v. Brokaw, 77 App. Div. 310, 79 N. Y. Supp. 244. It necessarily results, if there be any traverses of material allegations incorporated in the plea, that the opposite party loses his right to test the sufficiency of the plea, unless he may strike out the traverses. This the courts have recognized as a genuine embarrassment to the opposite party, and have therefore entertained such motions (Stieffel v. Tolhurst, 55 App. Div. 532, 67 N. Y. Supp. 274), at least when they are iterations of similar traverses elsewhere. A difficulty faces a pleader, however, when the opposite party has already incorporated a traverse of a possible plea in avoidance in his own pleading—"leapt before he came to the stile." If he leaves unanswered such an assertion, though it is not really an allegation at all, he hazards its being taken as such; indeed, he might strike it out, for it has no proper place in the first pleading. However, being placed in this position through the fault of the first pleader, it surely serves to convenience if he be allowed to couple a traverse of this anticipatory traverse along with the plea which the anticipatory traverse has denied. Pullen v. Seaboard Trading Co., 165 App. Div. 117, 150 N. Y. Supp. 719. The result is indeed amorphous, and racks the soul of a conscientious pleader, because there is strictly no place for a traverse in a plea at law at all, at least where the original pleading is not alternative or double. Courts do not, however, value so much as formerly their logical integrity, and, if the result be convenient, no harm is done.

[4-6] To apply these principles to the case at bar, the second traverse ought to be allowed to stand, because, though anomalous, it avoids the result of a plea inconsistent in substance, though not in form, with the counterclaim. The first and third traverses are not necessary to the validity of the plea, which should stand upon its own merits. The third is only an iteration of an earlier traverse in the answer; the first may be incorporated by amendment in the proper place, if the plaintiff desires. Strictly speaking, both these traverses raise immaterial issues, since the allegations are conclusions of law and would be disregarded in any case. Formally, however, they are bad where they are, and should be stricken out, as they may be. The fourth traverse is also immaterial, since the action is in contract, and requires no allegation of damages to withstand demurrer. Its presence in the plea would therefore not prejudice the defendant's right to demur. However, like the first and third, it has no proper place in a plea, since it is not necessary to the validity of the plea, and it may therefore be stricken out, like them.

In re CONTINENTAL BUILDING & LOAN ASS'N.

(District Court, N. D. California, First Division. November 9, 1915.)

No. 9509.

1. BANKRUPTCY ⊂=123—CREDITORS—ELECTION OF TRUSTEE.
Where a corporation was adjudged a voluntary bankrupt, and the petition named its shareholders as creditors, other creditors cannot complain that the shareholders were allowed to vote for the trustee, where it appeared that, if the shareholders were not creditors, the corporation was perfectly solvent, with assets greatly exceeding liabilities.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 171–179; Dec. Dig. ⊂=123.]

2. BANKRUPTCY ⊂=126—SELECTION OF TRUSTEES—RIGHT OF CREDITORS.
A creditor, who will at all events be paid in full, cannot complain that it was denied the right to select the trustee.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 182, 184, 187; Dec. Dig. ⊂=126.]

3. BANKRUPTCY ⊂=126—TRUSTEE—SELECTION.
It is proper for the referee to reject a trustee, where the selection was influenced, if not brought about, by the officers and attorneys of the bankrupt corporation.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 182, 184, 187; Dec. Dig. ⊂=126.]

In Bankruptcy. In the matter of the bankruptcy of the Continental Building & Loan Association. Petition to review an order of the referee disapproving the selection of a trustee, and to review his action in allowing shareholders of the bankrupt to vote as creditors. Order affirmed, 232 Fed. 828, — C. C. A. —.

N. Schmulowitz, of San Francisco, Cal., for petitioner.

DOOLING, District Judge. The Continental Building & Loan Association was upon its own application adjudicated a bankrupt on

August 9, 1915. On August 30, 1915, the creditors appeared by proxy before the referee for the purpose of electing a trustee. The trustee selected at that time was not approved by the referee, and another election was held on September 15, 1915. At this election the Anglo-California Trust Company was chosen, but the selection was disapproved by the referee.

The order disapproving this selection has been brought here for review. There is also brought here for review the action of the referee in permitting the shareholders of the bankrupt to vote as creditors for the trustee, and the refusal of the referee to permit the Merchants' National Bank, which has a claim against the bankrupt for money loaned to it, to select the trustee, as being the only creditor, within the meaning of the Bankrupt Act, that appeared and offered to vote at the meeting. The amount of the latter's claim is $2,611.20, while the claims of the shareholders voting at this election aggregate $522,437.50.

[1] The question as to whether the shareholders can be at the same time creditors is an interesting one, but under the peculiar circumstances of this case need not be definitely determined at this time. The adjudication was had upon the petition of the corporation itself. The shareholders were named in the petition as creditors. If they are not creditors, within the meaning of the bankrupt law, the corporation is not insolvent, as the only other claims amount to but $12,198.90, while the assets of the corporation are scheduled at $769,508.13. If, therefore, the shareholders are eliminated as creditors, we have these vast assets with which to pay debts of $12,198.90. No one interested has made any objection to the adjudication, and so long as it stands, based on the theory that the shareholders are creditors, they must be regarded as creditors for all purposes.

[2] The Merchants' National Bank will be paid in full, whatever happens to the shareholders' claims, and the order denying it the right to select the trustee is affirmed.

[3] The selection of the Anglo-California Trust Company was disapproved by the referee, because he found that the selection had been influenced, if not brought about, by the officers of the bankrupt and the attorneys for the bankrupt. His action in so doing is affirmed.

In re SCHUMM.

(District Court, N. D. California, First Division. August 23, 1915.)

No. 9091.

BANKRUPTCY ⟸396(4)—RIGHT TO EXEMPTION—STATUTE.

Under Code Civ. Proc. Cal. § 690, exempting one dray or truck by the use of which a drayman or truckman habitually earns his living, the exemption of an auto truck cannot be granted, unless it appears that the bankrupt habitually earns his living by use thereof.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 659; Dec. Dig. ⟸396(4).]

In Bankruptcy. In the matter of the bankruptcy of Leonard G. Schumm, bankrupt. Petition by the bankrupt for review of an order of the referee refusing to set apart to him as exempt an auto truck. Order affirmed.

A. H. Carpenter, of Stockton, Cal., for bankrupt.

DOOLING, District Judge. Petitioner seeks to review an order of the referee refusing to set apart to him as exempt a certain auto truck. Without passing upon the question as to whether or no an auto truck would be exempt under any circumstances, it does not appear in the present case that the petitioner habitually earned his living by the use of the truck in question. But subdivision 6 of section 690, C. C. P., upon which this exemption is claimed, exempts "one dray or truck * * * by the use of which a * * * drayman, * * * truckman, etc., * * * habitually earns his living."

The order of the referee is therefore affirmed.

In re DARR.

(District Court, N. D. California, First Division. February 11, 1916.)

No. 9932.

BANKRUPTCY ⊂=45—PROCEEDINGS—PAYMENT OF FEES.

As, under the statute, payment of the clerk's filing fees has priority over payment of attorney's fees, a bankrupt cannot reverse this order, and, after paying his attorney a fee, file his petition and schedules as pauper.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⊂=45.]

In Bankruptcy. In the matter of the bankruptcy of George W. Darr. Petition in forma pauperis to be permitted to file the petition and schedules without paying the clerk the fees provided by law. Petition denied.

Rodolph Hatfield, of Oakland, Cal., for bankrupt.

DOOLING, District Judge. The petitioner has presented an oath in forma pauperis, and asks that he be permitted to file his petition and schedules without paying the clerk the fees provided for by law. His schedules show that he has paid his attorney the sum of $35. If this sum was paid from his estate, he should not be allowed to file his petition without paying the required fees, because in the order of priority established by the statute the clerk's fee takes precedence over the fees of his attorney, and a bankrupt cannot reverse this order by paying his attorney first and not paying the clerk at all.

The motion that the clerk be directed to file his petition without fees is therefore denied.

In re STARR.

(District Court, N. D. California, First Division. January 29, 1916.)

No. 9109.

BANKRUPTCY ⊂=348—CLAIMS—PRIORITIES.

As Civ. Code Cal. § 158, allows a husband and wife to contract, a wife's claim for services rendered in the business of her husband under an agreement for payment will not be postponed to claims of other creditors, there being nothing in the marital relation requiring a wife to engage in her husband's business without compensation.

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

In Bankruptcy. In the matter of the bankruptcy of Washington I. Starr. Petition by Josephine Starr for review of an order of the referee postponing her claim. Order reversed.

Rothchild, Golden & Rothchild, of San Francisco, Cal., for claimant.
Louis P. Dunkley, of San Francisco, Cal., for trustee.

DOOLING, District Judge. The claim of Josephine Starr, wife of the bankrupt, for $2,531.40, supported by the promissory note of the bankrupt, executed in 1911, having been disallowed by the referee, she seeks a review of the order of disallowance. The claim was not disallowed in terms, but was made subordinate to the claims of other creditors, which, owing to the paucity of funds, will result in her receiving no dividend. The claim, evidenced by the note, is for services rendered by the wife in the business of her husband, and its bona fides is not questioned by the referee, nor apparently by the trustee. The Civil Code of this state (section 158) permits husband and wife to enter into contracts of this kind, and I know no reason why this claim should not stand as any other claim would for like services. There is nothing in the marital relation which would compel a wife to work in her husband's store without compensation, nor anything in the record here which would in good faith estop the claimant from presenting her claim.

The order postponing the claim is therefore reversed.

LEE LINE STEAMERS v. ROBINSON.

(Circuit Court of Appeals, Sixth Circuit. April 6, 1916.)

No. 2825.

1. COURTS ⟸329—JURISDICTION OF FEDERAL COURTS—JURISDICTIONAL ALLEGATIONS.

It is not absolutely necessary that a bill in equity in a federal court should contain an allegation that the amount in controversy exceeds $3,000, where that fact appears from other allegations.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 897; Dec. Dig. ⟸329.]

2. COURTS ⟸264(1)—JURISDICTION OF FEDERAL COURTS.

A suit in a federal court for cancellation of instruments purporting to transfer a judgment at law, rendered by such court in favor of complainant, is ancillary in character, and the court has jurisdiction, regardless of the amount in controversy.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 801; Dec. Dig. ⟸264(1).]

3. COURTS ⟸328(1)—JURISDICTION OF FEDERAL COURT—AMOUNT IN CONTROVERSY.

An interest in a judgment to which plaintiff's counsel is entitled as a fee is neither interest nor costs, but a part of the judgment, for the purpose of determining the amount in controversy to give a federal court jurisdiction of a suit to determine the validity of an assignment thereof by plaintiff.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 890; Dec. Dig. ⟸328(1).]

4. JUDGMENT ⟸842—VALIDITY OF ASSIGNMENT—FRAUD.

Complainant, who was an ignorant and dissipated colored man, recovered a judgment for $5,000 against defendant for severe personal injuries. Pending proceedings in error in the appellate court, defendant, without knowledge of his counsel, obtained from complainant an assignment of the judgment for $125, with a provision that in case of affirmance he should receive an additional $25, which was paid after affirmance and another assignment taken. *Held*, that such facts, found by the trial court on testimony taken in open court, which also made it doubtful whether complainant knew the nature of the papers he signed, were sufficient to support a decree setting aside the assignments for fraud.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1538; Dec. Dig. ⟸842.]

5. JUDGMENT ⟸842—SETTING ASIDE—PLEADING—OFFER TO RETURN CONSIDERATION.

In such suit, that complainant did not tender back the money received did not defeat the right of recovery, where the decree provided for its return.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1538; Dec. Dig. ⟸842.]

Appeal from the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Suit in equity by Will Robinson against the Lee Line Steamers. Decree for complainant, and defendant appeals. Affirmed.

See, also, 218 Fed. 559, 134 C. C. A. 287.

Stephens, Lincoln & Stephens, of Cincinnati, Ohio (C. H. Stephens, Sr., of Cincinnati, Ohio, of counsel), for appellant.

W. D. Gilbert, of Memphis, Tenn., for appellee.

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

WARRINGTON, Circuit Judge. This was a suit to set aside two written instruments purporting to transfer to S. R. Lee all right and interest of Robinson, plaintiff below, in a judgment previously recovered by him against the Lee Line Steamers, defendant below. The bill alleges diversity of citizenship, that plaintiff had not signed either of the instruments or received any money or other consideration for either, and that defendant had procured the instruments through fraudulent acts and practices of some of its agents, including the transferee. The answer specifically denies such acts and practices, and in great detail of alleged facts and circumstances states defendant's version of the negotiations leading up to and including the execution of the instruments. Decree was entered for plaintiff, adjudging in substance as follows: Plaintiff had signed the instruments; they had been received by S. R. Lee as agent for defendant; they had been fraudulently obtained and were null and void; and, the amount of the judgment having been paid to the clerk, it was ordered that, after deducting the sums, with interest, which appear in the instruments, respectively, to have been received by plaintiff, the clerk pay the money remaining in his hands to the plaintiff.

[1] The answer also alleges that the bill does not show upon its face that the court has jurisdiction. True, the sum or value of the matter in dispute is not formally alleged; but it was not absolutely necessary that it should be. The amount could be otherwise shown. United States v. Freight Association, 166 U. S. 290, 310, 17 Sup. Ct. 540, 41 L. Ed. 1007; Robinson v. Suburban Brick Co., 127 Fed. 804, 806, 62 C. C. A. 484, and citations (C. C. A. 4th Cir.).

[2, 3] The bill states the amount of the judgment to be $5,000. The object of the suit is to have conflicting claims and interests determined in respect of the judgment recovered in the action at law, and so is ancillary in character. Lumley v. Wabash R. Co., 76 Fed. 66, 69, 22 C. C. A. 60 (C. C. A. 6th Cir.). The answer alleges, in the first place, that the instruments in issue purport to transfer to Lee only the interest of plaintiff in the judgment, and that this interest is less than $3,000, and, in the next place, that the instruments were received by defendant with knowledge that plaintiff's attorney would in the event of recovery be entitled to a claim and lien thereon for 50 per cent. of the amount as fees, and thus that the matter in controversy is, exclusive of interest and costs, less than the sum of $3,000. So far as the defense of jurisdiction is concerned, the burden of proving these allegations touching the value of plaintiff's interest in the judgment was on the defendant, and it failed to discharge the burden; on the contrary, the balance of the judgment, which in distinct terms was ordered to be paid to the plaintiff, as before pointed out, is largely in excess of $3,000. Independently of this, the compensation of coun-

sel is neither interest nor costs, and for jurisdictional purposes is to be treated as part of the matter in controversy. Springstead v. Crawfordsville State Bank, 231 U. S. 541, 542, 34 Sup. Ct. 195, 58 L. Ed. 354.

[4] Upon the merits of the controversy, it is insisted that this court shall reverse the conclusions of the District Judge which resulted in the decree. The general rule undoubtedly is, as counsel strenuously urge, that a court of equity cannot set aside a written instrument for fraud, upon a bare preponderance of testimony which leaves the issue in doubt, but that this must be done, if at all, upon evidence that is clear, unequivocal, and convincing. As the contention of counsel appears to us, however, they rely on decisions announcing the rule rather than upon the particular facts to which the rule was applied. Upon their facts we regard those cases as distinguishable from the present case. The question of ultimate control here is whether, in view of all the facts and circumstances of the instant case, it can be said that the rule mentioned was not in effect observed and followed by the learned trial judge.

We have seen that the judgment is for $5,000. The recovery was for serious personal injuries suffered by plaintiff while a passenger on one of the defendant's steamboats. Lee Line Steamers v. Robinson, 218 Fed. 559, 134 C. C. A. 287. According to the first of the two contested instruments and the proofs, while the original case was pending on error in this court, the defendant, through one of its agents, secured from the plaintiff a formal transfer of his "right, title, claim, and interest" in the judgment, for the sum of $125 in cash. The instrument contains a further provision that in the event of affirmance the plaintiff was to receive an additional sum of $25, but in case of reversal the first-named sum was to be "in full settlement and satisfaction of any and all claims," and the defendant was in terms "discharged from all other or further liability or obligation" to plaintiff "in said suit because of said injuries." In short, affirmance of the judgment was to entitle plaintiff in all to $150, and reversal was to disentitle him to anything more than the $125 for his cause of action—regardless of the grounds of reversal. The second instrument, after reciting that Robinson had "assigned to S. R. Lee the judgment," also the substance of the first instrument, and the fact that the judgment had "within the last few days" been affirmed, acknowledges receipt of the additional sum of $25 "in full payment of all claims * * * and in full settlement of all rights" plaintiff has in the judgment.

Plaintiff's counsel knew nothing of these instruments, or of the transactions they set forth, until after affirmance of the judgment; and no reason is shown why counsel might not have been seasonably advised. Admittedly the mandate was received in the court below about December 21, 1914, the instruments were filed the 22d of that month, and the bill was filed on the 1st of January following. The plaintiff's mental and physical condition alike should have been a warning to defendant not to conclude such an arrangement as the instruments in issue disclose without first consulting plaintiff's counsel. In the course of his opinion in this suit, Judge McCall said:

"So I think this is peculiarly a case where a court of equity ought to interpose. Here men are dealing with each other who occupy such different relation—one, as I said a moment ago, thick-headed, a dullard, without knowledge of his rights, and at the time he may have signed this paper was reduced almost to a skeleton by wounds inflicted upon him by the defendant; on the other hand, there were the defendant and its representatives, Mr. Lee and Mr. Neely, all of them men of affairs, men who count in the consideration of matters of importance, knowing, as they must have known, if this suit was affirmed, they got the judgment, and, if it was reversed, the suit was dismissed and settled. I have never seen anything just like it in all my experience at the bar or on the bench, and I am forced to the conclusion that this man has been overreached, and that he ought to have the relief he prays for."

All the witnesses delivered their testimony in the presence of the District Judge. We have frequently had occasion to allude to the advantage that the trial judge has in such circumstances. The demeanor of the witnesses, testifying upon such issues as are here involved, is of manifest importance. It is true that the record alone of the testimony appears to discredit the plaintiff in some particulars; and still it is to be gathered from that source that the plaintiff is illiterate and was dissipated, was physically broken down, and otherwise unfit to protect such interests as he had here. We are not impressed by the testimony that the papers were read to plaintiff and that he assented to them before signing; for we cannot think that he had capacity fully or fairly to comprehend the papers. Furthermore, his poverty and dependence, his apparent lack of a sense of responsibility, and his intemperate habits, all combined to render him an easy victim to the temptation of money—even the comparatively small sums he received. The pertinency here of still another portion of the opinion cannot fail of appreciation:

"I doubt if any disinterested man can hear this evidence as I have heard it here this morning, and become apprised of the facts that have come to the attention of the court in this case, who is not forced to the conclusion that this colored man should not be deprived of what the courts have said he was entitled to from this defendant, at the hands of the defendant itself. I think I know human nature well enough to know in what the defendants were interested, and when they made that deal with Robinson, if the deal was ever made, they pursued the course men pursue who are trying to drive a sharp bargain and get all out of it possible. They knew the circumstances of the man with whom they were dealing; they knew his weakness—his physical condition as well as his mental condition."

We recognize the rule that mere inadequacy of consideration is not alone sufficient; but when we add to this the great disparity in capacity and in condition between the plaintiff and those who took part in behalf of the defendant in bringing about the transfers, also the defendant's acceptance of the obvious advantages of the transactions without first arranging for plaintiff to have the advice of his counsel, we are convinced that the conclusion reached below should be sustained.

[5] It is urged that the case should fail for the reason that there has been no tender made of the $150; but, in view of the peculiar circumstances of this case, we think the provision made in the decree to return the money, as before pointed out, is a sufficient answer to this

contention. Georgia Home Ins. Co. v. Rosenfield, 95 Fed. 358, 363, 37 C. C. A. 96 (C. C. A. 6th Cir.). Upon examination, also, of the other assignments, we do not find reversible error.

The decree is affirmed, with costs.

J. H. LANE & CO. et al. v. MAPLE COTTON MILL et al. SAME v. HAMER COTTON MILLS et al. TALLMAN v. DILLON COTTON MILLS et al.

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

Nos. 1362–1364.

1. CORPORATIONS ⟸619—SALE OF PROPERTY—PURCHASE BY TRUSTEES.

Under Civ. Code, S. C. 1912, § 2815, providing that upon the dissolution of a corporation the directors shall be trustees, with full power to settle the corporation's affairs, sell its property, etc., directors of a corporation so selling its property as statutory trustees could not buy the property for themselves, or a new corporation organized by them, where the amounts of their bids were less than the value of the property, and the sales would be set aside, as the positions of buyer and seller are inconsistent, and a trustee will not be permitted to assume both positions.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2459, 2460; Dec. Dig. ⟸619.]

2. CORPORATIONS ⟸619—SALE OF PROPERTY—PURCHASE BY TRUSTEES.

A purchase of property by the attorney for such directors would also be set aside, though he was also acting for other parties interested and with the best intentions towards all concerned, especially where his purchase was in conjunction with the purchases by the directors, and so closely connected with them that it would add to the existing confusion to allow it to stand while setting aside the others.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2459, 2460; Dec. Dig. ⟸619.]

Appeals from the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Middleton Smith, Judge.

On rehearing. Former affirmance set aside, judgment reversed, and cause remanded, with instructions.

For former opinion, see 226 Fed. 692, —— C. C. A. ——.

Frederic R. Kellogg, of New York City (Huger, Wilbur & Guerard and Wm. C. Miller, all of Charleston, S. C., and William H. Fain, Kellogg, Emey & Cuthell, and Earle L. Beatty, all of New York City, on the brief), for appellants.

H. J. Haynsworth, of Greenville, S. C. (Haynsworth & Haynsworth, of Greenville, S. C., and Gibson & Muller, of Dillon, S. C., on the brief), for appellees.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. In the opinion heretofore filed in this cause a full statement was made of the legal issues and the facts out of which they arose. It is sufficient to say here that the appeal is from a decree of the District Court refusing to set aside, at the in-

stance of J. H. Lane & Co. and John M. Tallman, minority stockholders, sales of the Dillon Cotton Mills, Maple Cotton Mill, and the Hamer Cotton Mills, made in pursuance of resolutions of the stockholders of the several corporations.

This court affirmed the decree holding that the District Judge had decided correctly all the questions referred to in his opinion. As to one of the points made in argument here, this court said:

"It was argued in this court that the sale was invalid because the property was bid off by the trustees and their attorney at a sale made by themselves. The objection would, to say the least, be of most serious import had it been made before the District Court and error assigned in the court's finding on it. Michoud et al. v. Girod et al., 45 U. S. [4 How.] 503 [11 L. Ed. 1076]; Scottish-American Mtg. Co. v. Clowney, 70 S. C. 229 [49 S. E. 569, 3 Ann. Cas. 437]; McCallum v. Grier, 86 S. C. 162 [68 S. E. 466, 138 Am. St. Rep. 1037]. But the sale was treated by the District Judge as having been made to the Dillon Mills on behalf of the majority stockholders, and his opinion gives no intimation that objection was made on the ground that a trustee could not bid off property at his own sale. A point not presented to the court below and passed on cannot be considered by this court. Missouri Pacific Railway Co. v. Fitzgerald, 160 U. S. 575 [16 Sup. Ct. 389, 40 L. Ed. 536]; Pine River Logging Co. v. United States, 186 U. S. 279 [22 Sup. Ct. 920, 46 L. Ed. 1164]."

A petition for rehearing on this point was filed on the ground that while the record did not show it, yet it was a fact that the point referred to had been made and fully argued in the District Court, and that it was understood by the court and the counsel that it had been passed on and decided by the District Court adversely to the appellants. An order was then made requiring the appellees to show cause—

"why the record in these causes on appeal from the District Court of the United States for the Eastern District of South Carolina, at Charleston should not be amended so as to show that the District Court considered the point as to whether the sale was made invalid by reason of the fact that the property was bid off by the trustees or their attorneys at the sale made by them."

By the petition and the return the court was convinced that the point referred to had been made and argued before the District Court, and was considered by all parties to have been passed on by the District Court adversely to the appellants. The court being unwilling under these circumstances, that the appellants should lose the benefit of a point of importance through mere inadvertence, considered that the record should be treated as properly amended. The assignments of error though very general in their form thus became responsive to the finding of the District Court on this point and drew in question the legality of the successful bids of the trustees and their attorney. Consequently reargument of the point was ordered.

[1] In the course of the dissolution proceeding, sales of the plants of the Maple Cotton Mill, Hamer Cotton Mills, and the Dillon Cotton Mills were made by the directors as trustees under the authority conferred by the following state statute:

"Upon the dissolution in any manner of any corporation, the directors shall be trustees thereof, with full power to settle the affairs, collect the outstanding debts, sell and convey the property and divide the moneys and other property among the stockholders after paying its debts, as far as such moneys and property shall enable them; they shall have power to meet and act under the by-

laws of the corporation and under regulations to be made by a majority of said trustees, to prescribe the terms and conditions of the sale of such property, and may sell all or any part for cash, or partly on credit, or take mortgages and bonds for part of the purchase price for all or any part of said property." Section 2815, vol. 1, Code 1912.

The statute thus made the directors trustees, and their trust was to all the stockholders—the minority as well as the majority. The Maple Mill plant was bid off by Wm. Hamer for $155,000, the Hamer Mill plant by W. T. Bethea for $190,000, and the Dillon Mill plant by Mr. H. J. Haynsworth for $50,000. Hamer and Bethea were directors and statutory trustees making the sale. Mr. Haynsworth was attorney for the trustees and for the new corporation to which the bids were afterwards assigned. The bids were all below the value of the property. We are convinced that no actual fraud was intended, and that all the parties were endeavoring to promote the interests of those concerned. Yet in legal contemplation the position of a seller is that of a person trying to get as high price as possible for the property; that of a purchaser of one trying to buy at as low price as possible. The two positions are inconsistent and irreconcilable, and the law forbids a trustee to assume both.

Minority stockholders who had refused to go into the new corporation were interested that the property should bring as much as possible. The trustees representing them in selling had no right to become purchasers for themselves or to purchase for another. The Supreme Court thus states the principle and lays down the rule:

"The rule of equity is, in every code of jurisprudence with which we are acquainted, that a purchase by a trustee or agent of the particular property of which he has the sale, or in which he represents another, whether he has an interest in it or not—per interpositam personam—carries fraud on the face of it. * * *".

"Where a person cannot purchase the estate himself, he cannot buy it as agent for another. 9 Ves. 248; Ex parte Bennet, 10 Ves. 381. The general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity. It restrains all agents, public and private; but the value of the prohibition is most felt, and its application is more frequent, in the private relations in which the vendor and purchaser may stand towards each other. The disability to purchase is a consequence of that relation between them which imposes on the one a duty to protect the interest of the other, from the faithful discharge of which duty his own personal interest may withdraw him. In this conflict of interest, the law wisely interposes. It acts not on the possibility, that, in some cases, the sense of that duty may prevail over the motives of self-interest, but it provides against the probability in many cases, and the danger in all cases, that the dictates of self-interest will exercise a predominant influence, and supersede that of duty. It therefore prohibits a party from purchasing on his own account that which his duty or trust requires him to sell on account of another, and from purchasing on account of another that which he sells on his own account. In effect, he is not allowed to unite the two opposite characters of buyer and seller, because his interests; when he is the seller or buyer on his own account, are directly conflicting with those of the person on whose account he buys or sells."

See Michoud et al. v. Girod et al., 4 How. 503, 11 L. Ed. 1076; U. S. v. Oberlain M. Carter, 217 U. S. 286, 30 Sup. Ct. 515, 54 L. Ed. 769, 19 Ann. Cas. 594; Magruder v. Drury and Maddox, Trustees, 235 U. S. 106, 35 Sup. Ct. 77, 59 L. Ed. 151; Scottish-American Mtg.

Co. v. Clowney, 70 S. C. 229, 49 S. E. 569, 3 Ann. Cas. 437; McCallum v. Grier, 86 S. C. 162, 68 S. E. 466, 138 Am. St. Rep. 1037; Perry on Trusts, § 602. These decisions cover the precise point involved and are binding on this court.

[2] Mr. Haynsworth it is true was acting for other parties interested and no doubt acted with the best intentions towards all concerned; but he was also the representative of the trustees. Besides the purchase by him was in conjunction with the other purchases, and so closely connected with them that it would add to the confusion already existing to allow it to stand while setting aside the others. We have considered carefully the cases cited by counsel for appellees holding that when the transaction is shown to be in all respects fair, a purchase from the corporation by the directors or by another corporation in which they are interested will be sustained. Ryan v. Williams (C. C.) 100 Fed. 172; Marks v. Merrill Paper Co., 203 Fed. 16, 123 C. C. A. 380; Green v. Bennett (Tex. Civ. App.) 110 S. W. 108. Where such sales have been sustained a showing has been usually required, not only of the utmost fairness, but of adequate price; in this case, as we have indicated, the successful bids by the trustees were less than the value of the property. But, aside from that consideration, the case does not fall under the authorities relied on, because the persons who sold this property and bought it were not acting as directors, but as statutory trustees, whose express trust was to sell the property to the best possible advantage. The conclusion seems inevitable, under the law as laid down by the Supreme Court of the United States and the Supreme Court of South Carolina, that the sales must be set aside.

For the reasons stated, we are of opinion that the court below erred in its decree refusing to set aside the sales of this property. Therefore the decree of the lower court is reversed, and the cause remanded, with the instructions to set aside the sales, without prejudice to the right of the trustees to resell, or to the stockholders to order another sale by different trustees, or to the rights of the purchaser or any other person to apply to the District Court for subrogation or any other proper relief on account of payments made for the benefit of the corporations, and without prejudice to the rights of any party in interest to apply to the District Court for a resale under the direction of the court, or for any other order that may be proper for the adjustment of the equities of the parties, not inconsistent with this opinion.

Reversed.

PARRISH v. ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA.

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

No. 1382.

1. INSURANCE ⟸789(1)—ACCIDENT INSURANCE—NOTICE OF LOSS.
Where the constitution of an order fixed its liability for bodily injury effected through accidental means which occasioned death immediately or within six months from the happening thereof, and provided that in the event of death resulting from accidental means, as thereinbefore provided, notice of the accident must be given, and in addition notice of the death within 10 days after the death, notice was required to be given in case of death resulting immediately from the injury.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1963, 1964; Dec. Dig. ⟸789(1).]

2. INSURANCE ⟸789(1)—ACCIDENT INSURANCE—NOTICE OF LOSS—IMPOSSIBILITY.
The fact that it might be impossible, in some cases of immediate death from accident, to give the notice of loss required by the constitution of the order does not excuse failure to give it when it was possible.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1963, 1964; Dec. Dig. ⟸789(1).]

3. APPEAL AND ERROR ⟸1067—ERROR FAVORABLE—REFUSAL TO DIRECT VERDICT.
Where the facts from which the jury were told they should infer waiver of notice of death were not disputed, or were established by uncontroverted testimony, the jury must have found that the order waived the requirements for notice, and the plaintiff cannot complain of the failure to give a direct instruction that defendant had waived the requirement.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4229; Dec. Dig. ⟸1067; Trial, Cent. Dig. § 475.]

4. INSURANCE ⟸825(3)—ACCIDENT INSURANCE—SUFFICIENCY OF EVIDENCE—SUICIDE.
In an action on a benefit insurance certificate, excluding liability for suicide, evidence *held* sufficient to warrant the court in refusing to direct a verdict that the insured had not committed suicide.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 2009; Dec. Dig. ⟸825(3).]

5. INSURANCE ⟸819(1)—WEIGHT OF EVIDENCE—SUICIDE.
In an action on a fraternal benefit certificate, where the evidence of suicide is circumstantial, the defendant fails, unless the circumstances exclude with reasonable certainty any hypothesis of death by accident or by the act of another.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 2006; Dec. Dig. ⟸819(1).]

6. INSURANCE ⟸825(3)—QUESTION FOR JURY—SUICIDE.
In an action on a fraternal benefit certificate excluding liability for suicide, though the presumption is against suicide and the defendant must show it by clear and satisfactory evidence, where there is evidence so tending to support the defense that reasonable men might differ as to whether the inference of suicide or accidental death should be drawn, that inference must be drawn by the jury and not by the court.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 2009; Dec. Dig. ⟸825(3).]

7. INSURANCE ⟸819(1)—BURDEN OF PROOF—SUICIDE.
In an action on a fraternal benefit certificate excluding liability for suicide, the defense of suicide should be established by clear and satisfactory proof, such as is required to establish a fraud.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 2006; Dec. Dig. ⟸819(1).]

In Error to the District Court of the United States for the Eastern District of Virginia, at Richmond; Edmund Waddill, Jr., Judge.

Action by Bettie S. Parrish against the Order of United Commercial Travelers of America. Judgment for defendant, and plaintiff brings error. Affirmed.

R. L. Gordon, Jr., of Louisa, Va. (Gordon & Gordon, of Louisa, Va., on the brief), for plaintiff in error.

John A. Lamb, of Richmond, Va., and Harry L. Doud, of Columbus, Ohio (Lamb & Lamb, of Richmond, Va., on the brief) for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. Bettie S. Parrish, a resident of Fluvanna county, Va., brought this action as beneficiary of a certificate or life insurance policy issued to her son Eugene M. Parrish, as one of its members by the Order of United Commercial Travelers of America, an Ohio corporation.

By plea in abatement the defendant made the point that since the plaintiff is a resident of the Western District of Virginia and the defendant a foreign corporation, jurisdiction of the action was in the District Court for the Western District, and not the District Court for the Eastern District. This plea to the jurisdiction was overruled on the ground that the defendant had waived it by filing a general demurrer to the declaration. The demurrer was also overruled, and the defendant then set up these special pleas:

(1) That the plaintiff had failed to comply with the following provisions of the constitution of the order:

"In event of any accidental injury on account of which a death claim may be filed against the order, notice of the accident (not the results) must be given in writing to the Supreme Secretary within ten days thereafter, stating the full name and address of the injured member, date and full particulars of the accident and the name and address of his medical attendant.

"In event of a death resulting from external, violent and accidental means, as hereinbefore provided, notice of the accident must be given as hereinbefore provided, and, in addition, notice of the death must be given in writing to the Supreme Secretary within ten days after the death."

(2) That Eugene M. Parrish had caused his own death by intentionally shooting himself in the head with a pistol; and the constitution of the order provided that there should be no liability under the policy for death resulting from intentional self-inflicted injury.

On the trial both plaintiff and defendant asked for a directed verdict. But the District Judge submitted the issues to the jury, with the result that a verdict was found for the defendant. Since the plea in abatement does not challenge the jurisdiction of the federal court,

but only raises the point that the action should have been brought in the Western instead of the Eastern District of Virginia, it may be laid aside for the moment; for the plaintiff, having brought the action in the Eastern District, cannot allege that it was not properly brought, and the point is important to the defendant only in the event that reversible error be found in the conduct of the trial on the merits.

[1] The plaintiff first contends that the notice 10 days after death required by the provision of the constitution above quoted has no application to a case of instantaneous death, and that the jury should have been so charged. The liability of the order as fixed by the constitution is for—

"bodily injury effected through external, violent and accidental means which alone and independent of all other causes shall occasion death immediately or within six months from the happening thereof."

It is therefore perfectly clear that the requirement of notice "in the event of death resulting from external, violent and accidental means as hereinbefore provided" applies to a death resulting "immediately" from the injury.

[2] It is true, as said in the argument of plaintiff's counsel, that cases might arise where from lack of knowledge of the death or other causes it would be impossible for the beneficiary to give notice 10 days after the death. But this is not a case of that kind. The fact that a contract may become impossible of performance from circumstances beyond the control of the party obligated does not affect its validity nor relieve from performance when possible.

[3] The instructions of the court on this point were equivalent to a direct instruction to the jury that the conditions as to notice and furnishing proof of loss had been waived by the defendant. It appears clearly from the record and from the excellent statement of the evidence in the brief of counsel for the plaintiff that the facts from which the jury were told they should infer waiver were either not disputed or established by uncontroverted testimony. Hence it is impossible not to infer that the jury must have found that the defendant had waived the requirements of the policy as to notice and proof of death, and there is no ground therefore for the plaintiff to complain of the failure to give a direct instruction that the defendant had waived the provision of its constitution pertaining to notice and proof of death.

The important question is whether the plaintiff was entitled to an instruction that Eugene M. Parrish had not committed suicide and that the plaintiff was therefore entitled to recover. On this subject the charge was as follows:

"The court charges you that on the issue of suicide raised by the defendant as a ground for avoiding the payment of the policy sued on, the burden of proof is upon the defendant to establish such defense. That the presumption, notwithstanding the finding of the dead body of the insured in the position described in the testimony, with his hands on the pistol lying between his legs, and the hole in his head, is that he met his death accidentally, and that the plaintiff is entitled to recover, unless the defendant can overcome the burden thus placed upon it; that is to say, unless the testimony excludes all reasonable hypothesis that the shooting was accidental, and you are convinced that the deceased intentionally took his life by inflicting the wound in his head."

The plaintiff's position is that the District Judge should have held and charged as a matter of law that the evidence did not exclude all reasonable hypotheses that the shooting was accidental, and that the verdict should be for the plaintiff.

[4] There was little difference as to the facts; the main issue is the inference to be drawn from them. Eugene M. Parrish was a traveling salesman about 25 years old, in excellent health, successful in business, sunny and bright in disposition, held in high esteem, and, so far as known, free from serious anxiety or trouble. Early in the afternoon of Thursday, May 27, 1911, he arrived at the Hotel Hamilton in Bristol. At supper he directed the waiter to have his breakfast on the table at 9:30 the next morning. The next morning he was found dead in his bed from a pistol shot which entered a little above the right temple. There were powder burns around the point of entrance of the ball, and on the left forefinger and perhaps the thumb. One of the witnesses testified that the ball had entered at right angles with the head, and that in his opinion the pistol could not have been fired more than 18 inches away from the head. Deceased was lying on his back, dressed except his coat and vest, with his body turned a little to the left side, and his feet on the floor. The right hand was resting across his body and the left hand nearly straight on the bed. The pistol was on the bed between his thighs pointing from one to the other. One chamber had been discharged, all the others were loaded. A box containing cartridges was on the mantel. The evidence was conflicting as to whether the deceased had recently acquired the pistol or had owned it for some time. Scattered on the hearth were a quantity of papers which had been torn into small pieces. Some were found to be orders for goods or other business memoranda and some letters. Two or three letters were in a woman's or boy's handwriting. A post card was formed from some of the pieces which had on it a picture of a man and woman walking and conversing, and this writing:

"Have you had a walk like this lately. Had a long letter from Miss M. H. You ought to see what she said, you said about me. Will show you soon."

The two doors to the room were locked, and there was nothing to indicate the presence of any other person in the room at the time of the tragedy.

[5] Did this evidence require the District Judge to direct a verdict for the plaintiff, or to leave the issue of accidental death or suicide to the jury? In Cosmopolitan Life Ins. Co. v. Koegal, 104 Va. 619, 52 S. E. 166, the Supreme Court of Appeals states the rule that:

"Where the evidence of self-destruction is circumstantial, the defendant fails, unless the circumstances exclude with reasonable certainty any hypothesis of death by accident or by the act of another."

We cite a few of the many authorities holding this rule to be now unquestioned and restating it in different forms: Travelers' Ins. Co. v. McConkey, 127 U. S. 661, 8 Sup. Ct. 1360, 32 L. Ed. 308; Life Ins. Co. of Va. v. Hairston, 108 Va. 832, 62 S. E. 1057, 128 Am. St. Rep. 989; Metropolitan Life Ins. Co. v. De Vault, 109 Va. 392, 63 S. E. 982, 17 Ann. Cas. 27; Sou. Atl. Life Ins. Co. v. Hurt, 115 Va.

398, 79 S. E. 401; Cochran v. Mutual Life Ins. Co. (C. C.) 79 Fed. 46; Fidelity & Casualty Co. v. Egbert, 84 Fed. 410, 28 C. C. A. 281; Tackman v. Brotherhood of Am., 132 Iowa, 64, 106 N. W. 350, 8 L. R. A. (N. S.) 974; Cady v. Fidelity & Casualty Co., 134 Wis. 322, 113 N. W. 967, 17 L. R. A. (N. S.) 260; Wilkinson v. Ætna Life Ins. Co., 240 Ill. 205, 88 N. E. 550, 25 L. R. A. (N. S.) 1256, 130 Am. St. Rep. 269; Krogh v. Modern Brotherhood of Am., 153 Wis. 397, 141 N. W. 276, 45 L. R. A. (N. S.) 404; Bohaker v. Travelers' Ins. Co., 215 Mass. 32, 102 N. E. 342, 46 L. R. A. (N. S.) 543; Boynton v. Equitable Life Ins. Soc., 105 La. 202, 29 South. 490, 52 L. R. A. 687; Mallory v. Travelers' Ins. Co., 47 N. Y. 52, 7 Am. Rep. 410.

[6] In the Virginia cases and all others to which we have referred the question was not whether the jury should have been directed to find for the plaintiff, but whether a verdict in favor of the plaintiff should be set aside on the ground that the evidence conclusively proved suicide. In view of the frequency of suicide it cannot be doubted that some courts have gone very far in applying the rule of presumption against it; but all the authorities agree that although the presumption is against suicide, and the defendant must take the burden of showing it by clear and satisfactory evidence, and that the jury should be so instructed, yet where there is evidence so tending to support the defense of suicide that reasonable men might differ as to whether the inference of suicide or accidental death should be drawn, then the inference must be drawn by the jury and not the court.

[7] We find no clearer statement of the test required by common sense than that thus given in Life Ins. Co. of Va. v. Hairston, supra, by the Supreme Court of Appeals of Virginia speaking through Judge Keith:

"We are of opinion that the defense of suicide should be established by clear and satisfactory proof, such as is required to establish a fraud."

In Leman v. Manhattan Life Ins. Co., 46 La. Ann. 1189, 15 South. 388, 24 L. R. A. 589, 49 Am. St. Rep. 348, the verdict in favor of the defendant on the issue of suicide was set aside, the court saying:

"In this condition of the record there is no adequate basis to refer the death to the intentional act of the deceased. If there are indications that point to suicide, there are other features not consistent with that theory."

While that case and this are similar in some of the facts, there are important differences. There, as here, there was proof of death, cheerfulness, and apparent happiness, and absence of any known reason for suicide. The circumstances of death are thus stated by the court:

"The body, found with the wound from a gunshot, causing death; the discharged pistol, wedged, or as if it had been forced, on the thumb of the right hand; the body reclining on the sofa as of one sleeping; the left arm rested on the breast; the right leg crossed on the left; the head in the usual position of one in repose; and there being no evidence of any convulsive movement, if we correctly translate the technical word 'jactitation,' used by the physicians who testify. The pistol was 'tightly wedged' to the thumb, so as to require force to remove it. The question is whether these appearances point to suicide to the exclusion of any other cause. Why not, with equal potency, to accidental death or death by the hand of another?"

In the present case there was evidence that the deceased was somewhat depressed when he left home; that there were powder burns at the wound and also on the left forefinger, indicating discharge of the pistol very close to the temple, and the use of the right hand in firing it and of the left in holding it very close to the temple. Taken in connection with this evidence, the tearing up of a large number of letters and other papers was a circumstance of significance.

We cannot doubt that these facts might well exclude in the minds of reasonable men any other inference than that the deceased intentionally shot himself; and that the issue was properly submitted to the jury.

In view of this conclusion the question of venue is of no importance. Affirmed.

THE WILHELMINA.

(Circuit Court of Appeals, Fifth Circuit. April 4, 1916.)

No. 2874.

1. SHIPPING ⟸86(2)—LIABILITY OF VESSEL OR OWNER—INJURY TO STEVEDORE.

Conflicting evidence considered, and *held* to sustain a decree holding a shipowner liable for injury to a stevedore engaged in stowing crossties in the hold, on the ground that the brake on the winch used to lower the ties, which was furnished by the ship, was defective.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 356, 357; Dec. Dig. ⟸86(2).]

2. SHIPPING ⟸84(5)—INJURY TO STEVEDORE—CONTRIBUTORY NEGLIGENCE.

A stevedore, injured while stowing cargo by the slipping of a defective winch, may be charged with contributory negligence, where he remained on the work with knowledge that the winch was defective and dangerous, although on the occasion of the injury he did all he could to protect himself.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 342; Dec. Dig. ⟸84(5).]

3. ADMIRALTY ⟸50—SUIT FOR INJURY TO STEVEDORE—PARTIES.

The dismissal of a petition bringing in a charterer under admiralty rule 59 (29 Sup. Ct. xiv) in a suit against a shipowner for injury to a stevedore, *held* without prejudice, where a decree against respondent was based on a finding that the injury was caused by a defective winch, which was provided by the ship.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 69–85; Dec. Dig. ⟸50.]

Appeal from the District Court of the United States for the Northern District of Florida; Wm. B. Sheppard, Judge.

Suit in admiralty by Walter H. Gaskill against the American steamship Wilhelmina, the A. H. Bull Steamship Company, claimant, with the Moore Timber Company, impleaded. Decree for libelant against respondent, and dismissing the suit as against the Timber Company, and claimant appeals. 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., J. W. Kehoe, Francis B. Carter, and J. E. D. Yonge, all of Pensacola, Fla., for appellees.

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

GRUBB, District Judge. The libel in this case was originally filed by the appellee, Walter H. Gaskill, against the steamship Wilhelmina. The appellant, A. H. Bull Steamship Company, appeared as claimant, and defended the libel. The appellant also filed a petition in the cause, asking that the Moore Timber Company, which was the time charterer of the vessel, be impleaded as a respondent in the cause. The court entered an order directing a citation to issue to the charterer, but, upon exceptions filed to the petition by the charterer, dismissed the citation and discharged the charterer from further appearance in the cause. Upon the hearing upon the merits, the court below rendered a final decree for the libelant against the claimant in the sum of $1,500, reducing the damages one-half because of a finding that the libelant was himself guilty of contributory negligence.

[1] The libelant's injury was received by him during the course of his employment as a stevedore in loading a cargo of cross-ties and lumber into the Wilhelmina at Panama City, Fla. The stevedores were employed by the Moore Timber Company, which was the time charterer of the steamship. The libelant, at the time of the accident, was working in the hold of the ship, and was struck on the head by cross-ties that were being lowered from the deck into the hold through the instrumentality of a winch. The apparatus for handling the ties was furnished by the ship; the work of loading was done by the charterer, through stevedores employed by it. The charter provided that the ship should furnish suitable appliances for loading, including winches. From the relation existing between the libelant and claimant, the claimant would be liable for negligence in failing to furnish a reasonably safe winch, but not for the negligence of the operator of the winch, furnished by it, who was the employé of the charterer, and a fellow servant of the libelant. The questions presented for decision are whether the facts in the record show the injury to have been caused, upon the one hand, by a negligent defect in the winch, or, upon the other hand, by the negligent operation of a proper winch, and whether the libelant was himself at fault. No question of assumption of risk arises, since the libelant was not employed by the claimant.

The alleged defect in the winch relied upon by libelant consisted in the alleged worn condition of the blocks of hardwood, which performed the function of brake shoes, and were fastened to the band, and came between it and the drum, when the brakes were applied. The effect of the alleged worn condition of the wooden blocks was to make it more difficult for the operator of the winch to check the speed of the descending load by the foot brake, which applied the wooden blocks to the drum. The claimant's position is that the winch was not defective, that the blocks were not worn, and that the brake was operative, but

that the winchman was inexperienced and careless, and permitted the load to descend with too great rapidity by a negligent operation of the winch.

The line of cleavage between the testimony of the ship's officers and that of the stevedores is distinct. The ship's witnesses, Zuljeric, Hodgard, Farnsworth, Knudson, Merritt, Makinson, and Traylor, testify generally to the good condition of the winch, both before and after the accident, and to the carelessness of Jim Hand, the operator of the winch, and of the stevedores indiscriminately. They did not see the accident that caused the libelant's injury. As against their testimony, the libelant offered the evidence of himself, Maloney, Bell, Simonson, Brunson, and Hinds, who were longshoremen or stevedores, and who testified that the winch was defective in the respect mentioned; that the brake had not worked properly on the morning of the accident, but had slipped because of the worn condition of the wood blocks; that the attention of the ship's second officer had been directed to its condition, with the result that he stated it was all right, without inspection; that at the time of the accident the winchman, Hand, jumped with both feet on the foot brake of the lowering away winch as soon as the load was transferred to it, but failed to hold it properly; that another longshoreman, Simonson, also put his weight on the foot brake, with no better success in checking the speed of the load as it went down into the hold.

The evidence was in conflict as to whether the winch worked all right during the afternoon after the accident, and also as to whether any repairs were made upon the wooden blocks before work was resumed with it. Indeed, there is an irreconcilable conflict in the testimony of libelant's witnesses, who were longshoremen, and claimant's, who were officers of the ship, upon every question important to the solution of the case. As the evidence was taken by deposition, the court below did not have the opportunity of seeing and appraising the witnesses. The ship presented seven witnesses; the libelant, six. However, the libelant's witnesses were more intimately connected with the work, and had much better opportunities for knowing the manner in which it was conducted, the condition of the blocks of the winch, and the immediate cause of the accident. They each testify directly that the winch was defective; that it had slipped before the accident; that it did slip on the occasion of the accident, and this, in spite of the fact that there was the weight of one or possibly two men upon the foot brake; and that the foot brake was carefully operated by Jim Hand, the winchman. It is true that the ship's officers testify that the winch had been inspected the evening of the day before the accident and found in good condition; that no complaint was made of its condition on the morning of the accident, and before it occurred, by the stevedores; and that all the stevedores employed, including Hand, were careless and inexperienced during the entire period of the loading of the ship.

The libelant's evidence relates to the specific facts of the accident, and is that of direct eyewitnesses thereto. If false, it is willfully and knowingly so, since the opportunity of the witnesses to know the truth precludes the idea of mistake. The claimant's witnesses do not profess

to recount the immediate facts of the accident, which they did not see. As to the condition of the apparatus, they largely content themselves with stating that the winch was in general good condition; whereas, the condition of the wood blocks, which formed the brake shoes, was the important fact. As to the negligence of the winchman, the accusation of these witnesses is in general terms, inclusive of all the stevedores, and not related to what was done at the time the accident happened, or to acts of a similar character to those which Hand was engaged in doing, at the time of the accident.

We agree with the court below that the testimony of libelant's witnesses, who were eyewitnesses of the accident and actually engaged in the doing of the work the winch was then doing, and all of whom, except the libelant himself, were without interest in the result, should prevail over that of the ship's officers, who were not eyewitnesses, who spoke in general terms, and who were interested in exonerating the ship from liability.

[2] The court below found the libelant to be at fault himself, and reduced his damages for that reason, and this is complained of by the appellee. The libelant's testimony was to the effect that the winch had been slipping during the morning and prior to the accident, and that complaint had been made by the foreman to the officers of the ship to that effect. It seems reasonably free from doubt that the libelant was informed of the condition of the winch and knew the probable danger to him consequent upon it. He seems to have protected himself to the best of his ability from the descending load at the time of the accident, and no fault is to be attributed to him in that respect. He, however, continued to work in a place of danger, after realizing the peril of so doing. While, as between him and the appellant, there could be no assumption of risk, he might still have been guilty of contributory negligence in remaining at work, when the conditions were such that a reasonably prudent man would not have done so. This was the conclusion reached by the District Judge, and we agree with it. The damages awarded, before reduction, were $3,000. We regard this amount as conservative, in view of the libelant's injury and its possible outcome, but not so much so as to justify our interposition to increase the amount.

[3] The remaining question for consideration is the propriety of the order of the District Court dismissing the citation against the Moore Timber Company and discharging it as a respondent. The libelant sued the Wilhelmina alone. The claimant of the ship filed a petition, asking that the Moore Timber Company be made a party respondent to the libel. Admiralty rule 59 (29 Sup. Ct. xlvi) is invoked as authority for this position. The rule applies only "in a suit for damage for collision." This is not such a case. No authority has been cited that extends the application of the rule beyond its language. If the Moore Timber Company is liable to libelant, it is because his injury was due to some other negligence than that of claimant in failing to provide suitable appliances, and claimant could in that event show the facts placing the liability upon the Moore Timber Company, to escape liability itself, and this it could do as successfully in the absence of the

Moore Timber Company as a party respondent as with it present. If the facts showed a liability to the libelant on the part of the claimant, the presence of the Moore Timber Company in the suit could only advantage the claimant because of a right to recover over against that company in the same suit. This is a matter which does not concern the libelant, or the cause of action contained in the original libel; and only a rule could effect its introduction into the litigation, in the absence of consent of all parties to it.

The decree of the District Court is affirmed.

BROWNS VALLEY STATE BANK et al. v. PORTER.*

(Circuit Court of Appeals, Eighth Circuit. March 17, 1916.)

No. 4192.

1. PAYMENT ⟸38(1)—APPLICATION—PAYMENT BY THIRD PERSON.
   A corporation borrowed money from a bank and gave notes therefor, indorsed by its officers. One of the officers also gave his individual notes for further sums borrowed for the corporation and which he repaid from its funds. *Held* that, the corporation being the real debtor, the indorsers on its note were not entitled to have such payments applied thereon.
   [Ed. Note.—For other cases, see Payment, Cent. Dig. § 99; Dec. Dig. ⟸38(1).]

2. BILLS AND NOTES ⟸224—LIABILITY OF INDORSER—LAW GOVERNING.
   The liability of one who signs his name on the back of a note to which he is not otherwise a party is determined by the law of the place where the contract was made, which is the place where it became effective by delivery after the signature was made.
   [Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 526; Dec. Dig. ⟸224.]

3. BILLS AND NOTES ⟸242—INDORSEMENT BY THIRD PERSON—LIABILITY.
   Under the law of Minnesota, which is also the general law, one who writes his name on the back of a note to which he is not otherwise a party is liable as a maker, and is not entitled to demand and notice of nonpayment.
   [Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 542, 547, 548, 550, 551; Dec. Dig. ⟸242.]

Appeal from the District Court of the United States for the District of South Dakota; James D. Elliot, Judge.

Suit in equity by Clement F. Porter against the Browns Valley State Bank and Peter Nelson. Decree for complainant, and defendants appeal. Reversed.

F. W. Murphy, of Wheaton, Minn. (J. O. Andrews, of Sisseton, S. D., and Purcell, Divet & Perkins, of Wahpeton, N. D., on the brief), for appellants.

Frank McNulty, of Aberdeen, S. D. (Howard Babcock, of Sisseton, S. D., on the brief), for appellee.

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

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

*Rehearing denied July 10, 1916.

SMITH, Circuit Judge. The Independent Elevator Company was organized under the laws of South Dakota, and engaged in the grain and coal business at various points in that state, and owned elevators at Wilmot, Peever, and Wecota. The nominal headquarters of the corporation were at Sisseton, S. D. The stockholders were A. J. Norby, his wife, E. E. Norby, appellee Clement F. Porter, and Frank McNulty, who later became circuit judge of the Fifth judicial circuit of South Dakota. About 1907 the corporation established its actual managing office at Minneapolis, Minn. At that time Mr. A. J. Norby moved to Minneapolis, and thereafter, at least, was secretary, treasurer, and general manager of the company. While Mr. Porter and Judge McNulty were nominal directors, they never performed any substantial duties as such, but Norby practically conducted the business as he thought proper. On or about May 10, 1907, a loan was made by the Independent Elevator Company with the Browns Valley State Bank, of Browns Valley, Minn., of $5,000 upon a note signed upon its face by the Independent Elevator Company, by A. J. Norby, Secretary, and upon the back by Mr. Norby, Mr. Porter, and perhaps by Judge McNulty in the same way. This note was signed by Mr. Porter at Minneapolis. It was renewed from time to time, the last renewal being on October 14, 1910. This last renewal was signed on its face by the Independent Elevator Company, by A. J. Norby, Secretary, and upon the back by A. J. Norby, C. F. Porter, and Frank McNulty. The signature upon the face and that of A. J. Norby on the back were both signed at Minneapolis, and the note sent to Clement F. Porter or to Frank McNulty in South Dakota. It was there signed by the recipient and forwarded to the other individual who was to sign it, and signed by him, and then sent to the Browns Valley State Bank in Minnesota, where it was accepted. This note was for $5,000, with interest at 8 per cent., and was payable on demand. It was dated at Minneapolis, and provided it was payable to the order of Browns Valley State Bank, Browns Valley, at its banking house in Minneapolis, Minn. The last provision was a part of the form of note utilized, which was a form of note used in executing obligations to the Scandinavian-American National Bank of Minneapolis.

About July, 1911, upon application of Clement F. Porter, a receiver was appointed for the Independent Elevator Company, and Mr. A. J. Norby departed, as was reported, going to Calgary, and early in 1912 died. On August 24, 1911, Mr. Clement F. Porter paid the interest on the $5,000 note referred to and gave his own note to Peter Nelson, then president, but now vice president, of the bank, for the amount of the note of October 14, 1910, and secured his note by mortgages on lands in Roberts and Grant counties, in South Dakota. In October, 1912, Mr. Porter brought suit against the Browns Valley State Bank and Peter Nelson to cancel the note and mortgages and recover the cash paid, upon the ground that the note of October 14, 1910, had been paid in whole or in part without his knowledge at the time he gave his note for the sum of $5,000. In the complaint it was alleged:

"That plaintiff was not on said 24th day of August, 1911, or at any other time, indebted to said Browns Valley State Bank or to said Peter Nelson in

any sum or amount whatever, and plaintiff did not then or at any other time receive any consideration, either money, property, or thing of value, whatever for indorsing said note of the Independent Elevator Company to the Browns Valley State Bank, or any other note to said Browns Valley State Bank, or for giving said $5,000 note and the mortgages aforesaid to Peter Nelson to secure the same, or for paying said sum of $335 to said Browns Valley State Bank."

The defendants filed separate answers, and Mr. Nelson also filed a cross-bill, asking for judgment for the amount of his $5,000 note and interest, and foreclosure of his mortgages. To this cross-bill the plaintiff filed answer, to which Nelson made replication. This was the state of the issues when the case was tried in June, 1913.

On September 20, 1913, and while the case was still under advisement, plaintiff filed application to amend his answer to the cross-bill by setting up that plaintiff had been discharged from liability upon the note of the Independent Elevator Company by the failure to protest the same and give him notice of the nonpayment. On September 22d the court granted this leave, and on the same day it entered a decree for the plaintiff canceling the note and mortgages in question and awarding plaintiff judgment against both defendants for $335 and interest and the costs of suit. On October 24, 1913, complainant filed an amended answer to the cross-bill, in which he somewhat changed his previous allegations and alleged the lack of protest and notice of nonpayment to him on the note of the Independent Elevator Company.

The parties have argued many questions and have cited numerous authorities, but those points hereafter considered are conclusive of the case, and therefore the others will not be passed upon. It appears from the evidence that after the first note of $5,000 was given by the Independent Elevator Company to the Browns Valley State Bank it wished to increase its borrowings, but was notified that the bank had only $36,000 capital, and was prohibited from making loans to a single person in excess of 15 per cent. of its capital, and that no more money could be loaned to the Elevator Company in its own name for that reason. Thereupon it was arranged that some additional advances should be made upon notes signed by A. J. Norby and usually secured by collateral. From that time on Norby would give his note to the Browns Valley State Bank, and the Elevator Company would then draw on the bank for the amount of the loan and deposit the draft in its bank account. It seems that Norby, like too many failing debtors, to a certain extent manipulated the books of the Independent Elevator Company. For instance, when the first loan of $2,000 of this character was made, in place of entering it among the bills payable of the Independent Elevator Company, he directed the bookkeeper to credit the $2,000 thus obtained upon his individual account, upon which there was a heavy balance against him. It was his practice to pay all his personal expenses by checks drawn upon the funds of the Independent Elevator Company. Such checks, however, were charged to his account on the books of the company for aught that appears. It very satisfactorily appears that the loans made in the name of A. J. Norby were in fact for the Independent Elevator Company, and it received the funds therefrom, and they were deposited to its credit in its bank.

[1] It is the contention of the complainant that, as these sums were paid by the Independent Elevator Company upon the individual notes of Norby, they should now be applied upon the Elevator Company's obligations, and as they exceeded $5,000 in amount the note of October 14, 1910, should be treated as paid in full. The indebtedness in the name of A. J. Norby was in fact the indebtedness of the Independent Elevator Company. It may be conceded an action could not have been maintained by the Bank against the Elevator Company upon the note of Norby. Cragin v. Lovell, 109 U. S. 194, 3 Sup. Ct. 132, 27 L. Ed. 903. But no authority has been cited that, when the real debtor pays his indebtedness, he can recover it back upon the ground that the obligation was given in some one else's name. While Norby had no right to pay his individual debts with the money of the Independent Elevator Company, he had the right to pay the debt of the Independent Elevator Company with its funds, and if the Elevator Company had received the entire proceeds of the Norby notes, he had a right to pay them from its funds, and he especially ordered in the case of each remittance that the same should be applied on those notes. The payments on these took place through a course of years, and all appear upon the face of the books and files of the Elevator Company. Had the complainant and Judge McNulty given due attention to their duties as directors, they would have known these payments were being made, and it was due to the manner in which they conducted the business that they did not know. No discussion need be had of the question, assuming these payments upon the Norby notes to have been illegal, of the right of the complainant to take credit upon the note of October 14, 1910, for the money thus applied to the prejudice of the numerous other creditors of the Elevator Company. There was substantially no evidence that the note of October 14, 1910, had been paid as alleged.

[2] Turning now to the question as to whether complainant had the right to protest and notice of nonpayment of the note of October 14, 1910. He was not entitled to protest. Randolph on Commercial Paper (2d Ed.) 1143; Nelson v. First National Bank, 69 Fed. 798, 16 C. C. A. 425. For the present let it be conceded that the complainant was liable upon the note of the Elevator Company as indorser as he undoubtedly was as between him and the Elevator Company.

From a very early time there has been a serious conflict as to whether one who signs a note upon the back thereof, to which he is not otherwise a party, becomes a maker, guarantor, surety, or a simple indorser. As the note of October 14, 1910, was made out in Minneapolis, in Minnesota, and there signed by the Independent Elevator Company, by A. J. Norby, Secretary, and was there signed upon the back by A. J. Norby individually, and was then mailed by Norby to either Porter or McNulty in South Dakota, and was there signed upon the back by both of them and mailed to the bank at Browns Valley, Minn., it is clear that as between the Elevator Company and A. J. Norby individually and the bank the note was a Minnesota contract, and the next question is what law governs the construction of the contract as to Porter and McNulty.

Prior to the execution of the note in question the state of South Dakota had adopted the Negotiable Instrument Act, and under it Porter would have been entitled to notice of dishonor. On the other hand, in the state of Minnesota at the time in question the Negotiable Instrument Act had not been adopted by the Legislature. It is laid down in a recent work:

"It has been seen that the contract of the maker of a note is governed by the law of the place of payment; it by no means follows, however, that the contract of the indorser is governed by the same law. The maker binds himself to pay at the place named in the note for payment, and there his contract is to be performed. The indorser promises, upon certain conditions, which are not expressed in the contract of indorsement, but which are implied by law, that he will pay the note, but not that he will pay it at the place named in the note for payment. This promise is general for the payment of the note upon the implied conditions; and such general promise, not specially to be performed elsewhere, is governed by the lex loci contractus, which must determine the conditions upon which he is to be held liable. The indorsement is a separate and substantive contract, and is not necessarily controlled either by the place of payment named in the note or by the residence of the indorser. The general rule is that the contracts of this character are to be construed and their effect determined according to the laws of the state in which they are made, unless it appears that they are to be performed in or according to the laws of another state. The authorities establishing the proposition that the contract of indorsement in such case is governed by the law of the place where made, and not by that of the place where the note is payable, are clear and satisfactory. *The place referred to is the place where the contract itself is made, and not the mere act of writing the name upon the back of the instrument.* It matters not when or where this may have taken place, since there is no indorsement, binding as a contract, until the note or bill is transferred to a third person, with the intent of enabling him to enforce its payment. The place of this effectual transfer is therefore the place of the contract, and the law which there prevails governs its construction. Accordingly, where a person indorses a note in one state, and the note is sold and delivered in another state, the contract of indorsement must be regarded as made in the place where the sale and delivery occurred." 3 Ruling Case Law, pp. 1149, 1150.

Where was this contract of indorsement made? The note was made out at Minneapolis, Minn., upon a blank note, not of the Browns Valley State Bank, but of the Scandinavian-American National Bank of Minneapolis, and was there signed by the Independent Elevator Company, by A. J. Norby, Secretary, and was then signed or indorsed on the back by A. J. Norby individually, and was sent either to Mr. Porter or Judge McNulty, and similarly signed by the recipient and sent to the other indorser, and there signed by him. Both the last two indorsements were put on in South Dakota, and the note was then mailed to the Browns Valley State Bank in Minnesota and accepted by it there. Until it was received and accepted by the bank in Minnesota it never took effect at all. Not only was the note governed by the law of Minnesota, but that was true of the contracts of indorsement, because that was the lex loci contractus of them. Browns Valley is nearly 200 miles from Minneapolis, and it cannot be presumed, if that would be material, that the bank ever saw this note until it came forward from South Dakota, and it was not bound to accept it until after it had so received it and found it satisfactory. It is therefore concluded that this was a Minnesota contract in its entirety, including both the note proper and

the contract of indorsement. Welch Co. v. Gillett, 146 Wis. 61, 130 N. W. 879; Hackley National Bank v. Barry et al., 139 Wis. 96, 120 N. W. 275. This is in harmony with our holding in Lamson Bros. v. Bane, 206 Fed. 253, 124 C. C. A. 121, 46 L. R. A. (N. S.) 650.

[3] It is held, in those states where one who signs upon the back of a note without otherwise being a party to it he is an indorser, he is, of course, entitled to notice of nonpayment, but in those states where he is held a maker, guarantor, or surety he is not entitled to such notice. 7 Cyc. 1074, 1075. Assuming that the note and the contracts of indorsement were to be construed according to the laws of Minnesota and not according to the laws of South Dakota, in Robinson v. Bartlett, 11 Minn. 410 (Gil. 302), it is said:

"The question as to the relation of a party signing his name upon the back of a promissory note, under these circumstances, has been repeatedly before this court for consideration. It has in every instance been determined that his relation and rights and obligations are those of a maker, and that he is not entitled to demand and notice as an indorser. * * * This is in harmony with the weight of authority in England and our own country."

And this rule has existed in Minnesota from territorial days until 1913, when it was changed by statute. Pierse v. Irvine, 1 Minn. 369 (Gil. 272); Rey v. Simpson, 1 Minn. 382 (Gil. 282); Winslow v. Boyden & Willard, 1 Minn. 383 (Gil. 285); McComb v. Thompson, 2 Minn. 139 (Gil. 114) 72 Am. Dec. 84; Marienthal v. Taylor, 2 Minn. 147 (Gil. 123); Peckham v. Gilman, 7 Minn. 446 (Gil. 355); Dennis v. Jackson, 57 Minn. 286, 59 N. W. 198, 47 Am. St. Rep. 603; Peterson v. Russell, 62 Minn. 220, 64 N. W. 555, 29 L. R. A. 612, 54 Am. St. Rep. 634; Schultz et al. v. Howard et al., 63 Minn. 196, 65 N. W. 363, 56 Am. St. Rep. 470. Substantially the same rule is announced in Good v. Martin, 95 U. S. 90, 24 L. Ed. 341; Bendey v. Townsend, 109 U. S. 665;[1] 7 Cyc. 666, 667. See Guernsey v. Imperial Bank of Canada, 188 Fed. 300, 110 C. C. A. 278, 40 L. R. A. (N. S.) 377. It seems entirely clear that the purpose of the complainant was to give credit to the Independent Elevator Company, and he thus became a maker and owed the note when he gave his individual note in place of it, and he has no equity in his favor.

Complainant in argument contends that the section of his complaint quoted was also in the original answer to the cross-bill of Nelson, and that it raised the question that he had not been notified of nonpayment of the note, and that to permit the defendants to now cite the cases tending to show this was a Minnesota contract, and then to show the law of Minnesota, which is the general commercial law as administered in the federal courts, is an injustice to him; but as he first clearly pleaded the lack of notice four months after the trial and more than a month after the decision he is not entitled to complain of surprise on that question.

It is ordered that the decree be reversed, and the cause remanded, with instructions to dismiss the complainant's bill and grant a decree to the defendant Nelson on his cross-bill as prayed, upon presentation for cancellation of the note sued on.

[1] 3 Sup. Ct. 482, 27 L. Ed. 1065.

HARMON et al. v. BLACKWELL.

(Circuit Court of Appeals, Sixth Circuit. May 2, 1916.)

No. 2748.

1. RECEIVERS ⟸88—POWER OF APPOINTMENT—AUTHORITY.

Several days before the appointment of a receiver the authorized representatives of a railroad company agreed upon a compromise settlement of a claim for wrongful death, agreeing to make payment upon the issuance of letters of administration and approval of the probate court of the compromise. Letters were issued and the compromise approved by the probate court on the same day a receiver was appointed. The order appointing the receiver directed that any party in interest might apply for further directions with reference to the property and business. *Held*, that the court appointing the receiver, by virtue of the reservation and its inherent power, might order the receiver to pay the amount of the settlement as agreed upon; all conditions having been met and the approval of the probate court being for the benefit of the railroad company.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 162; Dec. Dig. ⟸88.]

2. RAILROADS ⟸17—OFFICERS—NOTICE.

Where railroad claim agents, having authority to compromise claims, agreed upon a compromise, their knowledge is imputable to the railroad company, as is knowledge of other agents, who agreed to the appointment of a receiver, and the railroad company cannot escape liability on a compromise on the ground that the knowledge of one set of agents was imputable to it, while the knowledge of another was not.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 36–38; Dec. Dig. ⟸17.]

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

Petition by E. Blackwell, administrator of James Brown, deceased, for an order directing Judson Harmon and another, receivers of the Cincinnati, Hamilton & Dayton Railway Company, to surrender to the administrator a sum of money upon his release of a compromised claim. From an order granting the petition, the receivers appeal. Affirmed.

J. R. Schindel, of Cincinnati, Ohio, for appellants.

C. O. Rose, of Cincinnati, Ohio, for appellee.

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

PER CURIAM. This appeal is from an order of the court below directing the receivers to deliver and surrender to the administrator $608.40 upon his release to them of a compromised claim for personal injuries resulting in the death of the administrator's decedent, James Brown, prior to the receivership and through alleged negligence of the railway company. The order was based upon undisputed facts which were brought to the attention of the court in the form of a motion, in effect an intervention, filed in the receivership proceeding. On June

30, 1914, an agreement was made between the railway company and the decedent's widow, Sarah Brown, who is the sole heir and beneficiary of the decedent's estate, whereby the company agreed to pay $600 and the costs of administration ($8.40) "in full compromise settlement" of the widow's "claim and cause of action, to the administrator of the estate of said James Brown, deceased, upon the issuance of letters of administration and the approval of the probate court of Hamilton county, Ohio, and said Sarah Brown agrees to the same and to accept said sum." On the following day the administrator was appointed and qualified, and the agreement was thereupon approved and confirmed by the probate judge.

On the next day, July 2d, and prior to 11 a. m., written forms of application and entry for presentation to the probate court and a written form of release of claim to the railway company were agreed on by the administrator for the estate and one of the counsel and the general claim agent for the railway. The claim agent at the time notified the administrator to call with the release and receive the money, and the agent's authority to bind the company is not denied. The application was thereupon filed in the probate court and the entry approving the settlement endorsed for record by the probate judge. At 9 o'clock a. m. of that day (July 2d) the bill of complaint in the receivership case was filed in the court below; at 9:45 o'clock the answer of the railway was filed, admitting the allegations of the bill, consenting to the appointment of a receiver and to his taking possession of and operating the railway property; and at 11:15 o'clock the receivers were appointed. The District Judge states in his opinion:

"Both the bill of complaint and the answer were printed; the former with the exhibit filed with it, consisted of 92 pages. The preparation of the bill and answer, with the printing thereof, must have occupied several days."

On the same day, though after appointment of the receivers, the administrator presented the release to the claim agent of the railway, who declined payment on the ground that receivers had been appointed and the company ordered to pay over to them all funds in its possession. This was the first information the administrator received of such appointment, and prior to this time he had no intimation that any such action was contemplated. The company had ample funds on the dates before mentioned to meet the sum so agreed to be paid, and, except for the order appointing the receivers, the claim agent had authority to pay the money.

It is true that, subject to some exceptions not here important, the order of appointment extended to all the property of the company, including "cash in banks, on deposit and in hand, money," etc.; also that the order does not in terms empower the receivers to pay such a claim as this; but the last paragraph of the order is as follows:

"And it is further ordered that any party in interest may apply to this court for further directions with reference to the property and business aforesaid."

The intervention was filed August 6, 1914, and the order in dispute was entered January 29, 1915. The grounds upon which the order was sought in substance were: (1) That the court had power to grant

the application for receivership on terms, and that it has power to supplement the terms of appointment; (2) that the circumstances operated to create the sum in issue into a trust fund, which may, in equity, be followed into the hands of the receivers; (3) that since the railway company, through its officers, must for several days prior to the transaction have known of its financial condition, a refusal to pay operates as a fraud on the administrator and the widow. The order was based on the second ground.

[1] We need not pass upon the sufficiency of this ground, for we are convinced that the matter in dispute was well within the power and discretion of the court. The appointment of the receivers and the order now under review were made by the same District Judge. There can be no question of the power of the court to have made the appointment of the receivers to depend upon their consummation of this compromise settlement; and, in view of the present order, it is equally clear that, if the court had been seasonably advised of the facts concerning the settlement, provision would have been made for payment of the agreed sum. Further, the last clause (before quoted) of the appointing order is in effect a reservation of power to direct completion of the settlement made in the circumstances here disclosed. Independently of the power so reserved, the court was not foreclosed by the order of appointment from considering and determining, equitably, whether there were still further claims or liabilities that should have been provided for in the original order. Louisville, etc., Railroad Co. v. Wilson, 138 U. S. 501, 506, 11 Sup. Ct. 405, 34 L. Ed. 1023; Union Trust Co. v. Illinois Midland Co., 117 U. S. 434, 465, 6 Sup. Ct. 809, 29 L. Ed. 963.

[2] Admittedly the acts of the claim agent were the acts of the railway company, and the acts of the other agencies, who consented to the appointment of the receivers, were likewise the acts of the company. It results that on July 2d the railway company itself was in effect both promising to complete this settlement and placing the means of settlement beyond its control. It will not do to say that the knowledge of the corporate agencies, respectively, who were engaged in these two proceedings, the one to bring about the settlement and the other the receivership, is not alike imputable to the company. Marmet Coal Co. v. People's Coal Co., 226 Fed. 646, 651, 141 C. C. A. 402 (C. C. A. 6th Cir.); G. R. & I. Ry. Co. v. United States, 212 Fed. 577, 583, 129 C. C. A. 113 (C. C. A. 6th Cir), writ of certiorari denied 234 U. S. 762, 34 Sup. Ct. 997, 58 L. Ed. 1581. The settlement and the means of consummating it were clearly within the power and control of the railway company. It is not claimed that there would have been any wrongful diversion of funds if the company had paid the money to the administrator at any time prior to the appointment of the receivers. The apparent reason for delay in completing the settlement was the desire of the company to secure approval of the probate court, under the Ohio statute relating to such settlements with administrators. Section 10772, Ohio Gen. Code. This was for the benefit of the company, rather than the beneficiary.

The order is affirmed, with costs.

DE WITT v. SKINNER, Collector of Internal Revenue.

(Circuit Court of Appeals, Eighth Circuit. May 1, 1916.)

No. 4313.

1. WITNESSES ⟸258—EXAMINATION—REFRESHING MEMORY.
In an action against a revenue collector to recover taxes, penalties, and interest assessed against plaintiff as a manufacturer of adulterated butter, and paid under protest, it was error to permit a revenue agent, called as a witness for defendant, to read from his diary entries regarding a conversation with plaintiff as to the use of lime water in preparing butter, where the witness did not say whether he had any independent recollection of the details of the conversation, or that his memory was refreshed by the diary.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 887, 893, 895, 896; Dec. Dig. ⟸258.]

2. WITNESSES ⟸240(3)—EXAMINATION—"LEADING QUESTION."
The test of a "leading question" is whether it suggests or indicates the particular answer desired, and it does not necessarily make a question leading that it may be answered "Yes" or "No."

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 838; Dec. Dig. ⟸240(3).

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

3. WITNESSES ⟸269(1)—CROSS-EXAMINATION—SCOPE AND EXTENT.
The right of cross-examination is not confined to specific questions or details of the direct examination, but extends to the subject-matter inquired about.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 949; Dec. Dig. ⟸269(1).]

In Error to the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Action by Herbert M. De Witt against Mark A. Skinner, as Collector of Internal Revenue. Judgment for defendant, and plaintiff brings error. Reversed and remanded for new trial.

Thomas Ward, Jr., of Denver, Colo., for plaintiff in error.

John A. Gordon, Asst. U. S. Atty., of Denver, Colo. (Harry B. Tedrow, of Denver, Colo., on the brief), for defendant in error.

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

HOOK, Circuit Judge. De Witt sued the collector of internal revenue to recover taxes, penalties and interest assessed against him as a manufacturer of adulterated butter and against his product, and paid under protest after an unsuccessful application to the Commissioner of Internal Revenue for their abatement. A trial to a jury resulted in a verdict and judgment for the defendant, and De Witt, the plaintiff, prosecuted this writ of error.

The act of Congress applicable to the case provides:

"That 'adulterated butter' is hereby defined to mean a grade of butter produced by mixing, reworking, rechurning in milk or cream, refining, or in any

way producing a uniform, purified, or improved product from different lots or parcels of melted or unmelted butter or butter fat, in which any acid, alkali, chemical, or any substance whatever is introduced or used for the purpose or with the effect of deodorizing or removing therefrom rancidity." Act May 9, 1902, § 4, 32 Stat. 194.

The plaintiff conducted a creamery and butter factory at Denver, Colo. The surplus butter made by him in the summer months when cream was plentiful was put up in 200-pound cubes, carefully packed, and put in cold storage at a low temperature until fall or winter, when the supply of cream lessened and the demand for butter increased. The surplus in storage was then taken out, reworked, and put upon the market. In the process of reworking the cubes were cut into small pieces and put in a tempering vat, where they were left until they became plastic. The vat was in two compartments, one for the pieces cut from the exterior of the cubes to a depth of two or three inches and the other for the inner portions. The vat contained about 200 gallons of hydrant water raised to an appropriate temperature, into which was introduced a small quantity of lime water. When in a workable condition the pieces were removed from the vat, separately rechurned, and washed in clear water, salted, and molded into small forms for the market. The controversy was over the condition of the exterior portions of the large cubes of butter taken from the cold storage warehouse and the purpose and effect of the use of lime water. The plaintiff contended that the parts in question were sweet in fact and in odor, and that the lime water was added to the water in the tempering vat to counteract its tendency to become stagnant, and also as a preservative, like salt, to prevent the butter from deteriorating after being put upon the market. The defendant contended that the butter particles had an offensive odor and were rancid, and that within the definition of the statute the lime, an alkali, was "used for the purpose or with the effect of deodorizing or removing therefrom rancidity."

[1] A revenue agent called as a witness for defendant was permitted to read from his diary entries regarding a conversation with the plaintiff as to the use of the lime water and his purpose in using it. He had been asked to state the conversation, and, though not denied the right to refresh his memory by referring to his diary, he persisted in reading to the jury the account he had written there, part of which purported to give literally questions and answers in the conversation. Repeated objection was made that he was reading from his book, but it was finally overruled, and he was allowed to finish it. The witness did not say whether he had or had not any independent recollection of the details of the conversation, or that his memory was refreshed by the diary, and the result was his diary entries were received as independent evidence. This was error. The competency of such evidence was quite fully considered in Bates v. Preble, 151 U. S. 149, 14 Sup. Ct. 277, 38 L. Ed. 106, and the court, after reviewing its former decisions, said:

"We do not regard any of these cases as committing this court to the general doctrine that such memoranda are admissible for any other purpose than to refresh the memory of the witness."

One of the cases referred to was Vicksburg & Meridian Railroad v. O'Brien, 119 U. S. 99, 7 Sup. Ct. 118, 30 L. Ed. 299, an action by a passenger for personal injuries, in which it was held that a physician's written statement of the nature and extent of the injuries made for the information of others was not admissible in evidence, even when attached to the deposition of the physician in which he swore it was written by him and in his opinion was a correct statement.

[2, 3] One other matter remains. Though not sufficient for reversal it should be admitted that the plaintiff was unnecessarily hampered in introducing his evidence by frequent frivolous objections to questions as leading, as not cross-examination, and as immaterial—this, however, not by counsel appearing here. The test of a leading question is whether it suggests or indicates the particular answer desired. That a question may be answered "Yes" or "No" does not necessarily make it leading. McKeown v. Harvey, 40 Mich. 226, 228. The right of cross-examination is not confined to the specific questions or details of the direct examination, but extends to the subject-matter inquired about. Powers v. United States, 223 U. S. 303, 32 Sup. Ct. 281, 56 L. Ed. 448; Wilson v. United States, 232 U. S. 563, 34 Sup. Ct. 347, 58 L. Ed. 728; International Harvester Co. v. Voboril, 110 C. C. A. 311, 187 Fed. 973; Stewart v. United States, 129 C. C. A. 477, 211 Fed. 41; Commercial State Bank v. Moore, 227 Fed. 19, 141 C. C. A. 573.

The judgment is reversed, and the cause is remanded for a new trial.

OWL CREEK COAL CO. v. GOLEB.

(Circuit Court of Appeals, Eighth Circuit. May 1, 1916.)

No. 4321.

1. APPEAL AND ERROR ⟸1003—REVIEW—QUESTIONS OF FACT—VERDICT.
Where there is substantial evidence in support of a verdict and judgment, the fact that the weight of all the evidence is strongly against the plaintiff does not authorize an appellate court to substitute its opinion for that of the trial court and jury.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3938–3943; Dec. Dig. ⟸1003.]

2. MASTER AND SERVANT ⟸185(12)—INJURIES TO SERVANT—FELLOW SERVANTS—NATURE OF EMPLOYMENT.
Workmen, engaged in clearing up a coal mine after a blast of explosives, so far as they are intrusted with the performance of the primary duty of their employer in respect of a safe working place, are not the fellow servants of an employé who operates a machine for undercutting a vein of coal.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 399; Dec. Dig. ⟸185(12).]

3. TRIAL ⟸260(1)—INSTRUCTIONS—REQUESTS—INCLUSION IN CHARGE GIVEN.
The refusal of an instruction, which so far as proper is embraced in the charge given, is not error.
[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. ⟸260(1).]

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4. MASTER AND SERVANT ⊂=291(1)—INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS.

In an action for injuries to a servant, while operating a machine for undercutting a vein of coal, caused by the fall from the roof of coal which had not been removed after the preceding blast, an instruction which did not distinguish between the face of the coal at which plaintiff was engaged and the roof above him was properly refused.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1133; Dec. Dig. ⊂=291(1).]

5. MASTER AND SERVANT ⊂=295(7)—INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS—ASSUMPTION OF RISK.

In an action for injuries to a servant, an instruction including among the dangers assumed by plaintiff those which should have been known to and appreciated by him in the exercise of ordinary care was properly refused.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1175; Dec. Dig. ⊂=295(7).]

6. WITNESSES ⊂=269(1)—CROSS-EXAMINATION—SCOPE AND EXTENT.

The right of cross-examination is not limited to the precise, narrow scope of the questions in chief, but extends to the subject-matters of the direct examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 949; Dec. Dig. ⊂=269(1).]

7. APPEAL AND ERROR ⊂=1048(6)—REVIEW—HARMLESS ERROR—CROSS-EXAMINATION OF WITNESS.

In an action for injuries to a servant in a coal mine, where plaintiff had testified positively that he did not examine the roof of the place where he worked on the occasion in question, the exclusion of questions on his cross-examination as to how long it took to sound the roof of a working place, whether he ever examined it for loose coal, in the absence of the mine foreman, before setting up his machine, and how long he drove his machine before he looked around at top and walls of his working place, was without prejudice to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4145; Dec. Dig. ⊂=1048(6).]

8. WITNESSES ⊂=280—CROSS-EXAMINATION—TRICK QUESTIONS.

In an action for injuries to a servant by the fall of coal from the roof of the mine, a question to plaintiff on cross-examination as to how long he drove his machine before he looked around at top and walls of his working place might properly be excluded, as being framed unfairly and calculated to trick the witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 988, 990-993; Dec. Dig. ⊂=280.]

In Error to the District Court of the United States for the District of Wyoming; Robert E. Lewis, Judge.

Action by Peter Goleb against the Owl Creek Coal Company. Judgment for plaintiff, and defendant brings error. Affirmed.

William E. Hutton, of Denver, Colo. (Bruce B. McCay, of Denver, Colo., on the brief), for plaintiff in error.

E. E. Enterline, of Billings, Mont. (T. W. La Fleiche, of Sheridan, Wyo., on the brief), for defendant in error.

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

HOOK, Circuit Judge. Goleb, the plaintiff, recovered a judgment for personal injuries caused by the neglect of the Coal Company, in whose service he was, to perform its duty in respect of a safe working place. A previous judgment was reversed. The details of the case will be found in the reported opinion. 127 C. C. A. 27, 210 Fed. 209. The plaintiff operated a machine for undercutting a vein of coal in defendant's mine, preparatory to the use of explosives to loosen or dislodge it. The vein of coal was 8 or 9 feet thick, and the roof, when cleaned of hanging coal and rock, was at least that distance above the floor of the entry or chamber. While engaged in working his machine near the breast or face of the vein, some coal which had not been removed from the roof after the preceding blast fell upon and seriously injured him.

[1] The principal complaint is that the trial court denied defendant's motion for a directed verdict at the close of the evidence. It cannot reasonably be said that there was not substantial evidence supporting the plaintiff's side of every issue of fact involved in the case; that is to say, the questions of the negligence of the defendant, the plaintiff's assumption of the risk, and his contributory negligence—whether the danger was in the face of the coal at and into which the plaintiff was working or in the roof above him, whether it was his or defendant's duty to look to the condition of the roof under which he worked, whether he knew of the danger in the roof, either by his own observation or by warning from others, and whether the danger was so patent as to be readily observable by him under the circumstances. There being substantial evidence in support of the verdict and judgment, the fact that the weight of all the evidence was strongly against the plaintiff does not authorize us to substitute our opinion for that of the trial court and jury. That is too well settled to dwell upon.

[2-5] There was no error in refusing the requests for instructions. One request was that the workmen engaged in clearing up the place after the previous blast were fellow servants of the plaintiff. So far as they were intrusted with the performance of the primary duty of their common employer in respect of a safe working place they were not his fellow servants. Another was that if the plaintiff inspected or tried to pick down the coal which afterwards fell on him he could not recover. To the extent that this was proper it was embraced in the general charge as to the plaintiff's knowledge or notice of the unsafe condition. Some of the requests denied did not distinguish the face of the coal at which the plaintiff was engaged from the roof above him. The distinction was important to the relative rights of the parties, and the court properly instructed the jury in effect that plaintiff's case depended upon the unsafe condition of the roof. In another request the dangers assumed by the plaintiff were recited as including those "which should have been known to and appreciated by him in the exercise of ordinary care." We have frequently held the quoted phrase to be an inadmissible extension of the doctrine of assumption of risk. There was no error in the charge of the court. It was full and clear, and correctly stated the law applicable to the case.

[6-8] On cross-examination of the plaintiff he was asked by counsel for defendant how long it took to sound the roof of a working place,

whether he ever examined it for loose coal in the absence of the boss (mine foreman) and the loaders before setting up his machine, and how long he drove his machine before he looked around at top and walls of his working place. Objections to the first and second questions, as not proper cross-examination and immaterial or irrelevant, were sustained generally, and the third was excluded as not proper cross-examination. The right of cross-examination is not limited to the precise, narrow scope of the questions in chief, but extends to the subject matters of the direct examination. Tested by this rule, none of the questions were objectionable; but we think they were immaterial, and that the rulings were without prejudice. The witness had already testified positively that he did not examine the roof of the place where he worked on the occasion in question, and the essential point of his case was that he was not required to do so, but that the duty of inspection and safeguarding was on his employer and he had a right to rely upon the performance of that duty. Moreover, the last question might well have been excluded as being framed unfairly and calculated to trick the witness.

The judgment is affirmed.

THE WRESTLER.

THE WYOMISSING.

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

No. 185.

1. COLLISION ⟸90—RULES FOR "NARROW CHANNELS"—EAST RIVER.

The East River is not a "narrow channel," within article 25 of the Inland Rules (Act June 7, 1897, c. 4, § 1, 30 Stat. 101 [Comp. St. 1913, § 7899]), and the only regulation as to navigation between the Battery and Blackwells Island is Laws N. Y. 1882, c. 410, § 757, which requires vessels going up or down to keep as near as possible in the center of the channel.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 181–186, 196; Dec. Dig. ⟸90.

For other definitions, see Words and Phrases, Second Series, Narrow Channel.]

2. COLLISION ⟸95(2)—TOWS MEETING—NAVIGATING WITH LONG TOWS.

A tug with a tow of 18 loaded canal boats extending 650 feet beyond her stern, passing up East River on a flood tide near the Brooklyn shore, *held* solely in fault for a collision between one of two tugs coming down with a car float nearer the shore and one of the tail-end boats of her tow, which she permitted to swing around toward the meeting tugs.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200–202; Dec. Dig. ⟸95(2).]

3. COLLISION ⟸95(1)—TIDEWATERS—NAVIGATING WITH LONG TOWS.

Tugs which have long tows in tidewaters must see to it that they control their tows sufficiently to prevent them from doing harm to other vessels.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200–202; Dec. Dig. ⟸95(1).]

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

Suit in admiralty for collision by William H. Follette, owner of the canal boat Videtto, against the tug Wrestler, the River & Harbor Transportation Company, claimant, with the tug Wyomissing, the Philadelphia & Reading Railroad Company, claimant, impleaded. Decree against the Wrestler, and her claimant appeals. Reversed.

Burlingham, Montgomery & Beecher, of New York City (Charles C. Burlingham and Chauncey I. Clark, both of New York City, of counsel), for appellant.

James J. Macklin, of New York City (Frank V. Barns, of New York City, of counsel), for appellee Follette.

Armstrong, Brown & Purdy, of New York City (Pierre M. Brown, of New York City, of counsel), for appellee Philadelphia & R. R. Co.

Before COXE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. January 18, 1913, about 5 p. m., the tug Wyomissing was going up the East River with a hawser tow of four tiers, having four loaded canal boats in each tier, and two tailing on behind the middle boats of the last tier. The hawsers were 150 feet long, the boats about 100 feet long, and the tiers were 5 or 6 feet apart, so that the tow extended say 650 feet from the stern of the tug. The tide was flood and the wind southwest.

The East River runs from Brooklyn Bridge to Corlears Hook about east and west, and the flood tide sets over from the Brooklyn Bridge to the New York shore to a point above the Manhattan Bridge, and then runs along the New York shore to Corlears Hook. The effect of this is that there is an eddy tide from the Brooklyn Bridge for a considerable distance along the Brooklyn shore. The southwest wind blows quartering across the stream to New York.

The tug Montauk, with a car float on her starboard side and the tug Wrestler on the starboard side of the float, came down the East River and crossed from Corlears Hook to the Brooklyn side. The two tows were meeting starboard to starboard on the Brooklyn side of the river, which is there about 1,200 feet wide. As they were passing under the Manhattan Bridge the Wyomissing starboarded and the tail of her tow swung over toward the Brooklyn shore, whereupon the Montauk went in toward Brooklyn, and afterwards the Wrestler reversed full speed astern, with the view of throwing the stern of the car float away from the tail of the Wyomissing's tow; but the Videtto, which was the starboard of the two boats tailing on to the tow, came into collision at her starboard quarter with the starboard quarter of the Wrestler, sustaining considerable damage.

The owner of the Videtto filed a libel against the Wrestler, and the claimant of the Wrestler brought in the Wyomissing under the fifty-ninth rule (29 Sup. Ct. xlvi). The answer of the claimant of the Wyomissing to the petition stated:

"While the Wyomissing and her tow were in the middle of the river, and when shortly above the Brooklyn Bridge, the tugs Montauk and Wrestler, with a car float between said tugs, were coming down the East River on the

Brooklyn side. The Wrestler was on the starboard side of the car float. It was not possible for the Wyomissing to pass the said oncoming tow port to port as the latter was too near the Brooklyn shore, but there was abundant room to pass starboard to starboard, had the tugs Wrestler and Montauk either gone closer to the Brooklyn shore or stopped or slowed down for a few moments. The Wyomissing starboarded her wheel in order to give more room to the said tugs and car float, but, being incumbered with the tow as she was, she did not quite succeed in pulling the tail end of the tow clear of the Wrestler, with the result that the starboard quarter of the Videtto struck the starboard quarter of the tug Wrestler, injuring the boat Videtto."

The District Judge found the Wrestler solely at fault, saying that she was coming down on the wrong side of the river, that the witnesses of the Wyomissing impressed him favorably, and that he was convinced their recollection of the circumstances was correct.

[1, 2] The East River is not a narrow channel within article 25 of the Inland Rules, and the only regulation as to navigation between the Battery and Blackwells Island is section 757, c. 410, Laws of 1882, of New York, which requires vessels to go up and down as near as possible in the center of the stream. Both these tows were on the Brooklyn side of the center of the stream, the Montauk's quite close in. All the witnesses agree that as they were meeting they were obliged to pass starboard to starboard. They were navigating where they were for obvious reasons, which each perfectly understood. The Wyomissing wanted to avoid the set of the tide between the Brooklyn and Manhattan bridges over to New York, and the Montauk and her tow wanted to avoid the force of the flood tide in coming down the East River. Therefore they were each taking advantage of the eddy tide along the Brooklyn shore. There was no misunderstanding between them as to the way they should pass as is proved by the fact that no signals were exchanged, and that no alarm was blown by either indicates that the emergency which arose was sudden. As the effect of both the wind and the tide would have been to swing the tail of the tug's tow toward New York if she was going straight up in the center of the river at this point, we think the admitted swing of her tail was caused by her own navigation. It may be that to counteract the set of the tide toward New York the tug, which is a powerful one, first ported and then when she got into the eddy tide hard astarboarded. Certainly the pilot who was in charge of her navigation admitted that the tail of his tow did swing toward Brooklyn. He said it was 100 feet nearer than the tug was and he drew a diagram showing this. The pleading of the Wyomissing also admits this and the fact that the starboard quarter of the Videtto struck the starboard quarter of the Wrestler seems to us to confirm it.

[3] Tugs which have long tows in tidewaters must see to it that they control their tows sufficiently to prevent them from doing harm to other vessels. We think the Wyomissing solely at fault.

The decree is reversed.

THE WYOMISSING.

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

Nos. 207, 208.

COLLISION ⊂=71(2)—TOW AND VESSELS AT DOCK—LONG TOW.

A tug with a tow of 30 boats and a helper, the tow being 1,000 feet long, *held* in fault for a collision between some of the boats and equipment scows of a dredge lying at a pier at Elizabethport. The dredge, which was at work under a government contract requiring it to move if it should obstruct the channel so as to impede the passage of vessels, *held* not in fault because it did not move; there being an unobstructed channel 400 feet wide, through which the tow could have passed safely if properly navigated.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig. ⊂=71(2).]

Appeals from the District Court of the United States for the Eastern District of New York.

Suits in admiralty for collision by Albert E. La Veck, owner of the barge Goldie, and John H. Flannery, owner of the barge Mary F. Flannery, against the tug Wyomissing, the Philadelphia & Reading Railroad Company, claimant, with the Morris & Cumings Dredging Company impleaded. Decree against the Wyomissing, and her claimant appeals. Affirmed.

Armstrong, Brown & Purdy, of New York City (P. M. Brown, of New York City, of counsel), for appellant.

Everett, Clarke & Benedict, of New York City (A. Leo Everett, of New York City, of counsel), for appellee Morris & Cumings Dredging Co.

James J. Macklin, of New York City (Frank V. Barns, of New York City, of counsel), for appellees La Veck and Flannery.

Before COXE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. March 13, 1914, at night, the tug Wyomissing started from Port Reading with a tow of seven tiers of loaded boats, four in a tier, and two light boats tailing on, bound to New York. The length of the tow was about 1,000 feet. The helper tug Pencoyd, on the starboard side at the end of the tow, assisted it through the draw of the Baltimore & Ohio bridge across the Arthur Kill on the Staten Island side. The tide was flood and the night dark, but clear. From the bridge to a point at or near Elizabethport the tide runs comparatively true, but a tow rounding the point known as Holland Hook or Dooley's Point on the Staten Island side on the flood tide is swung toward the New Jersey side. At about 9 p. m. the tow reached this point. The width of water is about 600 feet and of deep channel about 400 feet. The Morris & Cumings Company's dredge No. 7 was at work day and night under a contract with the government deepening the channel. The government laid out eight cuts lengthwise of the stream about 1,000 feet long and 50 feet wide, numbered 1 to 8, be-

ginning at the Staten Island side. The dredge was in the second cut from the Staten Island shore, and had, as was required, the mud scow on her starboard or New Jersey side, leaving some 400 feet of unobstructed water between the scow and that shore. There lay at the Iron dock at Elizabethport, at a point 1,000 feet east of the dredge, in single file, beginning at the east end equipment of the Dredging Company as follows: Light scow C–22, light scow M–52, the tug Bismarck, the tug Wister, and loaded scow 51. When the tow began to swing, the Pencoyd left the starboard side to go over to the port side and shove the tail of it away from the Iron dock, but before she could get in position the outside port boat of the sixth tier rubbed against scow 52, followed by the barge Goldie, the outside port boat of the seventh tier, and the barge Mary F. Flannery tailed on behind her.

Libels were filed by the owners of these two barges to recover the damages sustained by them against the tug Wyomissing, whose claimant brought in the Dredging Company under the fifty-ninth rule. Judge Veeder found the Wyomissing solely at fault and we concur with him.

The chief charge against the Dredging Company is that upon the approach of the tow the dredge did not move nearer the Staten Island shore. The company's contract with the government contains the following clause:

"26. *Obstructions—Navigation.* The contractor will be required to conduct the work in such a manner as to obstruct navigation as little as possible, and at the completion of the work shall remove his plant, including rangers and buoys, piles, etc., placed by him under the contract, in navigable waters. In case the contractor's plant so obstructs the channel as to impede the passage of vessels, it shall promptly be so moved as to afford a practicable passage on the approach of any vessel."

This clause is not to be construed as requiring the dredge to move for every vessel that approaches, but only that she leave enough space for vessels navigating properly to pass. The dredge was rightfully where she was at work, and her necessary equipment was lying rightfully at the Iron dock. The work of deepening the channel of necessity somewhat reduced the width of the waterway. The Wyomissing was bound to take notice of this situation, and if her tow had been shorter, or if with her then tow she had employed an additional helper, or if the one helper had acted more promptly, we are satisfied that it would have passed safely. There is a dispute as to whether the dredge actually did move, about which the District Judge made no finding. If we assume that she did not, there was, as he found, unobstructed water enough for the tow to have navigated in safety, had she been adequately supplied and handled.

The decree is affirmed.

THE WYOMISSING.

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

No. 209.

COLLISION ⊂⊃69—NAVIGATING LONG TOWS—DREDGES OBSTRUCTING CHANNEL.

Tugs navigating with long tows in the tidewaters in the vicinity of New York, and desiring dredges engaged in government work to move themselves, or helping scows to give room for safer passage, must give timely notice; otherwise, a dredge is justified in continuing her work.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 87-90; Dec. Dig. ⊂⊃69.]

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

Suit in admiralty for collision by James Morrow and Herman Harjes, owner of the barge Meta Harjes, against the tug Wyomissing, the Philadelphia & Reading Railroad Company, claimant, with the Morris & Cumings Dredging Company impleaded. Decree against the Wyomissing, and her claimant appeals. Affirmed.

Armstrong, Brown & Purdy, of New York City (Pierre M. Brown, of New York City, of counsel), for appellant.

Everett, Clarke & Benedict, of New York City (A. Leo Everett, of New York City, of counsel), for appellee Morris & Cumings Dredging Co.

T. Catesby Jones, of New York City, for appellees Morrow and another.

Before COXE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. March 28, 1914, the tug Wyomissing with a hawser tow of twenty-five light boats in six tiers of four each and one tailing on behind was on her way from Port Liberty, N. Y., to Port Reading, N. J. The tide was ebb, and as she approached Elizabethport, in the Kills, her helper tug, the Pencoyd, went on the starboard side to keep the tow as it rounded the bend on the Staten Island side at Holland Hook or Dooley's Point from swinging against the Iron dock on the New Jersey shore. Dredge No. 7, belonging to the Morris & Cumings Dredging Company was at work at a point half a mile west of the bend excavating the channel under a contract with the government. The tow had to pass between her and the New Jersey shore, and in doing so pulled the Meta Harjes, port boat of the fourth tier, against the mud scow on the starboard side of the dredge. To recover for the damage so caused her owner filed this libel against the tug Wyomissing, whose claimant brought in the Dredging Company under the fifty-ninth rule (29 Sup. Ct. xlvi).

The pilot and several witnesses on the tug testified that he had blown a danger signal in approaching the dredge as notice to her to move the scow which was alongside. The witnesses from the dredge testify that no such signal was heard, and in view of the noise which the operation of the machinery makes this is most likely. At all events they did

not move the scow. The charge made against the Dredging Company is that the scow was not moved, and so greater water space given to the tow. It will not be necessary to repeat what we have said in the opinion in the La Veck Case (The Wyomissing, 232 Fed. 453, — C. C. A. —), handed down herewith. We concur with Judge Chatfield in thinking that companies engaged in transporting long and unwieldy tows in these tidewaters should send a timely request to the dredge to move or to move her scow, if they think that the position of either makes careful navigation dangerous. All those companies know the situation perfectly, and in addition they know the length and weight of the tows they are sending out and the number and power of the tugs they use. In the absence of such timely notice the dredge is justified in continuing her work.

The decree is affirmed.

KEBART v. ARKIN.

(Circuit Court of Appeals, Third Circuit. May 17, 1916.)

No. 2095.

1. PARTNERSHIP ⊂=318—MUTUAL RIGHTS AND LIABILITIES—ACCOUNTING.
   In Pennsylvania partnership accounts must be adjusted and settled, and the liability of one partner to another ascertained, by an action of account render or by a bill in equity.
   [Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 735–738; Dec. Dig. ⊂=318.]

2. PARTNERSHIP ⊂=105—MUTUAL RIGHTS AND LIABILITIES—RIGHT OF ACTION.
   Where a partnership has been willfully and wrongly broken up by a partner, the other partner, if he has kept his covenants, may bring an action at law; the measure of damages being the value to him of the continuance of the agreement during its covenanted term.
   [Ed. Note.—For other cases, see Partnership, Cent. Dig. § 168; Dec. Dig. ⊂=105.]

3. COURTS ⊂=328(1)—FEDERAL COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.
   Where a partnership was insolvent, and had only ten days to run, when its assets were sold on an execution on a judgment obtained in a state court for money due one of the partners from the firm, nothing more than nominal damages could be allowed in an action by the other partner for wrongful termination of the contract of copartnership, and no such damages could have been involved as the sum required to confer jurisdiction on the federal court in controversies between citizens of different states.
   [Ed. Note.—For other cases, see Courts, Cent. Dig. § 890; Dec. Dig. ⊂=328(1).]

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

Action by Jacob S. Kebart against Herman M. Arkin. Judgment for defendant, and plaintiff brings error. Affirmed.

John Weaver, of Philadelphia, Pa., for plaintiff in error.

Owen J. Roberts, of Philadelphia, Pa., and Smith, Paff & Laub, of Easton, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below, Jacob S. Kebart, a citizen of New York, brought an action at law against Herman M. Arkin, a citizen of Pennsylvania, to recover $10,000 damages for the alleged wrongful termination of a written contract of copartnership between them. On the trial it appeared the firm was insolvent, and that the partnership had only ten days to run, when its assets were sold on an execution on a judgment obtained in the state court, for money due the defendant by the firm. After the plaintiff's proofs disclosing the above facts were made, the court below granted a compulsory nonsuit, which it subsequently refused to take off, whereupon this writ was sued out.

[1] In Pennsylvania, as said by the Supreme Court in McCollum v. Carlucci, 206 Pa. 314, 55 Atl. 980, 98 Am. St. Rep. 780:

"Partnership accounts must be adjusted and settled and the liability of one partner to another ascertained by an action of account render or by a bill in equity."

[2] Where, however, a partnership has been willfully and wrongly broken up by a partner, the other partner, if he has kept his covenants, may bring an action at law and recover damages; the measure being the value to him of the continuance of the agreement during its covenanted term. Instances of such suits are found in the courts of that state. Thus in Adams v. Tutton, 39 Pa. 447, the dissolution was the second year of a five-year term; Reiter v. Morton, 96 Pa. 239, had 15 years of the partnership term yet to run; and in McCollum v. Carlucci, 206 Pa. 314, 55 Atl. 980, 98 Am. St. Rep. 780, as appears by the paper books, the partnership, when wrongfully and in bad faith broken up by Carlucci, was to continue so long "as there is any prospect of a paying job."

[3] Without entering into a discussion of the affairs of the partnership here involved and of the disputes between its members, we are clearly of opinion that the proper place for the adjustment of those difficulties was an accounting involving the affairs of the partnership, and not an action at law for damages for its dissolution, and therefore the judgment of nonsuit must be affirmed. But, over and above this, we deem it proper to call attention to the fact that this is a case with which the federal courts should not be burdened. In view of the insolvency of the partnership, the fact that it had only 10 days to run, and of the uncertainty of the lease of the premises occupied by it being extended, it is manifest that nothing but nominal damages could have been allowed, and that no such money damages for dissolution could possibly have been involved in this case as the sum required to confer jurisdiction on the federal court in controversies between citizens of different states.

Finding no error in the court below granting and refusing to take off the nonsuit, its judgment is affirmed.

AMERICAN AUTOMOTONEER CO. et al. v. PORTER.

PORTER v. AMERICAN AUTOMOTONEER CO. et al.

(Circuit Court of Appeals, Sixth Circuit. April 4, 1916.)

Nos. 2704, 2705.

1. PATENTS ⊜136—REISSUES—CONSTRUCTION OF STATUTE—"SPECIFICATION."
The word "specification," as used in Act July 8, 1870, c. 230, § 53, 16 Stat. 205 (Comp. St. 1913, § 9461), authorizing a reissue for defective or insufficient specification includes in its meaning both the descriptive portion and the claims of the patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 198½; Dec. Dig. ⊜136.

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

2. PATENTS ⊜136—REISSUES—"INOPERATIVE" PATENT.
To authorize a reissue under Act July 8, 1870, § 53, on the ground that the original patent is "inoperative," it is not necessary that the device as described and claimed should be wholly inoperative, but the patentee is entitled to a reissue if, for reasons given in the statute, it fails to secure to him the monopoly of his actual invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 198½; Dec. Dig. ⊜136.]

3. PATENTS ⊜136—REISSUES—"INADVERTENCE."
If a patentee, through his solicitor, without intending to do so, drafts or accepts claims not commensurate with his invention, such act is an "inadvertence" which entitles him to a reissue, and whether the act was inadvertent or deliberate is a question primarily for the Patent Office, whose decision will not be reviewed, unless inconsistent with other facts appearing in the record.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 198½; Dec. Dig. ⊜136.

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

4. PATENTS ⊜140—REISSUES—"SAME INVENTION."
What constitutes the "same invention," within the meaning of Act July 8, 1870, § 53, authorizing reissues, is not to be determined by the claims of the original patent, which would in effect nullify the statute, but from the description and such other evidence as the Commissioner may deem relevant.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 205; Dec. Dig. ⊜140.

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

5. PATENTS ⊜136—REISSUES—VALIDITY—BROADENING OF CLAIMS.
The statutory inoperativeness or insufficiency of a patent, through inadvertence, which will authorize a reissue, may exist even though the only correction to be made is to broaden the claims by omitting unnecessary limitations, and the particular invention first claimed in the reissue may be sufficiently disclosed in the original merely by specification and drawings.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 198½; Dec. Dig. ⊜136.]

6. PATENTS ⊜138(2)—REISSUES—VALIDITY—INTERVENING RIGHTS.
The reissue statute fixes no limit of time within which application must be made, and does not specify that rights accruing to the public or to in-

dividuals after the first issue and before the application for reissue shall affect the latter right, but such additional condition is based on the principle of estoppel.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 202; Dec. Dig. ⟸138(2).]

7. PATENTS ⟸138(2)—REISSUES—VALIDITY—INTERVENING RIGHTS.

Patents, applications for which were pending at the time of the issue of another patent, but which were issued later, do not of themselves constitute the intervening rights which will bar the right to a reissue; and especially where they do not involve that feature to which alone the reissue claim in controversy pertains.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 202; Dec. Dig. ⟸138(2).]

8. PATENTS ⟸148—REISSUES—CONSTRUCTION OF ORIGINAL CLAIMS RETAINED.

Original claims, retained verbatim in a reissue taken for the purpose of getting broader claims, must be given the narrow scope attributed to them by the patentee and the office, as a basis for allowing the broader reissue claims.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 200, 221, 222; Dec. Dig. ⟸148.]

9. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—ELECTRIC MOTOR CONTROLLER REGULATOR.

The Weyand reissue patent, No. 12744 (original No. 810,240), for an electric motor controller regulator, claim 29, *held* valid and infringed, and claims 25 and 30 void for lack of invention.

Appeal and Cross-Appeal from the District Court of the United States for the Southern Division of the Eastern District of Michigan; Arthur J. Tuttle, Judge.

In Equity. Suit by the American Automotoneer Company and the Electric Service Supplies Company against Joseph Y. Porter, doing business as the Porter Manufacturing Company and the Porter Railway Switch Company. From the decree, both parties appeal. Modified and affirmed.

For opinion below, see 205 Fed. 105.

C. N. Butler, of Philadelphia, Pa., for complainants.

R. A. Parker, of Detroit, Mich., for defendant.

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

DENISON, Circuit Judge. Infringement suit on patent for electric motor controller regulator, issued January 16, 1906, to Weyand, as No. 810,240, and reissued to Electric Service Supplies Company, January 28, 1908, as reissue No. 12,744, upon reissue application filed March 18, 1907. The first nine claims of the reissue are identical with the nine and only claims of the original; the remaining reissue claims 10-32, are of seemingly broader character. Infringement is alleged of claims 1, 2, 11, 25, 29, and 30. The District Court held claims 1, 2, and 29 to be valid and infringed, and claims 11, 23, and 30 to be void, because broader than the art permitted. Both parties appeal.

The invention pertained, commercially, to that form of controller used by the motormen of electric cars in turning the current on and

off. All parties accepted it as essential that the "on" motion should be step by step, with a distinct stop between each two steps, while the "off" motion should be—or at least the motorman should be left free to make it—a continuous sweep. The purpose of the class of devices to which those of both parties belong is to compel the motorman to use the step by step method for the "on" motion, instead of leaving this result to his voluntary and skilled manipulation. This result is accomplished by devices in connection with the (customarily) vertical controller rod and the removable operating handle which, when placed in position, suitably engages the rod and so makes it revolve; and more specifically by attaching, rigidly to the top of the controller box and surrounding the rod, a plate called a base-plate, and by attaching to the rod, so as to revolve with it, a similar plate called a cover-plate. Between these two plates were inserted pawl and ratchet devices; the pawl or dog being upon the lower side of the cover-plate, and the ratchet teeth or stops being carried by the upper face of the base-plate. All these were old; the questions involved pertain to the construction and arrangement of detent and stops, of handle and cover-plate, and of cover-plate and base-plate.

The first question we meet is whether the reissue was invalid, because broadened. It was applied for within 15 months from the original issue, and neither laches nor abandonment can be urged against it from mere lapse of time. The reissue was very frankly for the sole purpose of broadening the claims. No consequential error in the specification was suggested, and the only "inadvertence, accident, or mistake" alleged was the omission to make the additional claims which were said to have been necessary to make the monopoly or protection of the patent as broad as the invention disclosed by the specification and drawings. The mistake or inadvertence was that of the applicant, induced by a negligent or unskillful solicitor.

The question is most squarely presented by claim 29, as follows:

"In an electric controller regulator, the combination with a controller of a base mounted thereon and provided with cams and stops, a rotatable cover on the base having a pawl which co-operates with the cams and stops to intermittently arrest the cover, a jaw on the cover, an operating handle engaging the controller rod and jaw to connect said rod and cover, and a coupling to secure the cover to the base without interfering with its rotation."

When this is compared with other claims, it is seen that its identifying thought, and so what must be deemed the invention of this claim, is the use of the handle to lock together and cause to turn in unison the cover-plate and controller rod; and this, of necessity, carries the implication that, when the handle is not in position, the rod and cover-plate will be disconnected. The claims of the original patent did not reach and protect the invention thus described. Two or three of the claims included, as elements, directly or by necessary implication, the handle and the controller rod and the jaws for locking the handle to the cover; but in such claims these elements were grouped in combination with a large number of other elements not involved in this thought, and it follows that these claims were so narrow as not to protect broadly the idea of making the rod and cover coupling in this way.

[1] Defendant urges that reissue for the purpose of such expansion is invalid—even if there are no "intervening rights"—and presses upon us the Supreme Court and the Seventh Circuit decisions below cited. The question has not been as expressly treated in this circuit as seems desirable, and we proceed to its consideration. If it were an original question, it would, as we see it, present no difficulty. The Patent Act of 1836, by section 13, provided that:

"Whenever any patent * * * shall be inoperative or invalid by reason of a defective or insufficient description or specification, or by reason of the patentee claiming in his specification as his own invention more than he had or shall have a right to claim as new, if the error has or shall have arisen by inadvertency, accident or mistake, * * * it shall be lawful for the Commissioner * * * to cause a new patent to be issued to the said inventor, for the same invention * * * in accordance with the patentee's corrected description and specification." Act July 4, 1836, c. 357, 5 Stat. 122.

The act of 1870, by section 53, uses practically the same language, save that "specification" is substituted for "description and specification." The statutory conditions thus become (1) "inoperative or invalid;" (2) "a defective or insufficient specification;" (3) "inadvertence, accident, or mistake;" and (4) "the same invention."

It is well understood that at the time of the first statute "specification" was an inclusive term, covering what, in later nomenclature, are identified as "specification" and "claims"; and though in 1870 the distinct identity of claims was recognized, it is not to be supposed that the re-enactment of this part of the act of 1836 contemplated any different definition of the terms used than had been understood and accepted with reference to the same terms in the earlier statute. Indeed, the last edition of Walker on Patents (4th Ed. §§ 111, 173) says that the claims are part of the specification. See, also, Macomber, pages 71 [1] and 822.[2] Thus giving to the statute its necessary interpretation when applied to the present-day subdivision of the statutory word "specification," we find it distinctly declared that a reissue may be granted when the patent is inoperative by reason of defective or insufficient specification or claims.

[2] The statute does not say "wholly inoperative"; and although a patent may, in the strict sense, be operative if it grants any monopoly of anything, yet if it fails to secure to the inventor the monopoly of his actual invention, it surely does not operate according to the intent of the law. Thomson v. Wooster, 114 U. S. 104, 115, 5 Sup. Ct. 788, 29 L. Ed. 105; Giant Co. v. Nitro Co. (C. C., Sawyer, C. J.) 19 Fed. 509, 510. Further, we find the statute saying, "by reason of a de-

[1] "The term 'specification' has been loosely used. In reading the decisions of earlier times, one finds it embracing description, claims, and even drawings —all that the patentee contributes to the grant—but most commonly to the description and the claims."

[2] "The term 'specification' is used in a twofold and confusing manner. As used in the statutes, it means both the descriptive portion and the claims. As commonly used by the Patent Office and by patent attorneys, it means the descriptive portion alone. The courts use the term in both ways, but the tendency in the more recent decisions is to mark the distinction as the Patent Office has done."

fective or insufficient specification or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new," and this means (interpreting "specification" according to its true force) inoperative by reason of defective description or insufficient claims or invalid by reason of too broad claims.

[3] "Inadvertence" is a word of broad meaning. The act of the patentee, through his solicitor, in drafting or accepting claims not commensurate with the invention, may be considered a mistake of law or a mistake of fact. In the typical case it is rather of the latter character, and is made because he does not appreciate the part which certain elements play in the operation and the value of the device described; but whether we call it a mistake of law or fact, it cannot very well escape the appellation "inadvertent," [8] unless, in truth, it is considered and deliberate. Leggett v. Avery, 101 U. S. 256, 260, 25 L. Ed. 865; Yale v. Berkshire, 135 U. S. 342, 403, 10 Sup. Ct. 884, 34 L. Ed. 168; Grand Rapids Co. v. Baker (C. C. A. 6) 216 Fed. 341, 351, 132 C. C. A. 485. This latter question—whether the error really was inadvertent or was deliberate—is primarily committed to the Patent Office for its decision. If the Patent Office, by general rule or by action in a particular case, should hear conflicting evidence upon that question and decide it, the courts would not lightly review that decision. None the less does this result follow when the Patent Office sees fit to accept and act upon an ex parte affidavit. It is only when other parts of the record (as the former, deliberate abandonment of the broader claim) conclusively show that the error was not inadvertent that there seems to be reason for disregarding the prima facie case made out by the Patent Office decision.

[4] The further and last statutory condition is that the reissue must be for "the same invention." It is true that, for purposes of determining infringement, the identity of the patented invention is fixed by the claims; but to apply the same test to identity of invention as between original and reissue loses sight of the difference between the real invention and the originally patented invention, and unless there is such a difference, there is no occasion for reissue. To recognize that difference and permit it to be corrected is the whole purpose of the reissue statute; and so it seems quite destructive of the statute to assume that the identity of the actual invention is permanently declared and fixed by the form which the original claims are inadvertently allowed to take. In the same way as with reference to mistake, the question of identity is submitted to the Patent Office, and for the same reason its conclusion is to be taken as prima facie right. The last sentence of section 53 even permits the Patent Office, in certain cases, to go entirely outside the record to determine what the original invention was. It follows that only when it is clear that the

[8] "If a patentee who has no correction to suggest in his specification except to make his claim broader and more comprehensive, uses due diligence in returning to the Patent Office, and says, 'I omitted this,' or 'my solicitor did not understand that,' his application may be entertained, and, on a proper showing correction may be made." Mr. Justice Bradley in Miller v. Brass Co., 104 U. S. 350, 352, 26 L. Ed. 783.

reissue is not for the same invention are the courts justified in reaching that conclusion; and we take this to be the rule of the decisions hereinafter cited.

[5] We thus see that, apparently, the statutory inoperativeness, insufficiency, and inadvertence may exist, even though the only correction to be made is to broaden the claims by omitting unnecessary limitations, and that the particular invention first claimed in the reissue, may be sufficiently disclosed in the original merely by specification and drawing, and without express verbal reference thereto. To the contrary effect, upon one or more of these points, defendant cites the cases in the margin,[4] and insists that they establish invalidity in a reissue made for the mere purpose of broadening the claims, if in a case where the first description contains no statement of the broader concept. Some of them do contain language to this seeming effect, yet we think in each the result will be found sufficiently controlled by laches, intervening rights, rewritten and altered description or drawing or other clearly distinguishing fact. Further, it is, in some aspects, a question of fact whether the reissue is for the same invention, and these decisions are, in some measure, conclusions of fact applying to the instant case rather than of law making a rule for future cases. However all this may be, if they would otherwise have the effect claimed, they are inconsistent with Topliff v. Topliff, 145 U. S. 156, 171, 12 Sup. Ct. 825, 36 L. Ed. 658, where it is expressly declared that there may be a valid reissue for the purpose only of broadening claims, and where, if the original description indicated any broader view of the invention than the original claim declared—save by describing the actual structure—that fact was not regarded as important enough to mention in the discussion. We are satisfied to hold that the necessary insufficiency of specification may consist only in that the claims are too narrow; that the necessary inadvertence or mistake may be found solely in the action of the patentee or his solicitor in framing these too narrow claims; that the original and reissue may be for the same invention although the original specification does not expressly indicate that the invention was regarded more broadly than the claims declared it; that upon all these questions, the decision of the Patent Office makes a prima facie case; and that only in a clear case of (actual or presumed) deliberate acceptance of the narrow claims or actual or presumed intervening rights or a clear case of departure from the real original invention as it may be found in the description and draw-

[4] Clements v. Odorless Co., 109 U. S. 641, 648, 3 Sup. Ct. 525, 27 L. Ed. 1060; McMurray v. Mallory, 111 U. S. 97, 103, 4 Sup. Ct. 375, 28 L. Ed. 365; Turner Co. v. Dover Co., 111 U. S. 319, 326, 4 Sup. Ct. 401, 28 L. Ed. 442; Mahn v. Harwood, 112 U. S. 354, 357, 360, 5 Sup. Ct. 174, 6 Sup. Ct. 451, 28 L. Ed. 665; Coon v. Wilson, 113 U. S. 268, 277, 5 Sup. Ct. 537, 28 L. Ed. 963; Worden v. Searls, 121 U. S. 14, 24, 7 Sup. Ct. 814, 30 L. Ed. 853; Parker v. Yale, 123 U. S. 87, 97, 8 Sup. Ct. 38, 31 L. Ed. 100; Hoskin v. Fisher, 125 U. S. 217, 223, 8 Sup. Ct. 834, 31 L. Ed. 759; Flower v. Detroit, 127 U. S. 563, 571, 8 Sup. Ct. 1291, 32 L. Ed. 175; Electric Co. v. Boston, 139 U. S. 481, 501, 11 Sup. Ct. 586, 35 L. Ed. 250; General Co. v. Richmond Co. (C. C. A. 7) 178 Fed. 84, 102 C. C. A. 138; McDowell v. Ideal Co. (C. C. A. 7) 187 Fed. 814, 109 C. C. A. 574; Peoria Co. v. Cleveland Co. (C. C. A. 6) 58 Fed. 227, 239, 7 C. C. A. 197.

ings will the courts say that the reissue is invalid. See cases cited in margin.[5]

If the original specification and drawing disclose a structure with five elements, and it is apparent that three of them make an operative combination, the other two being useful but unnecessary additions—though the possible use of three only is not mentioned—and if the claim includes all five, and so is limited to the more complex combination, there is in these facts alone no bar to a reissue securing the simpler combination of three elements of which the patentee was in truth the first inventor. Upon principle, we cannot escape this conclusion, and we find no controlling decision to the contrary. Of course, if the original claims did not touch that part of the structure to which the reissue claim pertains, a somewhat different question would arise. If the opinions cited from the Seventh Circuit (General Co. v. Richmond Co. and McDowell v. Ideal Co.) carry implications against this conclusion, they must be read with the decision of the same court in Moneyweight Co. v. Toledo Co., 187 Fed. 326, 109 C. C. A. 586, in which it is held that the original claims do not fix the identity of the actual invention. Since the claim constitutes the only statutory medium for declaring the scope of the invention, as distinguished from its structural embodiment, it seemingly must follow that an omission to specify its true breadth in the place where that is not required—the description—cannot be more fatal than the same omission in the claim, where the formulation is required.

[6] Defendant next urges that there were "intervening rights" which prevented such a reissue, and relies upon Clements v. Odorless Co., supra, and similar cases, as showing that the three patents issued between the date of original issue and the date of application for reissue, sufficiently constitute or evidence those intervening rights which will bar a reissue. The reissue statute fixes no limit of time within which the application must be made, and does not specify that rights, accruing to the public or to individuals, after the first issue and before the application for reissue, shall affect the latter right. Miller v. Brass Co., 104 U. S. at page 350, 26 L. Ed. 783 (see Walker [4th Ed.] § 226), which first declared this additional condition, did not elaborate the foundation reason for so doing, but we think it must be assumed that the principle of estoppel (perhaps in favor of the public generally) is at the bottom of the rule. By the issue of a patent, the inventor dedicates to the public everything which he does not claim

[5] Battin v. Taggert, 17 How. 74, 84, 15 L. Ed. 37; Seymour v. Osborne, 11 Wall. 516, 544, 545, 20 L. Ed. 33; Mahn v. Harwood, 112 U. S. 354, 5 Sup. Ct. 174, 6 Sup. Ct. 451, 28 L. Ed. 665; Eames v. Andrews, 122 U. S. 40, 58, 59, 7 Sup. Ct. 1073, 30 L. Ed. 1064; Topliff v. Topliff, 145 U. S. 156, 165, 171, 12 Sup. Ct. 825, 36 L. Ed. 658; Houghton v. Whitin Wks. (C. C. A. 1) 153 Fed. 740, 83 C. C. A. 84; Thompson Co. v. Black River Co. (C. C. A. 2) 135 Fed. 759, 764, 68 C. C. A. 461; Showcase Co. v. Baker (C. C. A. 6) supra.

This view has seemingly long been followed by the Patent Office, pursuant to the fully reasoned conclusions of its controlling tribunal, the Court of Appeals of the District, by Justice Duell, former Commissioner of Patents, in In re Briede, 27 App. D. C. 298. See, also, In re Heroult, 29 App. D. C. 42, 53; Nelson v. Felsing, 32 App. D. C. 420, 426; Otis v. Ingoldsby, 35 App. D. C. 102, 106.

as his monopoly. Upon this dedication, the public has a right to rely, and if members of the public devote time and money to the manufacture of a device which the inventor has so dedicated, or to the devising, inventing and patenting of structures which embody such a feature, it may be presumed that this is done upon the faith of the dedication; and so the inventor may not be permitted thereafter to enlarge his monopoly to the prejudice of these new rights,—even though, except for them, the reissue would be permissible. The settled doctrine has come to be that from a delay of more than two years, and in the absence of any sufficient contrary evidence, these fatal intervening rights (public or private) will be presumed; in the presence of less delay, they must be proved. But see White v. Dunbar, 119 U. S. 47, 52, 7 Sup. Ct. 72, 30 L. Ed. 303; and Milloy Co. v. Thompson Co. (C. C. A. 6) 148 Fed. 843, 847, 78 C. C. A. 533.

Since a patent grants or creates no right to manufacture the thing patented, but only a right of exclusion (Swindell v. Youngstown Co., 230 Fed. 438, —— C. C. A. —— (C. C. A. 6—Feb. 8, 1916), it would seem that intervening patents, not followed by manufacture, can furnish the necessary basis for this rule (in a case of less than two years' delay) only because of the effort and expense involved in making and perfecting the inventions to which they relate; in other words, because the absence of the broad claim in the earlier patent has encouraged or misled the later patentee to make and perfect an invention which he would not have undertaken if the earlier monopoly had been wider.

[7] In this case, each of these three patents was applied for before the issue of the Weyand original, and so, at the time of such original issue, was a pending application showing an invention then completed and reduced to practice. Such patents, which merely go to issue in the interval, cannot raise the estoppel upon which this doctrine must at last depend—though it may be called "public policy." There is no evidence that the inventors under any one of them manufactured, and so they do not seem to have done anything in reliance upon the apparent dedication made in the first patent, excepting merely that they paid their final fees. To this action they were measurably committed before the original issue of the patent in suit; and we cannot think it, of itself, enough to bar the reissue. For this conclusion, there is the additional reason that the only one of the broadened claims which we find occasion to consider and enforce has to do with a feature of the device which was not used by any one of these three intervening patents. Their structures do not disclose any infringement of the reissue in this respect, and so it cannot be that they evidence any "intervening right" pertinent to that claim.

We need not determine still another supporting reason urged by the plaintiffs for the same result, viz. that the three intervening patents were either issued or assigned to and are now owned by plaintiffs themselves, and that the general public cannot claim through an intervening inventor who is himself not prejudiced. See Hartshorn v. Barrel Co., 119 U. S. 664, 674, 7 Sup. Ct. 421, 30 L. Ed. 539.

Before coming to the questions of validity and infringement, which we must decide, we note the differences between plaintiffs' and defend-

ant's constructions. It does not seem necessary to describe these in detail. Plaintiffs have the main body of the pawl pivoted under the cover, swinging horizontally, engaging stops projecting horizontally inwardly from the cylindrical wall of the base-plate, and held normally out of engagement by a spring which allows yielding in either direction from the normal. A post rigidly attached to and depending from the pawl, engages a series of cams on the upper surface of the base. In the "on" motion, this part contacts with the outer sides of the cams, and carries the pawl outwardly into engagement with its stops; on the "off" motion, the post passes on the inner side of the cams, and the entire unitary pawl and post structure yields inwardly and is not stopped. Defendant carries both stops and cams in concentric rows on the upper surface of the base; his main pawl, pivoted between ears depending from the cover, swings vertically, and is held normally up out of engagement with the stops by the weight of its tail, and for the depending cam engaging post, he substitutes a supplementary pawl, horizontally pivoted and depending vertically from the main pawl, and retreating vertically within it on the "off" motion.

[8] Claim 1 of the original and reissue patents (quoted in the margin [6] is a long claim, naming a large number of elements, and, as a matter of first impression, appears somewhat specific; at the same time, if the effect of the reissue were not considered, and if the claim were given a fairly broad range of equivalents, it would be infringed. Due regard for the reissue proceedings and what was accomplished thereby prevents allowing to this claim the liberality of construction that it might otherwise receive. It is, in respect of the features herein involved, the broadest of the original nine claims. The reissue was obtained on the express representation and the sole ground that the claims were inadvertently too narrow, and when this first claim is compared with several of those contained in the reissue, it is too clear for doubt that both the patentee and the Patent Office regarded the element "pawl," in the first claim, as entitled only to a narrow range of equivalents, and considered the base and its cylindrical wall as distinct and separate elements. These are the meaning and construction which the patentee deliberately selected for his first claim; he cannot now depart therefrom and say that some of his new claims in the reissue are no broader than his first claim already was; and this, we think, would be the necessary effect of a finding that the first claim is infringed.

The second claim is more specifically confined to the form of pawl and post involved than is the first claim, and it is governed by the same

[6] Claim 1—In an electric controller regulator of the kind described, the combination of a main body having a base *B*, a cylindrical part B^2, a series of interior ratchet teeth B^4 and B^5, a series of studs *C* and *C'*, and a central aperture B^6, said body being adapted to fit over an electric controller rod and to be affixed to a controller, with a revoluble cover, *D*, having a central aperture *E*, a jaw *F*, adapted to receive the shank of a handle of an electric controller; and a pawl J, pivotally attached to the inside of said cover, said pawl being adapted to be engaged by the studs *C* and *C'*, and to be deflected thereby into engagement with said ratchet teeth; and means for returning said pawl from its deflected position to a normal position J^6, substantially as described and for the purposes specified.

considerations. The decree below must be reversed as to these two claims. Claim 11 is as follows:

"In a controller regulator, the combination with a series of stops, a rotatable member having a pawl movable only in one plane, a series of cams for moving the pawl into engagement with the stops to effect a step by step movement of said member in one direction, and provision for permitting uninterrupted movement of the said member in the opposite direction."

The court below held this claim void as anticipated by the patent to Asbury. We agree that it would be void, if it was given a scope sufficient to cover defendant's form; but we think the claim may well be read so as to have validity over Asbury and still not be infringed. Its force turns on the meaning of the limitation "movable only in one plane." The claim, containing this limitation, was rejected on reference to Asbury; the applicant then pointed out that in Asbury, while the pawl moved only in what was practically one horizontal plane, yet that its carrying device was swung around the circle, and so, with reference to the part corresponding to the base-plate, it moved in and out in different radial planes. For this reason, the limitation was said to distinguish. This argument did not, in truth present any distinction between Weyand and Asbury. Where two parts are relatively changing, and we speak of the plane of motion of an attachment to one part, it is obvious that though the plane will remain the same as to the attached part, it will constantly change as to the other part. In Asbury, the pawl motion was always in the same plane as to the pawl carrier, but was in successive radial planes as to the stop-carrying part; just so, in Weyand, the pawl motion is always in the same horizontal plane as to the pawl-carrying cover, but is in successive radial and chord planes as to the stop-carrying base-plate; and just so with defendant—the motion of his main pawl is always in the same vertical plane with reference to the carrier, but is in successive vertical chord planes as to the base-plate. The true distinction between Weyand and Asbury—and this distinction was imported into Weyand's claim by this limitation in connection with what was already in the claim—was that Weyand provided for his pawl a stop-engaging motion in one plane, and then a further cam-avoiding motion by the same pawl in the same plane continued. We have, then, a case where the applicant was entitled to have, over the reference, the exact claim which was granted, but where he secured the allowance by presenting a view of the meaning of his claim, which, if correct, would have made the allowance improvident. Should we construe the claim as the applicant did, or should we say that the result obtained by the examiner should be sustained because it was right although he apparently was moved by a wrong reason?

We conclude that it is unnecessary to pass upon this perhaps novel question, because, if the claim is valid on the suggested theory, defendant does not infringe. It is true that his main pawl moves in a vertical plane, and his supplementary pawl retreats vertically into the main pawl, but neither this supplementary part nor the main pawl has any further motion in the plane of the first motion as extended; the main pawl has no cam-avoiding motion whatever; and it seems inci-

dental rather than characteristic that the independent motion of the part which corresponds to plaintiffs' post is in a vertical plane instead of swinging in a right-angled plane. If defendant could avoid infringement merely by changing the pivot angle of this swinging part, there would not be much left in the claim. The characteristic and meritorious thought formulated by this claim and upon which alone, if at all, its validity must stand, has not been used by defendant.

Claims 25 and 30 [7] clearly must depend for patentability, as compared with confessedly old combinations alone covered by all other portions of the claims, wholly upon the addition to such older combinations of "means for connecting the cover directly to the base to prevent separation thereof without interfering with the rotation of the cover." The District Court held these claims void because anticipated by Barrett. In fact, the structure of these claims is like Barrett in that it is for the same general purpose and has all the general parts, with the base-plate attached to the top of the controller box and the cover rotating on the base-plate and a handle attached to the controller rod and actuating the cover-plate. In Barrett, however, the cover-plate was kept from accidental or unintended removal from the base-plate by the fact that the base-plate, through the base was fast to the controller rod and the cover-plate was attached to the same rod by a set screw. Weyand discarded the set screw, and made an annular groove in the outside cylindrical wall of the base-plate and attached to the periphery of the cover-plate a depending clip or ear having a lug which traveled in the groove in the base-plate. When he wished to separate the parts, he unscrewed these ears from the cover-plate. If Barrett does not anticipate, it is only because his connection is less direct; but if we assume that there might be invention in the specific means adapted by Weyand for this engagement and which might validate some of the claims which refer to such specific means, we can see nothing patentable in the broad conception which he attempts to monopolize by claims 25 and 30. Mechanism for fastening a revolving part to a stationary part, so that the former might revolve upon the latter, but could not get away, was so familiar to every mechanic in every art that we may take judicial notice of it as a common expedient, upon the addition of which to an existing combination of base and cover-plate, invention cannot be predicated. Every wagon wheel and axle responds to this description, and the exhibits in the case show several familiar methods of getting this result; indeed, one of defendants' forms uses what is only a cap or retaining flange on an axle.

[9] There remains for consideration claim 29, quoted above. We think this claim valid both as against the defense of reissue and against the defense of noninvention. Every part to which it refers is fully shown in the drawing of the original and sufficiently described in the

[7] Claim 25—In a controller regulator, the combination with a base, a rotatable cover, means for compelling intermittent movement of the cover in one direction while permitting uninterrupted movement thereof in the opposite direction, and means for connecting the cover directly to the base to prevent separation thereof without interfering with the rotation of the cover."

specification. The latter makes clear that the handle is intended to be removable, and although it does not in so many words say that the controller rod is locked to the cover-plate when the handle is in position and that the two are disconnected when the handle is removed, this result is inevitable from the construction shown. The original specification does not affirmatively and expressly indicate that the invention included this feature, nor point out the purposes and commercial advantages of this construction; but as it is clear that the specification is not the appropriate place for declaring scope or equivalency, and that the patentee is entitled to all the benefits inherent in his patented construction, though he did not mention them and even though he did not know of them, it is not apparent how his failure to describe these advantages can be any more effective disclaimer of invention therein than is his failure to claim, or can bar his right, upon a reissue any more than upon an original, to make claim for the actual construction shown. However, if the fact that the original claims do not refer at all to those parts covered by the new reissue claim may tend to show that the latter patent is not for the same invention, that makes no difference here. The original claims, as above mentioned, do—imperfectly—cover this rod-cover-handle construction.

It was not a new thing, broadly speaking, to connect a revolving part to a central shaft by a bar removably locking to both so that when it was in position they would revolve together, and when it was removed, they would be disconnected. This construction was old in turret lathes—not elsewhere, so far as shown—but it had not been used for controller boxes or for any analogous purpose, and we cannot assume that it, like the new subject-matter of claims 25 and 30, was a common expedient. It had special utility for this use, because when the parts have been arranged on the general plan here followed, it is necessary that the cover-plate and controller rod should be fast and revolve together. If they are fastened in some semi-permanent way, as is done in each one of the several earlier controllers shown, it follows that, when the motorman takes out the handle and leaves the controller box, it can still be operated by any one who comes along; the cover-plate can easily be grasped by the hand and turned and the car set in motion; but with the construction which Weyand was the first to use, when the motorman removes the handle, the cover-plate and rod are automatically thereby disconnected, and any trespasser may revolve the cover-plate as much as he pleases without affecting the controller rod. While this is a simple step, we think that it involved invention—for anything shown by this record. The infringement is obvious.

Some complaint is made because, by the final decree, complainant was given only nominal damages; but the final decree recites that this action was taken after "further hearing." Counsel concede that proofs were taken bearing thereon, and those proofs have not been brought here. We cannot presume error.

The decree below will be modified so as to direct injunction on claim 29 only, so as to find that claims 1, 2 and 11 are not infringed and that claims 25 and 30 are invalid. The injunction must also be upon

condition that plaintiff, within 30 days from the mandate, or such further time as may be allowed by the court below, file a certified copy of a disclaimer as to claims 25 and 30. Herman v. Youngstown, 191 Fed. 579, 588, 112 C. C. A. 185. The patent having been invalid in the form in which suit was brought and maintained until final decree, the plaintiff can recover no costs in the District Court (Houser v. Starr, 203 Fed. 264, 275, 121 C. C. A. 462); in this court, since the injunction, although continued, is so far modified, defendant will recover one-half his costs on his appeal.

VENTILATED CUSHION & SPRING CO. v. D'ARCY.

(Circuit Court of Appeals, Sixth Circuit. April 4, 1916.)

No. 2627.

1. PATENTS ⟸168(2)—CONSTRUCTION—ESTOPPEL BY PROCEEDINGS IN PATENT OFFICE.

An applicant, who acquiesces in the rejection of claims by the Patent Office on references to prior patents, and accepts narrower claims, is estopped from broadening such claims beyond the natural import of their terms, even though the examiner may have been wrong in insisting on the limitation.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 244; Dec. Dig. ⟸168(2).]

2. PATENTS ⟸170—CONSTRUCTION—COMBINATION PATENT.

Although all of the elements of a patented combination are not found in a single structure in the prior art, so as fully to anticipate, in determining the scope of the patent and its place in the art, as affecting the question of infringement, prior patents, showing separate elements of the combination, may properly be considered.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 245; Dec. Dig. ⟸170.]

Appeal from the District Court of the United States for the Western District of Michigan; Clarence W. Sessions, Judge.

On petition for rehearing. Denied.

For former opinion, see 229 Fed. 398, —— C. C. A. ——.

William R. Rummler, of Chicago, Ill., and Luther V. Moulton and Cyrus W. Rice, both of Grand Rapids, Mich., for appellant.

Fred L. Chappell and Chappell & Earl, all of Kalamazoo, Mich., for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. The grounds urged in support of the petition for rehearing, so far as it is necessary to notice them, are hereinafter mentioned.

1. Counsel say of our reference to Murray's patent of 1885, No. 324,335, that we were mistaken in stating that Murray "employs inverted conical springs with a short spring disposed within each of the long springs." The supposed mistake consists of an omission to call

attention to the further fact that the short springs are there stretched and held, as counsel say, in an "extended position so as to be of the same length as the other springs when the structure is completed." This feature of the Murray patent is of no importance in determining the pertinency or effect of the reference. The contention in this behalf concedes, and of course must concede, that the short springs are disposed within the long springs; but the feature of stretching the short springs beyond their normal length and to that of the long springs, where their upper ends are fastened together, was for a purpose distinct from the object of the reference. This will be seen, as also the relevancy of the feature referred to in the opinion, upon reading the following portion of Murray's specification:

"When pressure is brought to bear on such a seat (Murray's patented device), the small springs at first assist it to depress the large springs until the small springs reach their normal form. Then if the pressure be sufficient to continue descending, the small springs resist compression and assist the large ones to carry the load."

The idea of associating long and short springs for the latter of these two declared purposes is to be read in connection with Murray's further idea that the long and short springs might, as pointed out in the opinion, be separately disposed; and if these two disclosures did not anticipate Stotts' purpose of associating long and short springs, the effect of such disclosures was certainly to limit the scope of his patent, for Stotts declared in his specification that one of his "main objects" was—

"* * * to provide a cushion structure in which the resistance of one set of springs is reinforced by a second set after the first set has yielded to a certain extent, thus adapting the device to use for persons of either heavy or light weight."

2. It is urged that the court misapprehended the "controlling fact that in the device shown in the patent in suit, as well as in defendant's device, a supporting base exists even when the short springs are removed." This contention, so far as it relates to the patent in suit, ignores the essential features of Stotts' supporting base. To remove the short springs would in effect be to contradict Stotts' plan of a supporting base, whether that plan be sought in the contents of the file wrapper or in the letters patent. The reasons for these views sufficiently appear in the portions of the opinion which treat of the limitations imposed by the prior art, and also by what transpired in the Patent Office before the contested claims were allowed. We may, however, add that the model presented by appellant to illustrate and support the petition for rehearing serves to confirm us in our original conclusion touching the effect of omission of the short springs. This model omits those springs and, of course, the fastenings which were intended to secure the bottom convolutions of adjacent long springs to those of the short springs and so in vital part to form the supporting base in question. It is not open to appellant to say, as its counsel in effect assert, that this unitary method of construction can be abandoned without affecting the supporting base; nor will it do to say, as counsel contend, that the terms used in the claims in suit were intended as mere "descriptive phrases." The effect of adopting counsel's theory

would be to disrupt the supporting base, and also, through violation of essential portions of their very terms, to broaden each of the claims in suit. Such a theory as this amounts to an insistence that Stotts could have secured, in addition to his claims as allowed, also another claim which would have called only for the parts embraced in the model before alluded to; in other words, that he could have secured a claim omitting the short springs and the fastenings between their bottom convolutions and those of the adjacent long springs (see Fig. 3 and also explanation thereof as shown in opinion).

[1] It must be remembered, however, that what transpired in the Patent Office necessarily included not only the examiner's interpretation, but also Stotts' own understanding, of the references on which the examiner relied for rejecting Stotts' claims. It could make no difference if they were both wrong in their views concerning the references (though it is not intended to intimate that they were); for Stotts' acceptance of the claims and subsequent acquiescence therein plainly operate to estop both him and the appellant from broadening the claims beyond the natural import of their terms. This feature of the case falls well within the principles of the decisions contained in the opinion respecting the effect of Stotts' course as it is disclosed by the file wrapper; and to those citations we may add the following decisions of this court: Thomas v. Rocker Spring Co., 77 Fed. 420, 430, 431, 23 C. C. A. 211; Campbell Printing Press Mfg. Co. v. Duplex Printing Press Co., 101 Fed. 282, 295, 41 C. C. A. 351; American Stove Co. v. Cleveland Foundry Co., 158 Fed. 978, 983, 86 C. C. A. 182—and the rules laid down in W. W. Sly Mfg. Co. v. Russell & Co., 189 Fed. 61, 64, 110 C. C. A. 625, although the facts there involved, unlike the facts here, rendered the rules stated inapplicable to that case.

3. It is contended that the court misapprehended the wording of the claims. It was not deemed necessary to set out in the opinion more than the first claim and also the differences of importance between that claim and the other claims involved; but counsel think the differences so pointed out are erroneous as to claims 2 and 6. We need not repeat what is shown in the opinion as to how the second claim escaped amendment. What is there said renders counsel's allusion to an omitted phrase unimportant. The criticism made in relation to the sixth claim is reducible to a difference of words employed in that claim and in the first claim to describe how the bottom convolutions of the long springs should be connected with the bottom convolutions of the adjacent short springs; in the sixth claim these convolutions are to be "rigidly fastened" to one another, while in the first claim they are to be "in contact with and secured to" one another; counsel now insist that there is a distinction between these two methods of joining the bottom convolutions of long and short springs, of which we shall have something to say later; but they do not allude to what was said in respect of the supporting feature of the patented structure in another portion of the opinion, which is as follows:

"In claims 1, 9 and 10, this is called a 'wire net-work base,' while in claim 2 it is called a 'supporting-base for said springs,' and in the sixth claim 'a stiff supporting-base of wire net-work.' It is to be remembered that this support, regardless of the names applied to it in the claims, consists of the bot-

tom spring-convolutions, the lower border-frame, the braces, and the contrivances used to connect and hold these parts in place."

When the method adopted in the opinion for describing the claims is read in connection with the parts here brought into contrast, the difference, if there be any of importance, between the fastenings called for by the first and the sixth claims, so far as their supporting bases are concerned, might, we think, be readily discerned—especially for all purposes of testing their scope and effect with respect to the prior art and the contents of the file wrapper.

4. It is insisted that the court misapprehended the difference in operation between the patented device and the devices of the prior art. It is in substance said that the depression of the cushion by a load "will cause the short springs at each side of the center of depression to be tilted so that when the load reaches" the short springs "they will be positioned to receive the thrust more nearly in alignment with their axes," and that this is due to the resilience of the supporting base. The attention of witnesses was called both to the mounting and operation of the patented device, and explanations were given both directly and through comparison with at least one or two other devices. The object seems to have been to show advantages of a wire base over those of a wooden one with respect to fastening the springs securely, to avoid breakage and displacement of their support, and to supply ventilation through openings in the wire base. Naturally if the witnesses had regarded this so-called tilting quality as of any practical importance they would have been asked also to explain its advantages. The tilting feature, however, seems to have originated with counsel for appellant. It first appeared here in appellant's reply brief which was filed prior to the hearing, and has been strenuously urged in support of the petition for rehearing. Counsel have placed their chief reliance, as we understand them, upon a clause of the specification and the omission of the top frame *10* (see Fig. 1 shown in opinion) of the short springs from the claims in suit. It is stated in the specification:

"It will be seen that the base convolutions of the springs, the base frame *4* (the lower border frame), and the cross-wire *6* (the braces) together with the fastenings of each to the other, form a rigid base for the cushion. This base is, however, all constructed of resilient wire and is therefore capable of yielding to a certain extent."

Although it is there said the base is composed of "resilient" wire, it is also said the base is "rigid." Further, in his written response to the letter of the patent examiner showing the references upon which the first rejection of claims was based, Stotts said: "A stiff base is important, and it is of advantage to have such base of open network so as to provide for more complete ventilation, as in the so-called ventilated cushions for which applicant's device is particularly adapted." Granting then that the claims in suit should as counsel insist each be read with reference to the feature of the specification which states that the base is capable of "yielding to a certain extent" (National Tube Co. v. Mark, 216 Fed. 507, 515–517, 133 C. C. A. 13 [C. C. A. 6th Cir.]), and having in mind also the omission of frame *10*, still, we cannot think that the tilting quality now claimed is more than

theoretic; we certainly do not discover that any such quality was designed by Stotts, nor are we able to see that the quality is sufficient, to constitute any substantial operating characteristic of the patented device. It follows that the contention of counsel that the assumed tilting quality is to be regarded as an element of the combinations grouped in the several claims, and as distinguishing them from the prior art, cannot be sustained. It results, too, that the argument presented to show infringement of the sixth claim by reason of the "stiff supporting-base" there called for must fail. Although ingeniously put, the logic of the argument leads to a range of equivalents that is forbidden by the prior art; for in the absence of an effective tilting quality the theory of a *stiff-resilient* base, which is in effect contended for, comes to be a substitution of a metal base for a wooden one. The case is therefore unlike that of Diamond Rubber Co. v. Consol. Tire Co., 220 U. S. 428, 433, 31 Sup. Ct. 444, 446 (55 L. Ed. 527), cited by counsel. In that case the "tipping capacity" of the tire was shown by testimony. For example, Mr. Justice McKenna said:

"In other words, and in the language of one of the expert witnesses, the tire has the capacity to rise and fall and reseat itself under lateral strain, that is, to rise slightly from the rim on one side, independently of the other, when subjected to very great strain, and immediately reseat itself when such strain is removed."

True, the tipping capacity of the tire which was there proved to exist was not mentioned in the specification nor made the subject of claim in the patent in suit; it is true, also, that the patentee's knowledge of the existence of the quality at the time he made his application was seriously questioned; but these matters were regarded as falling within the well-settled principle that the patentee was nevertheless entitled to the advantage of the tipping quality so established, since it was necessarily involved in the invention. This court has had occasion to apply this principle a number of times. Morgan Engineering Co. v. Alliance Mach. Co., 176 Fed. 100, 107, 100 C. C. A. 30, and citations; Jackson Fence Co. v. Peerless Wire Fence Co. (C. C. A.) 228 Fed. 691, 696.

[2] 5. It is said that the court "did not treat the combination of the patent as a unit." The theory is that failing to find in the prior art any unitary structure precisely like the one in issue, the court "segregated the elements" of the claims in suit, found each of the elements anticipated in some device of the prior art, and, contrary to the law declared in Bates v. Coe, 98 U. S. 48, 25 L. Ed. 68, concluded that "if there was any invention in plaintiff's device, it was in the specific base only." In the opinion we assumed, without deciding, the patent to be valid, and confined the inquiry to the scope of the invention. Clearly this was not to assume, as counsel seem to intimate, that there was invention in the *supporting-base alone.* However, as we interpret their theory, counsel do not distinctly state their purpose in citing Bates v. Coe. That was a case for infringement of a patent; and the defense, in addition to a denial of infringement, challenged the validity of the patent. The particular part of the opinion there rendered, upon which reliance is placed, concerns the charge of *invalidity* of the patent, and so is inapplicable here; and, indeed, nothing is there stated that is

helpful to the solution of the instant case.[1] We infer, however, that the real purpose of referring to Bates v. Coe was, in the first place, to call attention to the statement, contained in the opinion, that the charge of infringement cannot be escaped by "proving that a part of the entire thing is found in one prior patent, * * * and another part in another prior exhibit, and still another part in a third one, and from the three or any greater number of exhibits draw the conclusion that the patentee is not the original and first inventor, * * *" and, in the next place, to conclude from this statement that the scope of the claims of a patent cannot be limited by the prior art, unless all the elements of the claims are found in a single prior patent. It thus becomes plain that according to this theory plaintiff would be entitled to a construction of the contested claims which would forbid looking into the prior art for its effect upon one or the other of the two controlling sets of elements comprised in the claims; that is, either those of the supporting-base or those of its superstructure. To illustrate, as pointed out in the opinion, Stotts associated in his supporting-base elements similar in point of equivalency to elements disclosed in metal bases of the prior art, with an arrangement of long and short spiral springs also disclosed by the prior art, without, however, producing a substantially new result. If then, according to the "unit" theory urged by counsel, only one of the two sets of elements so grouped in Stotts' device could be tested by the prior art (since both sets are not disclosed by a single prior patent), an advance in invention would result which in truth was not made.

In our judgment, however, it cannot be doubted that the question of whether any advance over the prior art is made in a patented device may be tested by two or more prior patents, which show as here that the device "is but one in a series of improvements all having the same general object and purpose." Familiar illustrations of this may of course be found in decisions which, after reviewing patents of the prior art, accord to the claims in issue only a narrow construction, and frequently restrict them to the precise form of the device, or the fullest equivalent of that form, as it is described in the specification and drawings. We may refer to some of the controlling decisions; for example, Mr. Justice Bradley said, in Bragg v. Fitch, 121 U. S. 478, 483, 7 Sup. Ct. 978, 981 (30 L. Ed. 1008):

"It is obvious from the foregoing review of prior patents, that the invention of Bristol, if his snap-hook contains a patentable invention, is but one in a series of improvements all having the same general object and purpose; and that in construing the claims of his patent they must be restricted to the precise form and arrangement of parts described in his specification, and to the purpose indicated therein."

Again, in Deering v. Winona Harvester Works, 155 U. S. 286, 291, 15 Sup. Ct. 118, 120 (39 L. Ed. 153), Mr. Justice Brown had occasion to say:

"Devices bearing certain similarity to this, and having in view the performance of a like function, were not wholly unknown to the prior art. These

[1] See remarks of Judge Jenkins upon Bates v. Coe in Campbell v. Bailey (C. C.) 45 Fed. 564, 565, and also Keene and Pharis v. New Idea Spreader Co., 231 Fed. 701, — C. C. A. —, decided by this court March 17, 1916.

devices, though not claimed to fully anticipate the Olin patent, are important in their bearing upon the construction of this patent and upon the alleged infringement by the defendants."

See Gordon v. Warder, 150 U. S. 47, 50, 14 Sup. Ct. 32, 37 L. Ed. 992; Specialty Manuf. Co. v. Fenton Mfg. Co., 174 U. S. 492, 497, 19 Sup. Ct. 641, 43 L. Ed. 1058; Derby v. Thompson, 146 U. S. 476, 481, 13 Sup. Ct. 181, 36 L. Ed. 1051; Hoff v. Iron Clad Mfg. Co., 139 U. S. 326, 328 to 330, 11 Sup. Ct. 580, 35 L. Ed. 179; Computing Scale Co. v. Automatic Scale Co., 204 U. S. 609, 615, 27 Sup. Ct. 307, 51 L. Ed. 645.

Further argument is unnecessary; after careful consideration, we are convinced that the petition for rehearing must be denied.

WERTHEIM v. LEFKOWITZ et al.

SAME v. RITTER et al.

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

Nos. 182, 183.

PATENTS ⇐328—INVENTION—BAG LOCK.

The Wertheim reissue patent, No. 13,886 (original No. 1,074,074), for bag lock, *held* void for lack of invention.

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

Suits in equity by Ludwig Wertheim against Louis J. Lefkowitz and Abraham Fisher, doing business under the name of Lefkowitz & Fisher, and against Louis Ritter, Jacob Ritter, and Samuel Ritter, doing business as Ritter Bros. Decrees for defendants, and complainant appeals. Affirmed.

The decree of the District Court dismissed the bills of complaint alleging infringement of reissued letters patent No. 13,886 granted February 23, 1915, to the complainant, being a reissue of patent No. 1,074,074 dated September 23, 1913.

Isaac B. Owens and Patrick A. Bolger, both of New York City, for appellant.

C. P. Goepel, of New York City, for appellees.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge. The claim of the reissue which is in controversy is the second. It is as follows:

"The combination with a bag and its frames, of the locking device on the frame, a yoke hinged to one frame and having a bend therein whereby it may embrace the locking device and bend down on the side of the opposite frame and a knob on the side of said opposite frame wherewith the yoke is adapted to removably engage for the purpose specified."

We are unable to discover anything approaching invention in this structure. The two locking knobs were concededly old. The patentee added the hinged yoke of the abandoned claim of the original patent,

which is simply used as an additional security to the interlocking balls of the prior art. In other words, this patentee added another locking device to the device then in use. The old device did not give the necessary security and another wellknown locking device was added. This addition did not make a new combination. The old device and the new act independently of each other and produce no new result. It is like the addition of a safety chain to a front door. If the ordinary lock is picked the chain will hold, but there is no combination between the two.

So, too, we can take judicial notice of the fact that ordinary traveling bags and suit cases were in use, long prior to the date of the patent in suit, provided not only with a central lock but also with side snaps and catches to reinforce the lock. It will hardly be contended that it required invention to add these wellknown additional securities to similar structures. The Greenbaum patent for a bag or pocketbook dated April 11, 1905, shows a combination having all the elements of the claim in suit when it is remembered that the claim is not limited to the precise structure shown or to the materials described in the patent. We cannot think that after Greenbaum there was invention in producing the Wertheim lock.

The decree is affirmed.

CONSOLIDATED RUBBER TIRE CO. et al. v. DIAMOND RUBBER CO. OF NEW YORK.

(Circuit Court of Appeals, Second Circuit. March, 17, 1916.)

No. 175.

1. PATENTS ⊜319(1)—SUIT FOR INFRINGEMENT—DAMAGES.
   Where a defendant has deliberately and persistently infringed a patent, even after its validity was established, any doubts as to the amount of damages for which it is liable will be resolved against it.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 578; Dec. Dig. ⊜319(1).]

2. PATENTS ⊜319(1)—INFRINGEMENT—DAMAGES.
   In finding an established license fee under a patent as a basis for computing damages for infringement, the law does not require that all license fees should have been for exactly the same amount at all times.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 581; Dec. Dig. ⊜319(1).]

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

Action by the Consolidated Rubber Tire Company and another against the Diamond Rubber Company of New York. Decree for plaintiffs (226 Fed. 455), and defendant appeals. Affirmed.

The decree of the District Court confirmed the report of the master finding that the infringement of the Grant patent, No. 554,675, beginning with the year 1905 and continuing until February 17, 1913, was "deliberate, continuous and wanton." The master also found that a minimum license fee of five cents per pound for rubber tire was established by the complainant and this license fee was adopted by the master as a fair measure of the damages sustained by the complainant on account of the infringement. At the rate of five cents per

pound upon 2,607,835 pounds of rubber tire used by the defendant, the amount due the complainant was found by the master to be $130,391.75.

The master also made an alternative finding to the third finding which is as follows: "Fourth. That the complainant be entitled to recover from the defendant as its damages on a reasonable basis amounting to five cents a pound on 2,607,835 pounds of rubber tire $130,391.75."

This report was reviewed by Judge Learned Hand upon exceptions filed by the defendant and a careful opinion considering all the questions now mooted was rendered with the result that he not only agreed with the master as to the amount awarded but added thereto $50,000, "to pay the costs of the litigation and give the plaintiffs smart money, in addition to the actual damages, as damages." He also added $26,869.89 as interest. 226 Fed. 455.

On this appeal taken by the defendant from the decree entered upon the master's report, to quote from defendant's brief: "The only questions in the case are as to what damages, if any, the plaintiffs are entitled to recover, and (if damages are to be recovered) from what date interest is to begin to run."

Charles Neave, of New York City, for appellant.

Charles W. Stapleton, of New York City (George W. Wickersham, of New York City, of counsel), for appellees.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge (after stating the facts as above). [1] Few patents have been subjected to such violent and persistent attacks as the Grant patent in suit. For 18 years it has been discussed by the Supreme Court, Circuit Courts of Appeal and many District Courts and the efficacy and value of the invention have been, of late years at least, almost universally recognized. Naturally the owners of the patent have been put to great expense and annoyance by this bitter and persistent attack upon their property. In such circumstances the courts should not be zealous to deprive the plaintiffs of the fruits of their victory. If doubts arise, they should be resolved against those who have deliberately infringed the patent, even after the Supreme Court had told them it was valid. Without going further into the merits, it suffices to say that their conduct has not been such as to commend them to the court. A large part of the difficulty in reaching the exact facts has been due to the defendant's conduct. We think the finding of the master that there was a minimum license fee of 5 cents a pound established during the infringement period is amply sustained by the proof. It certainly cannot be argued that such a sum was exorbitant and it seems to us entirely reasonable. If the defendant did not like the price it should not have infringed.

[2] The law does not require that all of the license fees should be for exactly the same amount at all times. Sulphite Co. v. De Grasse, 193 Fed. 653, 113 C. C. A. 521; Packet Co. v. Sickles, 86 U. S. (19 Wall.) 611, 22 L. Ed. 203. The principal questions in controversy have been so thoroughly covered by the master and the District Judge that we deem it unnecessary to add further to the report and the opinion. An established minimum license fee of 5 cents per pound has been proved and we see no reason why this license fee should not be regarded as a reasonable royalty also. In any view a correct result has been reached.

The decree is affirmed with costs.

DAVID E. KENNEDY, Inc., v. BEAVER TILE & SPECIALTY CO. et al.

(District Court, S. D. New York. February 7, 1916.)

1. PATENTS ⊂⊃7—SUBJECTS OF PATENTS—"PROCESS."
The method of making a floor by laying cork tiles under pressure is patentable as a process.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 6; Dec. Dig. ⊂⊃7.

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

2. PATENTS ⊂⊃21—"INVENTION"—PROCESS.
The application of an old process to a new material may involve "invention," but generally speaking it does not, and especially where the method operates in the same way and effects the same results.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 23; Dec. Dig. ⊂⊃21.

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

3. PATENTS ⊂⊃328—INVENTION—METHOD OF LAYING CORK TILES.
The Kennedy patent, No. 1,054,423, for a method of laying cork tiles in floors under pressure in all directions, *held* void for lack of invention, in view of the prior practice of laying wooden blocks in practically the same manner.

In Equity. Suit by David E. Kennedy, Incorporated, against the Beaver Tile & Specialty Company and Isaac R. Russell. On final hearing. Decree for defendants.

This is the usual bill in equity for infringement of a patent to David E. Kennedy, No. 1,054,423, for a method of laying cork tiles in floors. It is not necessary to go into the details of the patent, except to say that the method is to lay the floors in a plurality of hollow squares, so filling them in that the cork tile shall be laid under pressure in all directions. The corner tiles of the square are to be nailed down at such distances apart that in filling between them to make the outer lines of the square, the tiles must be put in under pressure. This is done by canting up the edges and forcing them down. Thereafter the square is filled up in the same way with rows of tiles, until the space comes down to four tiles, which must be laid in a kind of canted pyramid and all forced down together at the same time, thus putting the blocks under pressure in all directions. It is not necessary to consider the language of the claims, all of which are in suit, nor is it necessary to consider the question of infringement, which was not seriously disputed. The principal defenses are four: First, that the patent does involve invention, but is to be found in the prior art; second, that the claims are broader than the invention itself; third, that the invention was not originated by the patentee, but by one Brink; and, fourth, that the patent is not for a patentable art or process under the statutes.

Hillary C. Messimer, of New York City, for plaintiff.
Stephen J. Cox, of New York City, for defendants.

LEARNED HAND, District Judge (after stating the facts as above). The first question I shall take up is whether the claims of the patent are broader than the alleged invention, and therefore invalid. The objection is that the claims do not represent the real invention. The real invention is supposed to be for laying the floor in a plurality of

relatively independent squares or sections: Claims 1, 2, and 3 certainly include such element, and claims 6 and 7, in my judgment, contain the same, although not so certainly. Claims 4 and 5 need not be considered under these circumstances.

[1] The next objection I shall consider is that the patent is not for a patentable art or process, apparently upon the theory that an "art" must change the "substance" of the materials to something new. In Cochran v. Deener, 94 U. S. 780, 24 L. Ed. 139, the Supreme Court said that an art was an act or series of acts performed upon a subject-matter which was transformed or reduced to a different state or thing. The last expression of the court is Expanded Metal Co. v. Bradford, 214 U. S. 366, 29 Sup. Ct. 652, 53 L. Ed. 1034, in which the court disclaims any intention, as in Cochran v. Deener, of confining a process patent to a change in chemical substance. Even if an "art" requires that the old elements be transformed into some new thing, a new thing may be created merely from mechanical readjustments or the new juxtaposition of parts. In this case a floor results from the laying of tiles under pressure, and such a floor is a different thing from cork tiles and brads and underflooring. The method of creating such a floor from such elements is surely a patentable process.

The next question is of invention. Wood carpet has been laid for many years, and a common mode of laying was to lay out a hollow square, and put in each side of the square under pressure. The tiles are laid with the grain alternately parallel with, and normal to, the side in question, and the space between the end tiles, which are firmly nailed down, is a little too short for the tiles to be put in them. A tile whose grain is normal to the side of the square is then put in buckled up. When this tile is forced down, the whole row from end to end is put under pressure. After the four sides of the square are thus made, the panel so made is filled in by rows of similar character; each row being locked in the direction of its length by pressing down a buckled tile.

The tile I have mentioned were all split into strips and the strips pasted upon canvas, so that they had a relative motion upon the axis of the grain. Some 20 years ago it was, however, common to lay solid wood tiles made in various ways. Some of these were just like the present wood carpet tiles, but were glued firmly side by side, making a solid tile of necessary size. Some were made of small squares, with the end grain of the wood for the wearing surface, the squares held together by molten lead. Some were solid pieces of wood. Some were strips glued together in sections of three feet by one. All these solid tiles were laid in substantially the same method as the wood carpet tiles; that is to say, they were laid within hollow squares first made, and each row was locked by canting the last tiles and forcing them in, thus putting the whole row under pressure. Moreover, the rows were run along adjacent sides of the hollow square, so that the pressure was exerted in two directions. An exception to this is to be made in the case of those tiles made up of small squares, because these were tongued and grooved, but there is no doubt that these rows, also, were put in with pressure in one direction. They may have been put in parallel to each other. Similarly in the case of the oblong sections, they may have been staggered, as suggested, and run in parallel rows,

each under pressure only in one direction, but they were tilted up and pressed down to secure pressure.

If a hollow square be filled in by locking alternated rows set normal to each other, in the end one will come to four tiles at one corner, just as indicated in the patent. This needs no invention; it is the necessary result of the process. These last four tiles, if they are to be put in at all, must be canted into the form of a pyramid and pressed down. Similarly in the case of wood carpet tiles. It is possible either in the case of wood carpet tiles or of solid tiles to lay the whole floor without locking it, leaving a buckled tile, or two canted tiles, in each row, and pressing them down after they are all in place; but there is this difficulty in such a method—i. e., that the last two buckled tiles, or the last two canted tiles, to be pressed in, will already be under pressure normal to the pressure they are themselves to exert, and that this will have a tendency to shear their edges as they are pressed down. There is not the least reason to doubt, therefore, that when solid tiles were laid under pressure the last four blocks were put in as indicated in the patent. The witnesses Taylor, Boynton, and McBride say so, and they are each disinterested. If each row was locked as laid, the result must have been so; if the rows were not, the shearing would have resulted, and it would have been very hard to get in the last two buckled tiles, or last four canted tiles.

The plaintiff says that the method is impracticable when applied to solid blocks. I am not disposed to differ with him, if he means only that you cannot compress wooden blocks—of course not along the grain, and substantially not across the grain. No pressures are available which would effect that result, nor was that the purpose. What the floor layers needed was to press together the cracks between the tiles, if solid, and between the strips, if laid as wood carpet. Pressure was necessary for that, and the method gave it. I can see no reason to question that it was produced in precisely the same way that pressure is produced by the patent in suit. The fact that the patent contemplates compression of the cork tiles only means that the degree of pressure is different from that used in wood carpets, or solid wooden tiles.

[2] Therefore the sole claim to invention of the process lies in the application to a new material, cork, of a process formerly used upon a similar material, wood. The substitution of a new material in a mechanical combination may, of course, sometimes require invention. Frost v. Cohn, 119 Fed. 505, 56 C. C. A. 185; Frost v. Samstag, 180 Fed. 739, 105 C. C. A. 37. But generally the rule is otherwise. Especially ought this to apply to a process patent, where the same process is used upon another material. I do not mean to say that it may not require invention to see the applicability of an old process to a new material. It may take the highest; but I do think that, generally speaking, it will not do so, especially where the method operates in the same way and effects the same results. In the case at bar, the results of the process are precisely the same, whichever material you use, except, of course, that you finish with the same material with which you started.

In Brown v. District of Columbia, 130 U. S. 87, 9 Sup. Ct. 437, 32 L. Ed. 863, Cowing, the patentee, had got a patent for a method of making street pavements, which was to lay wooden blocks made in the form of frusta of square pyramids and to fill in the square so left open with earth and gravel. In the prior art Chambers had a patent for the same thing in stones, the filling to be anything insoluble in water; Lindsay had a patent of the same sort, the interstices to be filled with small stones and grout; and Nicholson had a patent for blocks of wood spaced by pieces of wood to be filled with concrete. The Supreme Court held that, as the change between Cowing and Chambers or Lindsay was merely a change in material, without any new mode of construction or new result, the patent was void. Upon the proof of the wood flooring art and this case I should have no hesitation in declaring the patent void, were it not for the somewhat surprising history of the cork floor art itself.

[3] Cork floors were laid as early as 1896, and between 1900 and 1910 the industry grew largely. Much of the laying was done by wood carpet and parquetry artisans, who carried over to it the knowledge they had brought with them. Yet there is no evidence that in those years cork floor layers ever adopted the wood carpet method, save Brink, of whom more later. Hasbrouck is himself a good example. He was a wood carpet man who began laying cork tiles in 1910. He cannot say how his wood carpet layers put down his tiles; but, though he is defending this suit, he brings none of them forward to show that the transition between one and the other method was instinctive. On the other hand, the plaintiff proves with fair certainty that Hasbrouck was using the old method of "blocking up" until about 1914, when he got Wills, who had learned the hollow square method from Kennedy, after which Hasbrouck adopted it universally. Kennedy's own men were wood carpet layers for some time after he began; but he never saw any one lay a cork floor, except in the old way. Yet when the new method was once adopted it immediately displaced the old "blocking up" method absolutely, and was found to save a great proportion of the cost of laying the floors, as well as to make a tighter and better floor. This history of the introduction of the patented method into the cork industry is at first sight undoubtedly of force; it seems to present an instance where the skilled artisan, who knew the old wood carpet method, when faced with the new need, continued his routine without making the apparently obvious adaptation of the old process to the new need. However, when the law takes for the standard of invention the imagination of the skilled artisan, I suppose that it does not mean an artisan working at daily wages, who has no interest in labor-saving methods, but rather the contrary; what the law contemplates is the invention of a skilled artisan, working under the stimulus of some gain which will come to him from the exercise of his imagination.

There is no reason to suppose that the men employed by Kennedy or Hasbrouck had any concern in changing the methods as they found them when they got there. With the masters it was different, but there is no proof that any of the masters engaged in floor laying were fa-

miliar with the wood carpet flooring, except Hasbrouck himself. Brink, it is true, did work on contract; but Brink had been laying cork floors for only 18 months prior to the floor of the Pennsylvania ticket office, and it does not appear that he ever knew the customary methods of laying wood floors. The industry was always in few hands, not more than six in all, and those continually diminished in numbers as Kennedy came into more exclusive control. The amount of business ever done by any one but Kennedy and the length of time that the others lasted does not appear. It would be gratuitous to assume that all of these competitors were for a substantial length of time working to secure an economy which Kennedy finally discovered. With Hasbrouck, and with him alone, the case is different, because, though he had been for over 30 years in the hardwood floor business, he laid cork floors for 4 years without adopting the method of wood carpets. Still I do not think we can base invention wholly upon the fact that Hasbrouck failed to make this discovery independently. He swore that he did not know how his men laid their floors, but left it to them. Whether he ever exercised his faculties of invention upon the subject-matter is unproved, and, if he did, at most he would only be one, and one case alone forms no just test for invention.

When, on the other hand, we turn from the wood carpet method to the solid block method, the case is stronger against invention, for that went out of practice some 20 years ago, before the cork tiling came into any substantial use, and there is no evidence that of all those who ever turned their hands to cork tiles any one except Hasbrouck ever had knowledge at all of the method of laying solid block floors. Indeed, it does not appear that Hasbrouck himself had any such knowledge; such a conclusion rests in inference alone. Hence, if we are to conclude that some invention was necessary to adapt the wood carpet method to cork floors, since it was never done before Kennedy, at least we have no evidence to show that the mere change of material involved in using the solid block method for cork floors, was beyond the competence of any mind which, knowing that method, was faced with the necessity of laying cork floors.

The examiner who allowed the application had not before him the art as it is in this case. Even on the crude analogy of the method of laying matched flooring, he was for long disposed to deny the application; and if that analogy caused him so much difficulty, we have no reason to suppose that he would ever have allowed the application, had he known methods of laying wood carpets or solid block floors. There is no presumption of validity over those prior uses which were not before the Patent Office.

Although a supposed invention rests only in a change of material, we may well be justified in some misgiving of our right to assume that the change was obvious, when we find that it has not been used before and that it at once supplants other methods. Yet in applying such a test we are liable to be misled without scrutiny; we are justified in demanding some explanation of why so simple a substitution should have for so long escaped discovery. In a narrow industry, resting always in few hands and those decreasing in number, the in-

ference of invention may be slight from such success; where those concerned in the art are not shown to have known the prior art, it is weaker still. Many other considerations than the absence of inventive genius may have delayed the discovery; many others than its value may promote its success. In the case at bar the cork tile industry may have been in its mere experimental stages until about the time when the process was applied. At least this plaintiff tried very hard to convince the court that all cork floors laid in cement were experimental up to within six months of the discovery of this process as he now claims it. Kennedy v. United Cork Companies, 225 Fed. 371, 140 C. C. A. 395. We know very little about the early years of the industry and still less about who were concerned in it. At present it appears largely in the plaintiff's own hands, who can hardly claim the gift of invention because of his own early inability to lay cork floors by the old wood carpet or solid block methods. The case is one in which I cannot believe that invention was necessary for a change in material.

The last question is of Brink's prior use in the barber shop of the Engineers' Club in May, 1909. This rests upon Brink's own testimony, in a measure contradicted by Kennedy, and possibly to some extent corroborated by Wills, the brad boy. As to Wills, I hardly think I need bear much upon his testimony. At the time he was only 15 years old, and some of the time he was out of the room. He is confessedly doubtful in his memory about what he did see, and I question whether he would have understood it at the time. Turning to Brink, it is not necessary to hold that he did not cant up some of the tiles, or that he did not lay out the dark border first, within which he put the central panel. By his own account, his purpose is now somewhat uncertain. Part of his testimony reads as though he practiced the process only by the accident of having tiles which ran a little larger than he supposed; part reads as though he were consciously putting in the tiles under pressure. The result must be a little doubtful; I think that he probably intended to get his tiles set under some pressure, but that he did not deliberately make his square scant for that end. He says that he got the whole of the central panel, at which he was at work when Kennedy interrupted him, under pressure in both directions. This is hardly possible, because now it is under pressure only in one direction, showing openings in the other. It is very difficult to see how he could have practiced the hollow square method in the central panel and failed to get either no cracks or cracks in both directions.

Moreover, I think it strange that he should not have put in practice his discovery in the numerous jobs which he did on his own account during the following year. His own explanation is that Kennedy had told him not to put in the tiles too tightly; but he does not pretend that Kennedy complained of the method in any other respect. Indeed, he went on and finished the job just as he began, except for easing up the pressure as Kennedy had wished. Why should he have lost the advantages of his discovery upon his subsequent jobs that year? There was no trouble in getting just as much or as little pressure as one wished by the method; it would save a good deal of time and give one straighter lines, just the same, whatever the pressure. Why not

explain to Kennedy the advantages, and show him how it was possible to get any required pressure? Even assuming Kennedy told him what Kennedy denies he said, I cannot quite accept the explanation, if he had fully comprehended the invention. If the case turned alone upon the proof of this prior use, I should not think that it was made out with sufficient clearness to be a defense.

The bill is dismissed, with costs, for lack of invention.

In re FOOK WOH & CO. et al.

(District Court, N. D. California, First Division. October 6, 1915.)

No. 9490.

BANKRUPTCY ⊂⊃48, 49—ADJUDICATION—OBJECTIONS.

Where the manager, who was one of the members, of a firm, filed a petition seeking the adjudication of the firm and himself as bankrupts, others named as members of the firm, who denied their membership, cannot complain of the adjudication, and motions by one for dismissal and by another for a jury trial on the issue of membership were properly denied.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 47; Dec. Dig. ⊂⊃48, 49.]

In Bankruptcy. In the matter of the bankruptcy of Fook Woh & Co., a partnership, and Jair Foo. Lew Yee Hoy moved for a jury trial on the issue as to whether he was a member of the firm, and the "Nanking" Fook Woh Company prayed a dismissal as to it. Motions to have the issue tried by a jury, and for a dismissal, denied.

Frederick E. Whitney, of Oakland, Cal., for petitioner.

C. A. S. Frost, of San Francisco, Cal., for respondent.

DOOLING District Judge. Jair Foo, as manager, and as one of the partners, of Fook Woh & Co., a partnership, filed a voluntary petition, asking that such partnership, and he himself, as an individual, be adjudged bankrupts. The petition avers that the partnership consists of 14 individuals, whose names are set forth therein, and "Nanking" Fook Woh Company, a corporation.

Lew Yee Hoy, one of the individuals named as a partner, has filed an answer, in which, while not denying any of the other facts alleged in the petition, he denies simply that he is a partner. Upon this issue he has asked for a jury trial.

"Nanking" Fook Woh Company, the corporation, has also filed an answer, which denies no allegation of the petition, other than the one which avers that such corporation is a member of the partnership. Upon this answer it asks that the petition be dismissed as to it.

Neither answer denies the existence of the firm of Fook Woh & Co. nor its insolvency. No adjudication is asked of any of the individual members of the firm, except the petitioner, Jair Foo; the prayer being only that he himself, and the firm, be adjudged bankrupts. Whether an adjudication of a partnership may be had without also adjudging

the individuals bankrupt is a question upon which the courts are somewhat divided. But as no adjudication of the individuals is asked in this petition, this question need not now be decided. Nor is it necessary at this time to determine whether Lew Yee Hoy or "Nanking" Fook Woh Company are members of the partnership, and it may never be necessary to do so.

The motion to have the issue as to Lew Yee Hoy tried by a jury is denied. The motion to dismiss as to "Nanking" Fook Woh Company will also be denied, with leave to renew the same in the event that any relief is sought against it. Both having denied membership in the firm, they cannot be aggrieved by an adjudication that the firm is insolvent. The cause will proceed regularly to adjudication of the firm, when proof of service upon all the alleged members shall have been made.

In re ISERT.

(District Court, N. D. California, First Division. October 13, 1915.)

No. 9344.

BANKRUPTCY ⊂⊃228—ORDERS OF REFEREE—PETITION TO REVIEW—TIME FOR FILING.

Where a rule of the District Court provided that a petition for review by the judge of an order by the referee as provided in General Order No. 27 of the General Orders in Bankruptcy (89 Fed. xi, 32 C. C. A. xxvii) must be filed with the referee within 10 days from the date of notice, unless for good cause shown such time be extended, a petition for review, not filed within 10 days, must be dismissed, where the time of filing was not extended.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 659; Dec. Dig. ⊂⊃228.]

In Bankruptcy. In the matter of the bankruptcy of Julius E. Isert. Petition by Minnie E. Isert for review of an order of the referee directing the selling of certain barley as the property of the bankrupt's estate. Petition dismissed.

A. H. Carpenter, of Stockton, Cal., for bankrupt.

L. J. Smallpage, of Stockton, Cal., for trustee.

DOOLING, District Judge. Petition for review of an order of the referee directing the sale of certain barley as the property of bankrupt's estate. The order of sale was made on August 24, 1915, and on August 25, 1915, notice of the decision of the referee in making such order, together with a copy of the order, was served upon the attorney for Minnie E. Isert who now seeks to have the order reviewed. The petition for review was not filed until September 7, 1915. Rule 10 of this court provides:

"A petition for a review by the judge of an order made by the referee as provided in General order No. 27 of the General Orders in Bankruptcy [89 Fed. xi, 32 C. C. A. xxvii] must be filed with the referee within ten days from the date of notice of such order, unless for good cause shown, such time is extended."

The petition for review was not filed within 10 days as required by this rule, and the time for such filing was not extended. The petition for review must therefore be dismissed, and it is so ordered.

KING TONOPAH MINING CO. v. LYNCH et al.

(District Court, D. Nevada. March 21, 1916.)

No. A–10.

1. CORPORATIONS ⟸636—FOREIGN CORPORATIONS—POWER TO EXCLUDE.
   The Legislature of a state has a right to exclude foreign corporations, provided the corporation is so organized that it has no authority to do anything but a purely intrastate business.
   [Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2505–2509, 2571; Dec. Dig. ⟸636.]

2. CORPORATIONS ⟸651—FOREIGN CORPORATIONS—POWER TO REGULATE.
   A state Legislature may prescribe the conditions on which a corporation may remain in and do business within the state, and for a violation of such conditions the privilege of doing business in the state may be revoked; but the corporation cannot, as punishment, be deprived of or compelled to waive a right guaranteed by the federal Constitution.
   [Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2574, 2575; Dec. Dig. ⟸651.]

3. CORPORATIONS ⟸668(15)—EVIDENCE ⟸65—FOREIGN CORPORATIONS—SERVICE OF PROCESS—CONSENT OF CORPORATION.
   A constructive agreement by a corporation doing business in a state to submit to a void or illegal statute prescribing a mode of serving process, which denies due process of law, cannot be founded on anything less than actual knowledge of the statute, as the presumption that every man knows the law does not hold him to a knowledge of statutes which for any reason are illegal or void.
   [Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2626; Dec. Dig. ⟸668(15); Evidence, Cent. Dig. § 85; Dec. Dig. ⟸65.]

4. CONSTITUTIONAL LAW ⟸309(2)—DUE PROCESS OF LAW—STATUTORY PROVISIONS.
   A method of service of process, though prescribed by state statute, is not sufficient, if it does not amount to due process of law.
   [Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 929, 930; Dec. Dig. ⟸309(2).]

5. CONSTITUTIONAL LAW ⟸251—DUE PROCESS OF LAW—STATUTORY PROVISIONS.
   A state may not, by prescribing what shall constitute due process of law, subtract anything from the right recognized and established as due process in the federal Constitution.
   [Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 726, 727, 732; Dec. Dig. ⟸251.]

6. CORPORATIONS ⟸675—FOREIGN CORPORATION—CONSTRUCTIVE SERVICE—JUDGMENT.
   Where, in an action against a nonresident foreign corporation, a writ of attachment was issued and levied when the action was commenced, the property so sequestered limited the extent to which a judgment obtained by constructive service could be enforced.
   [Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2653; Dec. Dig. ⟸675.]

7. CORPORATIONS ⊜670(4)—FOREIGN CORPORATIONS—CONSTRUCTIVE SERVICE —ATTACHMENT.

Where the property attached in an action against a nonresident foreign corporation was a patented mining claim, which was not being worked and had not been worked or occupied for years, and on which annual labor was neither performed nor required, and the only visible evidence of the seizure was notice to that effect posted on the claim, such seizure did not obviate the necessity of notice to the owner, and a valid judgment, which might be enforced against the mining claims, could not be obtained unless the company was served as prescribed by law and the service must have amounted to due process.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2631, 2632; Dec. Dig. ⊜670(4).]

8. JUDGMENT ⊜17(1)—PROCESS—NECESSITY OF PERSONAL SERVICE.

As a general rule a valid judgment in personam cannot be rendered against a defendant, except after his voluntary appearance or the personal service of process within the territorial jurisdiction of the court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 25; Dec. Dig. ⊜17(1).]

9. PROCESS ⊜85—CONSTRUCTIVE SERVICE—VALIDITY OF SERVICE.

While a state has no power over a nonresident and absent owner, it has complete jurisdiction over his property within its borders, subject to the constitutional restriction that property cannot be taken from its owner except after due process of law, and hence may provide for constructive service by means of which judgment may be obtained and satisfied out of the property in the state belonging to an absent defendant.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 99; Dec. Dig. ⊜85.]

10. CONSTITUTIONAL LAW ⊜309(3)—DUE PROCESS—SERVICE OF PROCESS—FOREIGN CORPORATIONS.

Rev. Laws Nev. § 5024, requires foreign corporations owning property or doing business in the state to appoint and keep in the state an agent upon whom process may be served. Section 5025 provides that if any such company shall fail to appoint such agent, on the production of a certificate of the secretary of state showing the fact, which certificate shall be conclusive evidence of the fact, it shall be lawful to serve such company with any legal process by delivering a copy to the secretary of state, or, in his absence, to a deputy secretary of state. *Held*, that service thereunder on the secretary of state did not amount to due process of law, where neither plaintiff nor the secretary of state made any effort or attempt to notify the company, and it acquired no knowledge of the suit prior to judgment, or within the six months thereafter, within which it might have answered to the merits, though plaintiff knew the defendant was a Utah corporation, had brought a prior action against it, and two days before instituting the action in question made an affidavit in which he swore that he was familiar with its business and affairs.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 929, 930; Dec. Dig. ⊜309(3).]

11. CONSTITUTIONAL LAW ⊜251—"DUE PROCESS OF LAW"—ELEMENTS.

The fundamental requisites of "due process of law" are notice and an opportunity to be heard.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 726, 727, 732; Dec. Dig. ⊜251.

For other definitions, see Words and Phrases, First and Second Series, Due Process of Law.]

12. CORPORATIONS ⟸507(1)—FOREIGN CORPORATIONS—SERVICE OF PROCESS—DUE PROCESS OF LAW.

The method of service of process on corporations, prescribed by statute, must be one that with reasonable certainty will result in actual notice to the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1971, 1972, 1974, 1976–1978, 1995; Dec. Dig. ⟸507(1).]

13. PROCESS ⟸80—SERVICE ON AGENT OF DEFENDANT.

Service of process on an agent otherwise competent, whose relations to plaintiff or to the claim are such as to make it to his interest to suppress the fact of service, is insufficient.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 92; Dec. Dig. ⟸80.]

In Equity. Suit by the King Tonopah Mining Company against T. J. Lynch and others for relief against a default judgment, under which property was sold at sheriff's sale. Case reopened.

Sweeney & Morehouse, of Reno, Nev., for plaintiff.

H. R. Cooke, of Tonopah, Nev., for defendants.

FARRINGTON, District Judge. May 8, 1912, in the district court for Nye county, T. J. Lynch commenced an action against the King Tonopah Mining Company, a Utah corporation, to recover the sum of $7,521.22, with interest at the rate of 7 per cent. per annum from May 1, 1907, alleged to be due on a stated account. The summons was issued by H. R. Cooke, attorney for Lynch, and served by the sheriff of Ormsby county. The return of the officer, in so far as it is material, is as follows:

"Ed. Regan, sheriff of Ormsby county, being first duly sworn, says: On May 9, 1912, affiant received the hereunto annexed summons, and on the 11th day of May, 1912, affiant instructed the secretary of state to make search of his records and to officially certify whether or not the King Tonopah Mining Company * * * had filed or caused to be filed in the office of the secretary of state of Nevada a designation of agent upon whom process against said company might be served; that said secretary of state, after making such search, was unable to find such designation, and thereupon officially certified that said corporation had no process agent designated for the state of Nevada; * * * that thereupon affiant personally delivered to the secretary of state of Nevada a full, true, and correct copy of the annexed summons, and that a certified copy of the complaint in said action was attached to said copy of summons and served at the same time and place."

The certificate referred to did not show that the mining company had failed to appoint an agent; it merely declared:

"There is no record in this office of the King Tonopah Mining Company ever having filed copy of their articles of incorporation in this office, either as a domestic or foreign corporation, and that they have not filed list of officers or the appointment of a resident agent upon whom process can be served."

George W. Cowing, deputy secretary of state, testified that he merely received the papers and filed them, without giving notice to any one. The service was made in pursuance of sections 5024 and 5025 of the Revised Laws of Nevada, which are as follows:

"5024. Every incorporated company or association created and existing under the laws of any other state, or territory, or foreign government, or the

government of the United States, *owning property or doing business in this state*, shall appoint and keep in this state an agent, upon whom all legal process may be served for such corporation or association. Such corporation shall file a certificate properly authenticated by the proper officers of such company, with the secretary of state, specifying the full name and residence of such agent, which certificate shall be renewed by such company as often as a change may be made in such appointment, or vacancy shall occur in such agency.

"5025. If any such company shall fail to appoint such agent, or fail to file such certificate for fifteen days after a vacancy occurs in such agency, on the production of a certificate of the secretary of state showing either fact, which certificate shall be conclusive evidence of the fact so certified to and be made a part of the return of service, it shall be lawful to serve such company with any and all legal process, by delivering a copy to the secretary of state, or, in his absence, to any duly appointed and acting deputy secretary of state, and such service shall be valid to all intents and purposes: Provided, that in all cases of such service the defendant shall have forty days (exclusive of the day of service) within which to answer or plead. This section shall be construed as giving an additional mode and manner of serving process and as not affecting the validity of any other valid service."

It appears from the complaint and oral testimony that the King Tonopah Mining Company since 1907 had been doing no business in the state of Nevada, except such as was involved in owning, either equitably or legally, in Tonopah mining district, five patented mining claims, and in paying the taxes thereon, and that at the time of the service it had no managing or business agent, cashier, secretary, agent, or officers in the state, except the secretary of state and his deputy, whose agency and authority, if any they had, was derived solely from the statute. Default of the company was entered in the state court, followed by a judgment in favor of plaintiff.

The five mining claims mentioned above had been attached on May 9, 1912. No question is raised as to the technical regularity of the attachment, or of the subsequent sheriff's sale on July 22, 1912. Six months later the sheriff executed a deed for all the claims to H. R. Cooke, C. H. McIntosh, and the Tonopah Banking Corporation. The testimony shows, and I so find, that the King Tonopah Mining Company had no knowledge of the action, or of the subsequent sale, until after January 30, 1913.

May 7, 1913, the King Tonopah Mining Company filed with the secretary of state of Nevada a certified copy of its articles of incorporation, and a certificate in which it named its officers, and designated an agent upon whom service of process could be had in Nevada. On the same day the present action was commenced in this court. It does not appear that the company had prior to 1913 filed any papers in the office of the secretary of state. It was organized November 20, 1902, and acquired the property sold under the above-mentioned execution, in December, 1911, by deed from the O'Meara-Lynch Company, also a Utah corporation.

Some time prior to May, 1912, an action was brought on the same cause by T. J. Lynch against the King Tonopah Mining Company and the O'Meara-Lynch Company. That action, having been removed from the district court of Nye county to this court, was dismissed May 6, 1912. Two days later the action was recommenced in the dis-

trict court of Nye county; the King Tonopah Mining Company being the only defendant. This was all done with no publicity other than that contained in the court records and in the office of the secretary of state. By reason of this complainant alleges that it was lulled into repose, and deceived and misled; that it never knew of said suit until after the time to move to set aside the default judgment and sale had expired. The prayer of the complaint is that it be adjudged that the district court of Nye county had no jurisdiction over the King Tonopah Mining Company in the case filed against it May 8, 1912; that no legal service of summons was ever had; that said company be adjudged to be the owner and entitled to the possession of said mining claims, and that said defendants be enjoined from asserting any title thereto.

The King Tonopah Mining Company contends that it had a good defense on the merits to the action brought in the state court; that the service of summons and complaint was insufficient, and consequently it has been deprived of its property without due process of law. Lynch insists that the service was valid, and that the King Tonopah Mining Company, by entering into the state of Nevada, doing business, and acquiring property therein, accepted the statutory conditions in regard to service of process, and is now estopped from questioning the validity of the statute or the sufficiency of the service. The position is thus stated in defendants' brief:

"Even though state statute relative to conditions imposed upon foreign corporations were unconstitutional, yet it was a matter that could be waived by the corporation, and the corporation did waive it when it entered the state, and would thereafter be estopped from questioning the constitutionality of the statute."

At the outset it is proper to say that I am not called upon to determine whether the service of process in the present case would have been sufficient if the secretary of state had notified the King Tonopah Mining Company, or if in any other manner the company had acquired knowledge of the action, either prior to judgment or thereafter within the six months allowed to answer to the merits, as provided in section 5084 of the Revised Laws of Nevada. The company had no knowledge or notice of the action prior to the time when all relief in the original case by motion, new trial, or other proceeding was barred.

It will also be noted that a delivery of a copy of legal process to the secretary of state is the extent of the statutory requirement for valid service of a foreign corporation, when made on that official. Notice of such service by the secretary of state to the foreign corporation is neither required nor prohibited.

[1, 2] The right of the Legislature to exclude a foreign corporation cannot be questioned, provided the corporation is so organized that it has no authority to do anything but a purely intrastate business. The Legislature may also prescribe the conditions on which a corporation may remain in and do business within the state, and for a violation of such conditions the privilege of doing business in the state may be revoked. Clearly, however, the corporation cannot, as punishment, be deprived of, or compelled to waive, a right guaranteed by the federal

Constitution. To hold otherwise is to hold that the Constitution of the United States may be nullified or abridged by state action.

This principle is illustrated in those cases where it has been held that contemptuous conduct or disobedience on the part of a defendant cannot be punished by striking his answer from the files. If punished, it must be in some other mode than by taking away his constitutional right to be heard before being deprived of his property. Hovey v. Elliott, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. Ed. 215; Foley v. Foley, 120 Cal. 33, 52 Pac. 122, 65 Am. St. Rep. 147; Harley v. Montana, etc., Co., 27 Mont. 388, 71 Pac. 407; Summerville v. Kelliher, 144 Cal. 155, 77 Pac. 889, 891. In the last case a California statute authorizing the court to strike the answer of a party for refusal to attend when required, and give his deposition, was pronounced unconstitutional.

The power of the state to revoke the license of a foreign insurance company, which had violated a statute prohibiting removal of causes to a federal court, was upheld in Doyle v. Continental Insurance Co., 94 U. S. 535, 24 L. Ed. 148; and also in Security Mutual Life Insurance Co. v. Prewitt, 202 U. S. 246, 26 Sup. Ct. 619, 50 L. Ed. 1013, 6 Ann. Cas. 317. But these decisions rest, not on any alleged illegality of the attempt to remove, but on the authority of the state to regulate its purely domestic affairs without direct interference from the general government. Hence the state had power to recall the license, even though its motives for so doing were unlawful. Recently, however, the Supreme Court has held that, where a foreign corporation is doing both interstate and intrastate business, a state may not revoke a license to do intrastate business, because the corporation removes, or attempts to remove, a case from the state to the federal courts. Harrison v. St. Louis & S. F. R. Co., 232 U. S. 318, 34 Sup. Ct. 333, 58 L. Ed. 621, L. R. A. 1915F, 1187.

State statutes which forbid exercise of the right of removal by a foreign corporation, or which, as a condition precedent to transacting business in the state, require such a corporation to agree in advance that it will not remove any case to the federal court, are repugnant to the Constitution of the United States, and void, and the agreement made in conformity to such a statute is contrary to public policy; it derives no support from the statute, and is void also. Southern Pacific Co. v. Denton, 146 U. S. 202, 207, 13 Sup. Ct. 44, 36 L. Ed. 942; Home Ins. Co. v. Morse, 20 Wall. 445, 22 L. Ed. 365; Herndon v. Chicago, etc., R. Co., 218 U. S. 135, 30 Sup. Ct. 633, 54 L. Ed. 970. In the Morse Case, supra, a New York insurance company had been sued in the state court of Wisconsin; the court, believing that such a statute and agreement against removal of causes justified the dismissal of the company's petition to remove, proceeded to trial, and rendered a judgment for plaintiff. The judgment was affirmed by the Supreme Court of Wisconsin. It was held that by doing business in the state the company had accepted the statute and waived its right of removal; but on writ of error the Supreme Court of the United States pronounced all proceedings had in the state courts subsequent to petition for removal illegal, reversed the judgment, and ordered that the prayer of the petition be granted. The right to exclude the corpora-

tion was recognized, but no right to prevent the removal of a cause was conceded.

In that case Wisconsin said to the Home Insurance Company: Give up all right of removal, or you cannot do business within this state. In the present case the state of Nevada said to the King Tonopah Mining Company: Appoint a state agent, or submit to service of process on the secretary of state, with no duty on his part to give you notice when action is brought against you in our courts. The alternative in the first case may be legally enforced, because the state may exclude a foreign corporation, with or without reason; but in the second case the alternative must be enforced, if at all, in the face of the constitutional provision prohibiting the state from depriving any person of property without due process of law.

It is true, there are constitutional rights which may be waived; that is, one may voluntarily refrain from claiming or exercising them. But it does not follow from this that a state may by statute exact from a corporation a valid, express agreement to abandon any such right. Nor does the circumstance that such a corporation acquires or holds property in the state, or does business therein at a time when the statutes of the state prohibit the exercise of a constitutional right, warrant the presumption that the corporation has agreed to waive that right. Pope Mfg. Co. v. Gormully, 144 U. S. 224, 234, 12 Sup. Ct. 632, 36 L. Ed. 414; Blake v. McClung, 172 U. S. 239, 255, 19 Sup. Ct. 165, 43 L. Ed. 432. In Insurance Co. v. Morse, 20 Wall. 445, 451, 22 L. Ed. 365, Justice Hunt says:

"Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights. In a criminal case, he cannot, as was held in Cancemi's Case [18 N. Y. 128], be tried in any other manner than by a jury of 12 men, although he consent in open court to be tried by a jury of 11 men. In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So he may omit to exercise his right to remove his suit to a federal tribunal, as often as he thinks fit, in each recurring case. In these aspects any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions whenever the case may be presented."

[3] Under the Constitution, the company in this case is entitled to due process; and if the service in question, in and of itself, does not constitute such process, then its binding force, if any it has, rests on an assumed consent of the company, or on the power of the state to limit and abridge the constitutional guaranty of due process. Consent can be predicated only on the presumption that, when it entered the state, the company knew and accepted the laws of the state, and by failing to appoint a resident agent indicated its willingness to be served in the manner prescribed by statute. The presumption that every man knows the law does not hold him to a knowledge of statutes which for any reason are illegal or void; and a constructive agreement to submit to a void or an illegal statute certainly cannot be founded on anything less than actual knowledge of the statute itself. No such

knowledge is shown in the instant case. The same argument has been pressed, without avail, on the Supreme Court of the United States in support of the contention that a corporation, entering a state not of its origin, is presumed to know and consent to statutes prohibiting it from exercising the right of removal.

[4] To admit that a method of service, whether it amounts to due process of law or not, is sufficient because it is prescribed by state statute, is to admit that a state may impair rights guaranteed by the national Constitution. The prohibitions of the Constitution cannot thus be evaded. Fayerweather v. Ritch, 195 U. S. 276, 25 Sup. Ct. 58, 49 L. Ed. 193; 5 Ency. U. S. Sup. Ct. Rep. 627. In Chicago, B., etc., R. R. v. Chicago, 166 U. S. 226, 234, 17 Sup. Ct. 581, 584 [41 L. Ed. 979] it was said:

"A state may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts, and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law, regard must be had to substance, not to form. This court, referring to the Fourteenth Amendment, has said: 'Can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation.'"

[5] It is unnecessary to produce authorities to the effect that a foreign corporation, as a penalty for failing to file a list of its officers with the secretary of state, or to designate an agent upon whom service of process may be had, can be deprived of its property without due process of law. As well might it be said that a state may punish murder by depriving a murderer of the right of trial by jury. It necessarily follows from this that a state may not, by prescribing what shall constitute due process of law, subtract anything from the right which is recognized and established as due process in the federal Constitution. Grannis v. Ordean, 234 U. S. 385, 34 Sup. Ct. 779, 58 L. Ed. 1363.

[6] When the present action was commenced in the state court, a writ of attachment was issued and levied on five patented mining claims in Nye county. Thus aided, the action may be regarded as a proceeding quasi in rem. The property so sequestered limits the extent to which a judgment obtained by constructive service against a foreign corporation can be enforced. Jones on Jurisdiction, §§ 56, 57.

[7] It is a theory of the law, usually true in fact, that all property is in the possession of its owner, and that its seizure will operate to impart notice to him. But where the property seized is a patented mining claim, which is not being worked, and has not been worked or occupied for years, on which annual labor is neither performed nor required, whose owner is a nonresident, and where the only visible evidence of seizure is notice to that effect posted on the claim, the seizure is not likely to impart knowledge; and, as the likelihood of notice diminishes, the reason for the rule also diminishes. In any event, such a seizure does not obviate the necessity of notice to the owner. Notifi-

cation is still indispensable. Windsor v. McVeigh, 93 U. S. 274, 23 L. Ed. 914.

The attachment in no wise relaxes the rule that in order to obtain a valid judgment, which may be enforced against the mining claims, the company must have been served as prescribed by law, and the service must have amounted to due process. An argument to the contrary was advanced, but without avail, in Lonkey v. Keyes S. M. Co., 21 Nev. 312, 320, 31 Pac. 57, 17 L. R. A. 351.

[8, 9] Notice is jurisdictional, and it may be stated as a general rule that a valid judgment in personam cannot be rendered against a defendant, except after his voluntary appearance, or personal service of process made within the territorial jurisdiction of the court. If no valid or effective judgment could be rendered in any case, except after such appearance or *personal service,* enforcement of just rights in many cases would be difficult, if not impossible. Hence the statutes providing constructive service, by means of which judgment may be obtained in a state from which the defendant absents himself, and satisfied out of and to the extent of his property therein. While the state has no power over the nonresident and absent owner, it does have complete jurisdiction over his property within its borders, subject to the constitutional restriction that property cannot be taken from its owner, except after due process of law. Roller v. Holly, 176 U. S. 398, 20 Sup. Ct. 410, 44 L. Ed. 520.

[10] The method of service employed in this case presents a striking contrast to other modes of constructive service provided by the Nevada statutes. Service by publication can be had only by order of the court, after proof to its satisfaction that "the person who is to be served resides out of the state, or has departed from the state, or cannot after due diligence be found within the state, or conceals himself to avoid the service of summons, and that a good cause of action exists against him." The order must "direct the *publication to be made in a newspaper,* designated by the court or a judge thereof, as one most likely to give notice to the person to be served, for a period of six weeks, at least once a week during said time." In addition to this, when the residence of the absent defendant is known, *copy of the complaint and summons must be mailed to him at his place of residence.* After publication has been ordered, personal service of a copy of the summons and complaint is equivalent to a completed service by publication and deposit in the post office. Revised Laws of Nevada, §§ 5026, 5027.

Section 1273 provides that, if an attorney of any insurance company appointed to accept service in any of the courts of this state "shall remove from the state, or become disqualified in any manner from accepting service, * * * valid service may be made on such company by service upon the controller," who *"shall immediately notify such company and the principal agent for the Pacific Coast, inclosing a copy of the service by mail, postpaid."* Sections 5028, 5029, and 5030 disclose similar, if not greater, precaution in providing an effective service on unknown heirs and parties interested in the subject of a complaint.

Sections 5024 and 5025, which are here in question, provide that on the production of a certificate of the secretary of state, showing that a foreign corporation owning property or doing business in the state has failed to appoint an agent on whom legal service may be made, service of all legal process may be made by delivering a copy to the secretary of state, or, in his absence, to his deputy. The secretary of state is not required to give any notice to the defendant, and the courts have held that it is not his duty to do so.

The method of service by publication, and the method of service provided for foreign insurance companies in certain cases, and for absent and minor heirs, are admirably calculated to give notice to interested parties. They provide for publication, and for mailing of the process. The method employed in the present case, however, provides for neither; it does not even require the secretary of state to make any effort to notify the defendant. If mere delivery of a copy of the summons and complaint to the secretary of state is sufficient to constitute due process in one case, why is mailing of process and publication of summons necessary in other cases?

If the defendant consented to this method of service, we must assume it also consented to a service which was not reasonably calculated to afford any notice whatever. If such service is valid, and constitutes due process of law, why would not a similar service on the clerk of the court in which an action is commenced be equally valid, if authorized by statute? Or why might not the mere filing of the complaint with the clerk constitute legal and sufficient service and due process of law, if so declared by statute? The one service would be quite as efficacious, quite as likely to be made known to the defendant, as either of the others.

The office of the secretary of state is never a popular resort, and, even if it were, there is no provision for posting notice of service. The commencement of an action, in the absence of personal service, service by publication, or by mail, could not be regarded, in and of itself, as notice sufficient to satisfy the constitutional conception of due process, even though it might be so declared by statute. Such service on the secretary of state is attended by no more publicity than the lodging of a complaint with the clerk of the court, except that the serving officer and the secretary of state are made aware of the fact. It would be difficult to conceive a method of constructive service better calculated not to accomplish the object for which service of summons is designed.

The only reasonable conclusion to be drawn from a comparison of the statutes regulating constructive service in Nevada is that the statutory method provided in sections 5024 and 5025, so meager in possibility of notice to a defendant corporation, is imposed by way of punishment. But, as we have seen, neither violation of a statute, nor prior constructive consent thereto, will validate state action by which the constitutional guaranty of due process may be curtailed or impaired.

[11] We have no precise definition for due process of law. Its fundamental requisites, however, are notice and the opportunity to be

heard. Hovey v. Elliott, 167 U. S. 409, 418, 17 Sup. Ct. 841, 42 L. Ed. 215; Louisville & Nashville R. Co. v. Schmidt, 177 U. S. 230, 236, 20 Sup. Ct. 620, 44 L. Ed. 747; Simons v. Craft, 182 U. S. 427, 437, 21 Sup. Ct. 836, 45 L. Ed. 1165; Twining v. New Jersey, 211 U. S. 78, 110, 29 Sup. Ct. 14, 53 L. Ed. 97.

"By due process is meant one which, following the forms of law, is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained, and, wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought." Hagar v. Reclamation District, 111 U. S. 701, 708, 4 Sup. Ct. 663, 667 [28 L. Ed. 569].

[12] The method of service on corporations prescribed by statute must be one that with reasonable certainty will result in actual notice to the corporation. 3 Thompson on Corp. § 3050.

"It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant until he has been duly cited to appear and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered." Galpin v. Page, 18 Wall. 350, 368, 21 L. Ed. 959.

In St. Clair v. Cox, 106 U. S. 350, 356, 1 Sup. Ct. 354, 360 [27 L. Ed. 222], Mr. Justice Field says:

"If a state permits a foreign corporation to do business within her limits, and at the same time provides that in suits against it for business there done, process shall be served upon its agents, the provision is to be deemed a condition of the permission; and corporations that subsequently do business in the state are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of the process. Such condition must not, however, encroach upon that principle of natural justice which requires notice of a suit to a party before he can be bound by it."

In Lonkey v. Keyes S. M. Co., 21 Nev. 312, 321, 31 Pac. 57, 60 [17 L. R. A. 351], where it was held that service of process on a foreign corporation, made by delivering a copy to the deputy secretary of state, was bad because the statute at that time authorized service on the secretary of state only, it was said:

"Until a defendant in an action is served with process in one of the modes pointed out by the statute, and given a reasonable opportunity of being heard in defense of his rights, a court has no power to divest him of his property."

In Roller v. Holly, 176 U. S. 398, 409, 20 Sup. 410, 414 [44 L. Ed. 520], service of process was made on a defendant residing in Virginia, requiring him to appear within five days after service to answer in a foreclosure suit pending in Texas. This service was made strictly in accordance with the statutes of Texas. It was held that five days' notice under the circumstances was not reasonable notice, or due process of law. The court said:

"That a man is entitled to some notice before he can be deprived of his liberty or property is an axiom of the law to which no citation of authority would give additional weight. * * * It is manifest that the requirement of notice would be of no value whatever unless such notice were reasonable and adequate for the purpose."

The same principle is applied in those cases in which it is held that, where a service is permitted by statute on a *local agent* of a foreign corporation, it must be on an agent upon whom it may fairly be presumed the duty rests, by virtue of his official position or his employment, to communicate the fact of service to the governing power of the corporation. St. Clair v. Cox, 106 U. S. 350, 359, 1 Sup. Ct. 354, 27 L. Ed. 222; Central Georgia R. Co. v. Eichberg, 107 Md. 363, 68 Atl. 690, 694, 14 L. R. A. (N. S.) 389, 392; Strain v. Chicago Portrait Co. (C. C.) 126 Fed. 831, 834; 5 Thomp. on Corp. § 6759.

[13] Service of process on an agent otherwise competent, whose relations to the plaintiff, or to the claim, are such as to make it to his interest to suppress the fact of service, is insufficient. 32 Cyc. p. 554; Atwood v. Sault Ste. M., etc., Co., 148 Mich. 224, 111 N. W. 747, 118 Am. St. Rep. 576.

In Southern Ry. Co. v. Simon (C. C.) 184 Fed. 959, there was a bill in equity in the Circuit Court for the Eastern District of Louisiana to restrain execution of a judgment for personal injuries suffered in Alabama. The judgment had been obtained in a Louisiana state court against the defendant railroad company, alleged then to be doing business in that state. The Louisiana statute, like that of Nevada, required every foreign corporation doing business in that state to designate an agent upon whom service of process could be made, and provided, in the event of noncompliance, that service of process could be made on the secretary of state with the same effect as if the corporation had been personally served. Service was made on the assistant secretary of state, who merely filed the process, and made no effort to notify the company. The company, though doing business in the state, had no actual knowledge of the pendency of the action until after final judgment. The court held, in view of the failure of the statute to provide for actual notice to the corporation, either within or without the state, by mail or otherwise, that the judgment of the state court was rendered without due process of law, and was therefore void, and said:

"It is fundamental that the method of citation should be fairly calculated to bring home to the defendant actual notice of the pendency of the action and allow him a reasonable time to put in his defense."

In the course of this opinion the following comment on the same statute was quoted from Gouner v. Mississippi Valley Bridge & Iron Co., 123 La. 964, 49 South. 657.

"There is a feature in the law last cited that is peculiar, and adds something to its illegality when it is proposed to maintain a service, as in this case. As applying exclusively to foreign corporations absent from the state, within the extreme meaning of the word 'absentee' we will state: This law makes no provision whatever for the service on the defendant. The officer may decline to communicate with the person sued, and give no notice whatever, not even by mail. A judgment might be obtained without the least knowledge of the person sued. Under the phrasing of the statute, the duty of the officer begins and ends in his office. If such a judgment were rendered, it could receive no recognition whatever at the place of the domicile."

In Pinney v. Providence Loan, etc., Co., 106 Wis. 396, 82 N. W. 308, 50 L. R. A. 577, 80 Am. St. Rep. 41, the Supreme Court of Wis-

consin had under consideration a statute providing that, until a domestic private corporation files with the register of deeds of the county in which its principal place of business is located a list of its officers on whom service of process may be had, such service may be made by leaving a copy of the process with the register of deeds. This statute was held to be void, as contravening the constitutional provision that no person shall be deprived of his property without due process of law. The suit was to quiet title by the holder of a tax deed, and therefore in rem. The defendant, a domestic corporation, having failed to file a list of its officers, service was made on the register of deeds, who filed a copy of the summons and complaint, but paid no further attention to the matter. No attempt was made to notify the defendant. Seven months after judgment by default, the company appealed. The court held that the service was well calculated to conceal from the officers and agents of the corporation the fact that an action had been commenced, and said:

"While foreign corporations may be permitted to do business within the state upon certain conditions, or be excluded altogether, and while domestic corporations may be subject to reasonable regulations and control, yet neither can be deprived of its property without due process of law. Undoubtedly the Legislature may, as it has in certain cases, authorize constructive service of summons to be made upon corporations, as well as individuals, especially where the action concerns property located within the state; but the method adopted should be reasonably calculated to bring notice home to some of the officers or agents of the corporation, and thus secure an opportunity for being heard and making a defense before the determination. Such service was not secured 'by delivering to and leaving with the register of deeds * * * true copies' of the summons and complaint, as prescribed by the portion of the statute quoted."

The decision in Olender v. Crystalline Mining Co., 149 Cal. 482, 86 Pac. 1082, is much relied on by the defendant in this case. The statute of California is like our own in providing for service on the secretary of state, without further notice, when a foreign corporation owning property or doing business in the state fails to appoint an agent upon whom service may be made. On appeal from a default judgment, and from orders overruling motions to quash service of summons and set aside default, the court said the defendant could have had notice of the action by complying with the statute and appointing an agent, but by failing to do so it had indicated its willingness to have such notice given to the secretary of state, consequently the statute was not invalid as depriving the defendant of property without due process. It appeared, however, that the company in that case had notice of the action in season to make, and did make, motions to quash the service of summons and to set aside the default judgment. Attention was called to the defendant's failure to pursue in its motion the relief provided in section 473 of the Code of Civil Procedure. If the company had averred in the lower court that the default judgment was taken through inadvertence or surprise, and that it had a good defense, and desired to try the case on its merits, the trial court would very probably have set aside the default; but, said the court, "the defendant does not ask to defend, it merely asks that it be allowed to escape the necessity of making any defense."

As I have already said, actual personal notice is not possible in every case; hence constructive service, and the theory that men are expected to be informed as to what concerns their real estate. Under the most carefully drawn and comprehensive statutes providing for constructive service, it is conceivable that property may be lost by judicial proceedings of which parties adversely affected have no notice. But as Justice White says in American Land Co. v. Zeiss, 219 U. S. 67, 31 Sup. Ct. 207, 55 L. Ed. 82.

"The criterion is not the possibility of conceivable injury, but the just and reasonable character of the requirements, having reference to the subject with which the statute deals."

Under the circumstances, the method of service employed in this case was neither just nor reasonable. It was not calculated to bring notice home to the agents or officers of the mining company, or to afford them an opportunity to be heard, or to make a defense. The practical effect of the statute is the designation of a person to whom a copy of process may be given, and of whom the foreign corporation, if it be so moved, may make inquiry as to whether it has been sued. The burden of providing due process is thus, in part, at least, shifted from the plaintiff to the defendant. The statute provides a form of service by which it is quite possible for a plaintiff, who is familiar with the business and affairs of the defendant, and consequently knows where the defendant may be served personally or by mail, to obtain a judgment without defendant's knowledge. If the statute were not so designed, if it were not the purpose to substract something from the full measure of constitutional due process, why was not the secretary of state required to make some attempt to give notice, particularly when the plaintiff is fully informed as to defendant's residence and whereabouts?

The dismissal of the former case in this court, the commencement of the same suit two days later in the state court, without the knowledge of the King Tonopah Mining Company, the absence of any effort or attempt to notify the company, either by the secretary of state or by the plaintiff himself, the fact that it was a Utah corporation, and that the plaintiff, Lynch, in his affidavit, subscribed and sworn to the very day the first suit was dismissed, states that "since 1907, and at the present time, affiant has been, and now is, familiar with the business and affairs" of the King Tonopah Mining Company, all indicate a desire on the part of Lynch to give the transaction no more publicity than was absolutely and imperatively necessary.

Under all the conditions, I am constrained to hold that the service in question did not constitute due process of law. I shall therefore reopen the case, in order that evidence may be introduced on the issue raised by plaintiff's allegations that he had, and has, a good and sufficient defense on the merits to the action in the state court.

On the application of either party a day will be fixed when a hearing may be had.

UNITED STATES v. QUAKER OATS CO. et al.

(District Court, N. D. Illinois, E. D. April 21, 1916.)

1. MONOPOLIES ⟸24(2)—COMBINATIONS IN RESTRAINT OF TRADE—REMEDIES —EVIDENCE.

In a suit by the government for an injunction under Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (Comp. St. 1913, §§ 8820–8830), evidence *held* not to show that a monopoly in fact was created by the purchase, by one company engaged in the manufacture and sale of package rolled oats, of the business of a competitor.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. ⟸24(2).]

2. MONOPOLIES ⟸12(1)—COMBINATIONS IN RESTRAINT OF TRADE—ATTEMPT TO MONOPOLIZE—INTENT.

Though no intent is necessary to establish a monopoly in fact, created by the purchase of a competitor's business, there can be no finding of an attempt to monopolize without proof of intent.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. ⟸12(1).]

Alschuler, Circuit Judge, dissenting.

In Equity. Suit by the United States against the Quaker Oats Company and others for an injunction. On final hearing. Decree entered dismissing the bill for want of equity.

William C. Fitts, of Washington, D. C., and Morgan L. Davies, of Chicago, Ill., Sp. Asst. Attys. Gen., for the United States.

John P. Wilson, John M. Zane, and Frank F. Reed, all of Chicago, Ill., for defendant Quaker Oats Co.

Adams, Crews, Bobb & Wescott, of Chicago, Ill., for defendants Great Western Cereal Co. and Joy Morton.

Before BAKER, MACK, and ALSCHULER, Circuit Judges, sitting under expediting certificate.

BAKER, Circuit Judge. The clerk is directed by the court to enter a decree dismissing the bill for want of equity.

This case has been brought here under the expediting act. The members of the court have deemed it well to enter the decree at once, without undertaking to prepare—use the time and create the delay that would be occasioned by making—written findings of fact and conclusions of law.

The decree is entered upon the votes of Judge MACK and myself, in favor of that decree, and against the vote of Judge ALSCHULER, who thinks there should be a decree for the complainant—the petitioner.

I will state very briefly my view of the facts and law of the case. At the conclusion the situation remained as it appeared to me upon the government's own statement of what it claimed was the situation with respect to the evidence, and on the government's statement of its views of the law. So far as my own disposition of the case was concerned, I was ready to dismiss the bill upon the government's own showing, because, under section 1, there must be a con-

tract, combination, or conspiracy in existence, in present force at the time the bill is filed. "Contract, combination, or conspiracy"—the collocation of words, of course, is influential, under familiar canons of statutory interpretation, in clearing and restricting each of the words; in short, necessarily they are all of the same genus. Now, when the government admits, or is compelled to admit, that there was no cause of action against Morton or the Great Western when the bill was filed, there could be nothing except a decree of dismissal against all defendants, under section 1. If three men, for example, are indicted for conspiracy to ruin a bank, and the evidence shows that A. had the intent to ruin the bank and was performing acts to ruin the bank, and the evidence also shows that there was no conspiracy on the part of B. and C., then, of course, there would have to be a directed verdict in favor of all the defendants, because one man cannot be guilty of conspiracy. One man or one institution, however, may be guilty of creating a monopoly, or attempting to create a monopoly, and so, legally, the existence of any case here would be dependent upon a violation of section 2.

[1, 2] Without reviewing the evidence, to my mind it is clear that the finding of fact should be that there was no monopoly in fact. Of course, if there is a monopoly in fact (a monopoly by its terms, by the very inherent thought, to my mind indicates an exclusion of others), if there is an exclusion, the taking unto one's self, completely or so far near completion that it is effective, and a monopoly is created, then the intent is wholly immaterial. It would be the fact of monopoly that would be determinative, and not the purposes or intents of the people creating the monopoly; but if no monopoly exists, there may still be an offense for which the remedies—the civil and injunctive remedies—of the statute may be appropriate, if there are acts which constitute an attempt to create a monopoly. But in the matter attempted, to my mind, the element of intent becomes essential. And so when I gathered from the government's own case that there were three defendants, say A., B., and C., and there could be—there was at the time of filing of the petition—nothing chargeable against B. and C., there could not be anything chargeable against A., on the ground of "contract, combination or conspiracy," which to my mind requires the act of more than one person; and when it became apparent that the government was not claiming any monopoly in fact, but only the potentiality, that there could be no finding of any monopoly in fact. The attempt at monopoly brings in the question of intent, that is, looking over to see why everything was done; and in that respect, no wrongful intent was claimed. Therefore it occurred to me that the government made no case.

MACK, Circuit Judge. I feel it my duty under the circumstances of the division of opinion of the court to express my personal views in concurrence with Judge BAKER, possibly in some slight respects differing from the reasons which led him to the conclusion to which both of us agree.

I would say in the first place that the bill, of course, is very much broader and may well justify the enormous expenditure of time and

money that has occurred in this case—very much broader than the claim made on the final hearing, by the government. If the bill had charged only what the government now charges, and had sought only the relief that the government now seeks, I take it that the case would have been ready for hearing in a comparatively short time, and with very much less expenditure. I say this, of course, not in any way as a criticism of the bill or the methods pursued, but as one of the reasons which it seems to me relieves the court of what otherwise might be its duty of a thorough and careful examination of the enormous record that has been presented here.

Then, in the second place, I believe the eminent representative of the government, Mr. Fitts, was under some misapprehension as to the reason for calling on him after his associate had made a statement of facts. This is a hearing in the court of original jurisdiction, and I personally felt it the duty of the representatives of the government, the plaintiff in the case, to present in the opening statement, not merely their version of the evidence, but also their view of the law itself, both for the enlightenment of the court and in accordance with the practice that prevails in this state, in order to give opposing counsel the opportunity to answer, and thereby avoid a response after the government's counsel had answered defendant's counsel. It was for that reason, for the purpose of having the government's views both as to the law and the facts fully presented, that I desired to hear from Mr. Fitts before hearing from the defense.

I agree, however, with Judge BAKER, that after the government had fully presented its case it seemed to me that neither by the facts nor under the law were the contentions of the government established. While the views expressed by Judge BAKER as to the meaning of the word "combination" are supported both by the collocation, the phrase being "contract, combination or conspiracy," and by the usage of the word at the time the act was passed, certainly it may well be —and it is unnecessary now for me to express my personal opinion on the question—it may well be that the word "combination" is much broader and more significant, and I shall assume that the contention of the government is entirely sound. I do not mean to express any personal dissent from this contention that there may be, within section 1, a combination, not of persons, but a combination of the instrumentalities of commerce, and that when one man combines within his ownership competing instrumentalities of commerce with the intent or with the effect thereby unduly to restrain trade, and that ownership continues and the combination continues, that such combination may be enjoined. If that be the correct definition of "combination," then of course the purchase by one dealer in rolled oats of any part of the business or any of the instrumentalities of the business of the other dealer in rolled oats, is a combination, and beyond all question all combinations restrain trade.

But the question is whether it is an undue restraint of trade, and that depends upon the entire situation, the nature of the business, the competing elements throughout the region of interstate commerce —the possibilities of further competition. Furthermore, and without

expressing an opinion now as between the majority and the dissenting judge in the Harvester Case ([D. C.] 214 Fed. 987), inasmuch as that case is pending in the Supreme Court, and assuming, and again without intimating any personal dissent—assuming that the majority in the Harvester Case is absolutely and entirely right, and assuming, further, that both an undue restraint of competition and a monopolization in business may arise, where the situation is such that, without any wrongful acts of any kind, one man or one company has it within his power, by reason of the combination, or by reason of the transactions which lead to the existence of that power, unduly to restrain competition or to monopolize the interstate commerce, I fail entirely to find on the facts as presented by the government, supplemented by the presentation of the defense, either an actual monopoly, or that power which, in view of the entire situation of the rolled oats business, tends to show the existence of the possibility of monopolizing or unduly restraining the trade in rolled oats. It seems to me that the subject-matter is not Quaker Oats and Mother's Oats, but rolled oats.

Assuming even that it is not rolled oats, but package oats, rolled oats as sold by the trade throughout the country in packages for retail consumption, that being the largely prevailing method of conducting the business, there is, on the facts, to my mind, no undue restriction of competition, and not in the slightest degree a monopolization of the product of the business, and that because of this, that while the Quaker Oats Company and the Great Western were the two largest factors in the business, there were numerous competitors, and there was the fullest possibility of the most extended competition, and the size and the power of neither of these companies, either single or combined, that is, the power of the Quaker Oats, after securing the Mother's Oats, were not such as could prevent the most unlimited competition in package rolled oats. The strength of both of these companies was due to the tremendous advertising of their brands. By virtue of that advertising the public had come to demand, not merely rolled oats, not package rolled oats, but Quaker rolled oats, or Mother's rolled oats, and yet the instrumentalities of satisfying the demands of the public, the wholesale business throughout the country, the retail business throughout the country, was all in most strenuous opposition to and competition with these two companies. The very elements that they necessarily utilized in the distribution of their product were their own chief competitors.

I do not speak now of the fact that the business concededly was in all respects legitimately conducted. That is not determinative. I agree with the government that a potential monopoly that has failed to exercise its tremendous power, and has become and has been a very good trust, is none the less subject to the law; but we must first find the undue restraint of competition, or the probability or possibility thereof. The very fact that the subject-matter of the competition in rolled oats was a product manufactured without the slightest difficulty, without the slightest hindrance, by reason of any patents, either in the product or machinery for manufacture, from

a raw material of which the supply for all practical purposes was absolutely unlimited, and to be had in all parts of the country—a supply of which the rolled oats represents maybe 1 or 2 per cent.—that with very small capital, as testified to here, $25,000 to start a small mill, and $65,000 to start a 500-barrel capacity, anybody could go into that business, negatives undue restraint. Now, it is true that anybody that went into the business and attempted to sell to the public package rolled oats would run up against the tremendous advertising power, against the tremendous advertising value of Quaker Oats and Mother's Oats; but competition could be established, and it has been established, and that which has existed all along is none the less real. The fact that one of the competitors, or two of the competitors, or one competitor combining the two competitors, has acquired a preponderance in the business of the package rolled oats, due to a tremendous expenditure for advertising, to my mind does not show that thereby there has been any undue restriction of competition. In no sense has the competition been restricted, so far as I have been able to comprehend, by the union of Mother's Oats and Quaker Oats as against the rest of the world.

It is true that by the combination of ownership there may be a restriction of the competition between the two brands of rolled oats, Quaker Oats and Mother's Oats; but there is no restriction—no country-wide restriction—of the competition, and no possibility thereby of creating a country-wide restriction of competition in rolled oats, or in package oats. Every wholesaler in the country is competing, and competing hard, and, so far as the evidence as presented to us shows, is competing successfully, in the package trade. It is true the Quaker Oats Company is prospering, and prospering tremendously, notwithstanding this competition. That is due to its past, present, and continuing advertising. If that advertising is causing a misapprehension on the part of the public, there are other remedies to correct that misapprehension. If the Quaker Oats Company is falsely asserting its claims, there are other methods of correcting their false statements. I do not for a moment say that it is; I merely assume that possibility.

Now, the government has urged that the real wrong is in the combination of these advertised brands in one hand, and that the contract which effectuated that condition is illegal. While on the facts presented it seems clear that the Quaker Oats did not go out with any intent to destroy the Great Western, to buy it off, and while it seems clear that the Great Western was anxious to sell out because of its actual insolvent condition, I do not think that that affects the question, either under section 1, or under the monopolization clause of section 2. The intent with which the Quaker Oats purchased Mother's Oats would be important only in the consideration of a violation of the prohibition against attempting to monopolize. So that for the purposes of this case, for the purposes of the consideration of the violation of section 1, and of the first part of section 2, the creation of an actual monopoly, it seems to me immaterial whether the Great Western came to the Quaker Oats, or whether the Quaker Oats went to the Great

Western. I should reach the same conclusion, even if the Quaker Oats had gone to the Great Western, for the very purpose of acquiring Mother's Oats and thereby lessening the competition. Every purchase between two people in the same business, one buying out the other, is necessarily a lessening of the competition; but as long as the property is such that the fullest opportunity for country-wide competition exists, the field being open to everybody with but small capital, there being no patent rights, there being no other hindrance to the freest development of individual enterprise, I fail to see anything undue, anything unreasonable, in the restriction of competition that results, although it be the largest of the several competing firms that buys out the second largest.

For that reason, I concur in the order dismissing the bill.

ALSCHULER, Circuit Judge. I cannot concur in the conclusion of the majority of the court, nor, of course, in some of the reasoning whereby that conclusion was reached. It was, and I think properly, deemed wise to expedite this case by announcing the decision as soon as it was reached, without waiting for the ordinarily longer process of preparing written opinions.

At the time of making the contract of purchase of which the government complains, of the total rolled oats output in and for the United States, the Quaker Oats Company had, roughly speaking, 55 per cent., the Western Cereal Company between 15 and 20 per cent., and the remainder, divided in various proportions between something over a dozen others, who were in the same business, the largest of them quite small in comparison with the Western. About half the Quaker output was of package goods under the advertised brand of "Quaker Oats," and a much larger proportion of the Western product was put out under the advertised brand of "Mother's Oats."

Competition in the market between these two brands was keen. Quaker had lost some ground in 1910 and 1911, and Mother's had rapidly gained in volume. The Quaker Company showed large profits, while the Western was running behind financially. There was much evidence as to the cause for the losses of the latter, the government claiming it was improper conduct of its officers; but to my mind this is quite immaterial to the issue here involved, particularly as it is not charged that the Quaker interests were instrumental in bringing about such conduct, if any there was.

The two companies themselves were composed of various units which had theretofore been brought together, the manner whereof could not be related in small compass; but suffice to say that even if, as claimed by the government, this was in some respect obnoxious to the law, these long-existing associations and combinations, culminating in these two major companies here involved, are not attacked by the bill, but it is sought only to affect thereby the contract of June 21, 1911, under which the Quaker acquired certain properties of the Western.

Without reviewing the voluminous details of conditions and negotiations leading to the contract, it seems clear to me that both parties to it contemplated that the Great Western should permanently with-

draw from participation in the rolled oats business. This is strenuously denied by the defendants, but it seems to me that the circumstances, to which I will refer very briefly, could lead to no other conclusion than that this was the purpose and intent of the transaction.

The directors' and stockholders' resolution adopted by the Western authorizing the transaction distinctly set out its purpose, in reciting that in the judgment of the board of directors it was for the best interests of the company to discontinue the manufacture of oatmeal, rolled oats, and crushed oats. The defendants contended that this was but a form that was adopted to assure the trustee of the mortgage or trust deed covering the real estate contracted to be conveyed that it would have the power under clauses of the trust deed to make a conveyance of property that was no longer of use to the company. But the contract itself seems to dispel all doubt on the subject. It provides primarily for the conveyance of two plants of the Western, one at Joliet and one at Ft. Dodge, but not of several other plants which it possessed. After providing for the conveyance of these two plants, and for all of the property contained therein, the fifth section conveys:

"All and singular the business, good will, contracts for sales, formulas, processes, trade secrets, copyrights, trade rights, trade-marks, trade-names, trade insignia, both registered and unregistered, and all registrations and certificates of registration, at home and abroad of any such trade-marks, trade-names, and trade insignia, etc., relating to or in any way connected or associated with the manufacturing, putting up, packaging, and sale of oatmeal, rolled oats, crushed oats, and commercial mixed feed, possessed or controlled or claimed by the party of the first part" (which is the Western).

It includes all, whether of the two mills specifically conveyed, or any other of the various mills in which it was theretofore manufacturing oat products. And in clause 7 the first party, the Western, covenants and agrees at once to turn over and deliver to the Quaker Company complete enjoyment of all such business and good will and trade-marks and the like, and that will not directly or indirectly interfere with the use and enjoyment thereof by the Quaker Company, nor use or authorize others to use the same. All labels, advertising materials, and premiums, boxes, and cartons are included, and the eleventh section provides that for the same consideration (which is stated in the instrument to be $10 and other good and valuable consideration, but which in fact was a little over $1,000,000) for which the plants at Joliet and Ft. Dodge are conveyed, the enumerated intangible things are also conveyed. Section 14 provides that the first party shall turn over all contracts for the oat products of the business of which the good will and trade-marks are sold, and a list of all the customers which the first party has in the oat product business.

Included in the sale there was also, for another consideration, being the appraised price thereof, all of the product on hand and all of the materials for the manufacturing of these products, in all of the mills and plants of the Western, not alone those at Joliet and Ft. Dodge. The appraised price paid for all of such products and materials was upwards of $400,000. This parting with its business,

good will, contracts, customers, marks, brands, advertising matter, stock, and materials, and stripping itself of the very essentials for building up and holding its immense trade, manifests an intention on the part of the seller permanently to retire, and upon the part of the purchaser that the seller shall so retire, from the oat product business in any form. The retention by the Western of its other plants, so far as indicating, as claimed, an intention to continue in this business, must have reference to the products of grains other than oats, in the manufacture of which other products both of the companies were then and theretofore heavily engaged.

Considering the relations of these companies toward each other, and toward the trade and the public, and attaching to the contract that probative value which common observation and ordinary experience will give it, I cannot escape the conclusion that the contract is violative of the statute. The controlling fact seems to me to be that the Quaker Oats Company, already through its domination of the major part of the entire output, in this advantageous position, took over the property of its largest competitor, whereupon the latter with its remaining mills ceased longer to be a factor in the oatmeal trade. That as the result of this acquisition the Quaker Oats Company did or could materially control or affect the raw product, the oats, is not reasonable to suppose; that the competition in the bulk rolled oats has not been appreciably affected since the contract may be said to be fairly established by the evidence. That by the added power of the Quaker Company, through its absorption of this its most potent competitor, it is in greatly improved position to seriously affect the trade through price manipulation of such goods, or other action easily possible with such power, is to me self-evident.

Although, as it was testified, $50,000, might build a fair-sized mill, the existence of this single powerful unit would be a strong deterrent to such an undertaking. But that the transaction in question did remove the strong competition theretofore existing between the Quaker Oats and Mother's Oats brands, in each of which the respective companies had theretofore built up a vast trade totaling far more than that of all others combined, is but another way of stating that the contract in question was consummated, for this was its necessary as well as its intended effect.

It is not tenable to say that in this transfer of the trade-marks, brands, and good will, rather than of tangible property, there was manifested no intent or tendency to monopolize trade in the product. The trade-marks and brands constitute the effective instrumentalities whereby a great trade was built up, and that there was real competition in these advertised goods would appear, not alone in the very nature of things, but in the fact that, as a probable result, the Quaker Oats brand output had somewhat declined, while the Mother's Oats was rapidly on the increase. True, the price of Quaker Oats package goods has not been increased; but this is not essential to the establishment of the existence of monopoly or of undue restraint of trade. If the Quaker concern has thereby better intrenched and secured itself against successful competitive attack, the tendency to trade restraint

and monopoly is apparent, and the law may be thereby, and in my judgment, under the circumstances shown, has been, transgressed. If the competition in package goods had been maintained, the Quaker might have lowered its prices, or done something else disadvantageous to itself and of advantage to the buying public, in order to maintain its commercial status. To say that people may buy the unadvertised or bulk product, which is equally good, at much lower prices, seems to me to be beside the question. It is not for the courts to tell the people what they may or shall buy.

If these companies have exploited their respective brands so successfully that the public by the hundreds of thousands have been induced to believe that they possess superior merit, and thereby the companies respectively have established this vast package trade in these goods, if then in some way they combine, or one sells to the other, for the advantage thereby accruing, and in such manner they unduly restrict trade and promote monopoly in these products, they ought not, in defense of such transaction, be heard to say that, if the public do not like it, they may get goods of other brands or go without any brand at all. That the great trade has been established in these particular goods through advertising does not in my judgment affect the proposition. The fact that through judicious and successful advertising two concerns each secure a vast trade, equal or greater than the other combined similar trade of the country, does not of itself authorize the two to unite to eliminate the competition between them. It is to the credit of the Quaker Company that it does not appear to have resorted to those coercive and terrorizing tactics for increasing or maintaining its trade, so often found to be the case where a business establishment has obtained the comparative ascendency and power of this one; but in my judgment this does not obviate the apparent undue restraint or attempted undue restraint of trade, which the entering into this contract seems to me to manifest.

There was for the defendants evidence to the effect that the real thing which was the subject of the purchase was the brands, trade-marks and good will of the Western in the oatmeal trade, and that the tangible property was taken only as an incident, because deemed essential to secure title to the intangibles, such as brands, trade-marks, and good will. If for this $1,000,000 or so of consideration, the Quaker Oats had obtained oats and machinery and real estate and other facilities for maintaining and enlarging its business and plant, things which might be purchased elsewhere, it might with better grace maintain that there was nothing in the transaction that tended to destroy competition and create monopoly. What did it buy for its $1,000,000 of investment? It is clear to me that it purchased the business extinction in the oat product trade, and the commercial status therein, of its greatest and most powerful rival, thus strengthening the purchaser's already strong grasp upon the entire industry, through the added force of this very considerable unit, thenceforth joined with its own. To my mind, this of itself, quite regardless of the manner in which this enlarged power has been exercised in the interim between the making of the contract and the filing of the bill, manifests in the

contract such an undue restraint of the interstate trade and commerce thereby affected, and such a purpose and tendency to monopolize, as comes fairly within the condemnation of the statute, a statute which denounces, not commercial growth, nor strength, nor power, nor proportion, but only combination or device, by whatever form they may appear, calculated and tending unduly to restrain interstate trade and commerce, or to eliminate competition, and, in the words of the statute, "to monopolize any part of the trade or commerce among the several states."

Entertaining these views, I believe there should be a decree for the government, the precise scope of which, under the circumstances, it is hardly necessary for me to discuss.

CONSOLIDATED RUBBER TIRE CO. et al. v. DIAMOND RUBBER CO. OF NEW YORK.

(District Court, S. D. New York. April 17, 1916.)

INTEREST ⇐22(3)—JUDGMENT—DECREE ENTERED ON MANDATE.

Under rule 30 of the Circuit Court of Appeals (150 Fed. xxxv; 79 C. C. A. xxxv), judgments and decrees entered upon mandates from that court do not bear interest, unless so directed in the mandate.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 45; Dec. Dig. ⇐22(3).]

In Equity. Suit by the Consolidated Rubber Tire Company and the Rubber Tire Wheel Company against the Diamond Rubber Company of New York. On motion by defendant to quash execution. Motion sustained.

Motion to quash execution. A decree for $209,954.97 was entered in this court on August 2, 1915. See 226 Fed. 455. An appeal was taken from that decree to the Circuit Court of Appeals, which affirmed the same and remitted its mandate to this court. 232 Fed. 475, — C. C. A. —. On March 29, 1916, judgment was entered on that mandate, affirming the judgment, and for costs. Thereupon the defendant paid to the plaintiff the sum of $209,954.97 on April 4, 1916, upon the original judgment and the second judgment, which was for costs; the money being received without prejudice to the receipt of interest upon the decree. On April 6, 1916, an execution was taken out by the plaintiff for the full amount of the judgment, on which execution the plaintiff's solicitor indorsed the payment of $209,954.97, and directed the marshal to levy and collect $8,179.58, that being the amount of the accrued interest upon the decree from August 2, 1915, together with interest upon the unpaid interest from April 4, 1916. It is this execution which the plaintiff moves to quash.

Charles Neave, of New York City, for the motion.
Charles W. Stapleton, of New York City, opposed.

LEARNED HAND, District Judge (after stating the facts as above). The question here involves the interest upon the decree which has been affirmed by the Circuit Court of Appeals. The decision of that court said nothing about awarding interest, and the mandate following the decision, on which this court acted, consequently did not award interest. The defendant alleges, therefore, that the judgment of this court did not carry interest, and that the defendant is not entitled to any execution,

as the face of the judgment has been paid. This question involves the construction of rule 30 of the Circuit Court of Appeals (150 Fed. xxxv, 79 C. C. A. xxxv), which is as follows:

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

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

I confess that, independently of authority, I should have thought that under this rule every mandate from the Circuit Court of Appeals ought to be interpreted as awarding interest unless the contrary was stated. Indeed, I find much difficulty in seeing what other interpretation can possibly be placed upon the words of subdivision 3, "unless otherwise ordered by this court." However, the Court of Appeals of the Sixth Circuit, in Green v. Chicago S. & C. R. R. Co., 49 Fed. 907, 1 C. C. A. 478, interpreted the twenty-third rule of the Supreme Court (32 Sup. Ct. ix), which is to the letter like the rule in question, as not of itself awarding interest, unless the mandate of the Supreme Court expressly mentioned interest, and the Circuit Court of Appeals for the Ninth Circuit, in Hagerman v. Moran, 75 Fed. 97, 21 C. C. A. 242, adopted a similar construction of rule 30 itself. Moreover, in the case of In re Washington & Georgetown R. R. Co., 140 U. S. 91, 11 Sup. Ct. 673, 35 L. Ed. 339, the Supreme Court held that, unless its own mandate expressly awarded interest, no interest could be granted by the court below. It is true that rule 23 is not mentioned in that opinion, which turns upon the verbal and literal conclusiveness of the Supreme Court's mandate upon the lower court; but at the time of the decision (April 27, 1891) rule 23 had been long in existence (108 U. S. 586), and either the court supposed the rule did not operate ex proprio vigori, or they overlooked the rule altogether. I must assume the former.

While, therefore, the result is no more than to require the Circuit Court of Appeals to add the two words, "with interest," to all affirmances, that seems to be the result of the authorities, and in accordance with that result I must grant the motion. Execution quashed, and judgment declared satisfied.

ROSENFELD et al. v. SCOTT, Collector of Internal Revenue.

(District Court, N. D. California, Second Division. May 8, 1916.)

No. 14,615.

1. INTERNAL REVENUE ⇐38—TRANSFER TAXES—RECOVERY OF TAX PAID.
Where the corpus of legacies under a will have not vested, and are not subject to tax in gross under War Revenue Act June 13, 1898, c. 448, 30 Stat. 448, but the present value of the rights given the beneficiaries to receive the income of the legacies is taxable, the remedy given by Refunding Act June 27, 1902, c. 1160, § 3, 32 Stat. 406, authorizing the Secretary of the Treasury to refund so much of a tax paid by an executor,

administrator, or trustee as may have been collected on contingent beneficial interests, which should not have become vested prior to July 1, 1902, is available to the trustees under the will in question, who have paid the tax on the entire corpus of legacies, for the recovery of the excess over the tax due on the value of the annual income.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 83, 84; Dec. Dig. ⟸38.]

2. INTERNAL REVENUE ⟸8—TRANSFER TAX—AMOUNT.

Under a will creating a trust to continue for 11 years, during which period the beneficiaries were to receive the annual income, and at its expiration they were to receive the principal or corpus of their respective legacies, the vested interest of each of the beneficiaries subject to the war revenue tax is the income for life, not merely for the term of 11 years.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 11, 12; Dec. Dig. ⟸8.]

At Law. Action by Louis Rosenfeld and others, as trustees under the last will and testament of John Rosenfeld, deceased, against Joseph J. Scott, Collector of Internal Revenue. Judgment for plaintiffs.

Marshall B. Woodworth, of San Francisco, Cal., for plaintiffs.

John W. Preston, U. S. Atty., and Annette Abbott Adams, Asst. U. S. Atty., both of San Francisco, Cal., for defendant.

VAN FLEET, District Judge. On the former trial this court held that the interests upon which the tax was assessed and collected were entirely contingent, beneficial interests, not vested in possession and enjoyment, and hence, under the doctrine of Vanderbilt v. Eidman, 196 U. S. 480, 25 Sup. Ct. 331, 49 L. Ed. 563, and other cases following it, were not subject to tax under the War Revenue Act, and that the tax was illegal and void. Judgment was accordingly given for the recovery of the entire tax. The Circuit Court of Appeals, while sustaining the view of this court that the corpus of the legacies under the will of John Rosenfeld had not vested at the time of assessment, and were not subject to the tax in gross, held that, under the principle announced in the later case of United States v. Fidelity Trust Co., 222 U. S. 158, 32 Sup. Ct. 59, 56 L. Ed. 137 (decided pending the appeal), the rights given the beneficiaries by the will to receive the income of the legacies "were rights which were vested at the time of the assessments which were made thereon and were subject to the war revenue tax, and assessable, not upon the gross amount of the legacy, but upon the value of the rights to receive the annual income," and the case was accordingly remanded for further proceedings, with a right in the plaintiffs to amend their complaint accordingly.

Having amended their pleading to conform to the changed aspects of the case and meet the views of the Court of Appeals, the plaintiffs at the present trial have proceeded on the same theory as at the first, that their right of recovery remains under section 3 of the Refunding Act of June 27, 1902, and made their case accordingly. That section provides:

"That in all cases where an executor, administrator, or trustee shall have paid, or shall hereafter pay, any tax upon any legacy or distributive share of

personal property under the provisions of the act approved June 13, 1898, entitled 'An act to provide ways and means to meet war expenditures, and for other purposes,' and amendments thereof, the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the treasury not otherwise appropriated, upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two." 32 Stat. 406.

[1] The defendant strenuously contends that the theory upon which plaintiffs have proceeded is erroneous; that, under the decision of the Circuit Court of Appeals, that section furnishes no basis for recovery; that the court, having held that, to the extent of the annual income, the rights given plaintiffs under the will were vested rights, it results that the tax collected must be regarded as one involving a mere overvaluation of such vested interests, and that the right of the plaintiffs to recover, if at all, is governed by the provisions of sections 3226, 3227, and 3228 of the Revised Statutes (Comp. St. 1913, §§ 5949, 5950, 5951), to the requirements of which the plaintiffs' proofs have not conformed.

But I am of opinion that this contention involves a misapprehension of the remedial scope of section 3 and a failure to fully appreciate what the Refunding Act was intended to accomplish. Its evident purpose was, as an act of justice by the government, to provide a means to restore to the citizen moneys to which the government was not entitled, but which he had been required to pay, by reason of a misconstruction by the revenue officers of the provisions of the War Revenue Act, and as to the recovery of which the existing statutes afforded no adequate remedy; and that it was intended to cover all instances where, as a result of the administration of that act, taxes had been to any extent illegally or unjustly assessed and collected is, I think, from its comprehensive language, quite obvious. By its very terms it contemplates that the tax may have been to some extent properly assessed, as being based upon a vested interest, and hence the provision that only to the extent that it exceeds such basis shall it be refunded; that is, "*so much* of said tax as may have been collected on contingent, beneficial interests which shall not have become vested."

The present case falls clearly within the scope of the act. It matters not whether we say the assessment was erroneous, because an overvaluation of vested interests, or because one made wholly upon interests which had not vested. Either is within the wrong Congress intended to redress, and both are equally within the remedial provision of the statute. Nor does the decision of the Circuit Court of Appeals operate to take the case out of the provisions of this act. That court clearly indicates by its opinion that, while the tax as assessed was in part based upon vested rights subject to the Revenue Act, it covered interests which were not so vested, and that, as to such excess, plaintiffs should be entitled in this action to recover.

This construction is in harmony with that of the Department of Justice. In his opinion rendered to the Secretary of the Treasury for his guidance as to the scope and purpose of the act of June 27, 1902, the learned Attorney General says:

"The provisions of the act are special, and apply to a particular class of obligations against the government. Being special, these claims are not governed by the provisions of the prior general statute. R. S. § 3228. Suits brought to recover money due under this act are not actions for the recovery of taxes, but for money held by the government in trust for the benefit of the parties to whom it rightfully belongs. The act, by its terms, creates and acknowledges the obligation of the government. A method is prescribed by which each party can secure the money belonging to him whenever he wishes it. No time has been fixed by any rule of the Secretary of the Treasury, which has been called to my attention, within which a claimant must apply for it, or after which the money is forfeited to the government. It is, therefore, an obligation payable on demand, and the statute of limitations does not begin to run until there has been a refusal to pay, or something equivalent thereto. United States v. Wardwell, 172 U. S. 48, 19 Sup. Ct. 86, 43 L. Ed. 360. It will be observed that under the provisions of this statute Congress has granted a right of repayment, regardless of any conditions that may have heretofore operated as a bar to such repayment. The statute is an acknowledgment by Congress of a supposed moral obligation; a provision as a bounty of the government. Whether or not the taxes were originally paid under protest is eliminated, and the question of voluntary or involuntary payment is immaterial." 26 Ops. Attys. Gen. 194.

See, also, Thacher v. United States (C. C.) 149 Fed. 902.

[2] The question as to the extent of the vested interests remains. The will of Rosenfeld creating a trust to continue for 11 years, during which period the beneficiaries were to receive the annual income, and at its expiration the principal or corpus of their respective legacies, plaintiffs contend that, under these provisions, the vested right of each subject to the tax was on the income for the definite term of 11 years; defendant, on the other hand, contending that the vested interests of each was to the income for life, since necessarily, under the terms of the will, the beneficiaries would have and enjoy the income not only during the trust, but thereafter during their lives. The latter is, I think, the correct construction. It is not a case where, at the termination of the trust period, the right to receive the income might, on the happening of some contingency, pass to some one other than the beneficiary, but where, by the vesting of the corpus of the legacy at the termination of that period the right to the income would still remain for life.

The total tax assessed and collected on the gross amount of the legacies given by the will was $4,062.90, which included a tax of $150 on a legacy to Margitta Fisher, not here in controversy. The tax on the legacies here in question was, therefore, $3,912.90. The evidence shows that the tax properly assessable on the rights of these beneficiaries was $2,480.71. The excess tax is thus represented by the difference between the latter sum and the sum of $3,912.90 actually collected, or $1,432.19, for which latter sum the plaintiffs are entitled to judgment, with interest at the legal rate from the date of payment, and for their costs.

Let judgment be entered accordingly.

UNITED STATES v. MULVEY.

(Circuit Court of Appeals, Second Circuit. April 18, 1916.)

No. 251.

1. ALIENS ⟸62—NATURALIZATION—RIGHT TO—TEMPORARY ABSENCE—"RESIDE."

Under Naturalization Act (Rev. St. § 2170 [Comp. St. 1913, § 4360]), declaring that no alien shall be admitted to become a citizen who has not for the continued term of five years preceding his admission resided in the United States, a mere temporary absence from the United States within the period will not prevent an alien from securing naturalization, for the court should search out the true meaning of the statute and give effect to that, rather than its letter; but the question whether the absence was such as to prevent naturalization is one for each case.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 123–125; Dec. Dig. ⟸62.

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

2. ALIENS ⟸62—NATURALIZATION—RIGHT TO.

The Naturalization Acts (Act March 26, 1790, c. 3, 1 Stat. 103, Act Jan. 29, 1795, c. 20, 1 Stat. 414, and Act April 14, 1802, c. 28, 2 Stat. 153) did not require aliens applying for citizenship to maintain a continuous residence within the country for the prescribed period, but Act March 3, 1813, c. 42, § 12, 2 Stat. 809, provided that an alien must have resided in the United States for the continuous term of five years next preceding his admission and without being at any time during the five years out of the territory of the United States. The last clause was repealed in 1848 (Act June 26, 1848, c. 72, 9 Stat. 240) and the Naturalization Act (Rev. St. 2170 [Comp. St. 1913, § 4360]) declares that no alien shall be admitted to become a citizen who has not for the continued term of five years next preceding his admission resided within the United States. An alien who had resided in the United States nearly the required period left with intention to return, but through unforeseen contingencies remained away for over two years. On his return he applied for naturalization. *Held* that, as the purpose of requiring an alien to be a citizen is to enable him to become familiar with local institutions, such alien, having been away nearly half of the prescribed period, was not entitled to naturalization.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 123–125; Dec. Dig. ⟸62.]

3. ALIENS ⟸68—NATURALIZATION—APPEARANCE BY REPRESENTATIVE OF BUREAU OF NATURALIZATION.

Where, in a naturalization proceeding, a representative of the Bureau of Naturalization appears and presents to the District Court facts relative to the personal history of the applicant, but does not appear as an attorney, he should be considered as amicus curiæ, and not as representing the government adversely to the applicant.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138–145; Dec. Dig. ⟸68.]

4. ALIENS ⟸70—NATURALIZATION—PROCEEDINGS FOR REVOCATION.

Defendant was naturalized, though a representative of the Bureau of Naturalization disclosed to the court facts which showed that the applicant was not entitled. Naturalization Act June 29, 1906, c. 3592, § 15, 34 Stat. 601 (Comp. St. 1913, § 4374), declares that it shall be the duty of the United States district attorneys, upon affidavit showing a cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the district in which the naturalized citizen may reside, for the purpose of setting aside and canceling the certificate of citizenship on the

ground of fraud, or on the ground that such certificate was illegally procured. Naturalization Act, § 11, gives the government the right to appear in naturalization proceedings in opposition to the alien petitioning for a certificate. *Held* that, as the representative of the Bureau of Naturalization did not appear as an attorney, but rather as amicus curiæ, and as an appeal would have been impracticable, because the facts presented to the court were not preserved, and for the further reason that naturalization proceedings are not adversary, the order of naturalization cannot be taken as a judgment precluding the government from thereafter questioning its validity, when the certificate was procured through fraud or was illegal.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 146, 151, 154–160; Dec. Dig. ⊂⊃70.]

5. ALIENS ⊂⊃69—NATURALIZATION—PROCEEDINGS.

In such case, where the facts showed that the alien was not entitled to naturalization, the issuance of the certificate was illegal, within the act of 1906, and might be set aside on proceeding by the district attorney.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 147–153; Dec. Dig. ⊂⊃69.]

6. WORDS AND PHRASES—"ILLEGAL."

The word "illegal" means contrary to law.

Hough, District Judge, dissenting.

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

Proceeding by the United States of America against Patrick Mulvey to cancel and set aside a decree of naturalization. From an order dismissing the petition, petitioner appeals. Reversed, with instructions to enter order of cancellation, without prejudice to subsequent application.

H. Snowden Marshall, U. S. Atty., of New York City (Earl B. Barnes, Asst. U. S. Atty., of New York City, of counsel), for the United States.

Joseph Forrester, of New York City, for appellee.

Before COXE and ROGERS, Circuit Judges, and HOUGH, District Judge.

ROGERS, Circuit Judge. This is a proceeding in which the government of the United States seeks to have the naturalization of the respondent set aside, canceled and declared null and void, and to have him restrained and enjoined from setting up or claiming any rights, privileges, benefits, or advantages whatsoever under his decree of naturalization.

[1, 2] The proceeding is under the provisions of section 15 of the Act of Congress of June 29, 1906, which provides as follows:

"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 cancelling the certificate of citizenship on the ground of fraud or on the ground that such certificate * * * was illegally procured. * * *" 34 Stat. 601.

The Naturalization Act contains the following provision:

"No alien shall be admitted to become a citizen who has not for the continued term of five years next preceding his admission resided within the United States." U. S. Rev. Stat. (2d Ed. 1878) § 2170 (Comp. St. 1913, § 4360).

It appears that the respondent is a native of Ireland and first arrived in the United States from that country in April, 1908, when he reached the port of the city of New York. He remained continuously in New York from that time until July 18, 1912, when he departed from the country taking a ship for Ireland. His return to Ireland was occasioned by news he received of his mother's illness. His intention was to see his mother, who was a widow, and had written him of her illness, and asked that he return; and at the time he left the United States it was with the intention of returning to this country, and of marrying a woman to whom he was engaged, and who lived here. That at the time he left the United States he had the intention of returning is shown by the fact that he left his clothes and a trunk here with his sister, with whom he had lived. After he arrived in Ireland, his mother wanted him to remain with her for a time. This he consented to do, and it was not until September 19, 1914, that he left Ireland, arriving in this country on September 27, 1914. When he first reached the United States, two brothers and three sisters were already living here, and they have since remained here. We have no doubt, upon the testimony in the record, that the respondent fully intended to return when he left this country, and that he never changed his intentions.

Having arrived the second time in the United States, as above stated, on September 27, 1914, he applied for his naturalization papers on December 28, 1914, and a final hearing was had on April 13, 1915. The facts in reference to his absence were known to the District Court, but that court was under the impression that he was entitled to naturalization and had not lost his residence by his visit to Ireland.

The question is whether an alien, who came to the United States five years prior to his naturalization, but has been absent from the United States during the five-year period for a period of two years and two months, and during the entire period of his absence has intended to return to this country, is entitled to have such absence disregarded upon his actual return to the United States, so that the time of his absence may be counted as a part of "the continued term of five years next preceding his admission" to citizenship during which he must have resided in the United States.

In other words, what did Congress mean when it enacted that no alien should be admitted to become a citizen "who has not for the continued term of five years next preceding his admission resided within the United States"? Must the alien be actually resident within the country for the entire period of five years, so that a temporary absence at any time during the period will deprive him of the advantage of the previous actual residence, and make it necessary to date the beginning of his "continued term of five years" from the date of his return, rather than from the date of his original arrival? It cannot be

supposed that Congress intended that any such unreasonable construction should be placed upon the act. Where adherence to the strict letter of a statute would lead to injustice or to manifest absurdity, it cannot be supposed that the lawmaking body intended any such result. In such cases the duty devolves upon the court to search out the true meaning of the statute and to permit the spirit or reason of the law to prevail over its letter. A thing may be within the letter of a statute, and yet not within the statute, because not within its spirit, nor within the intention of its makers. See Holy Trinity Church v. United States, 143 U. S. 457, 459, 12 Sup. Ct. 511, 36 L. Ed. 226 (1892).

This court does not entertain the idea that Congress meant by this enactment that an alien must be actually and physically within the United States for every day of the five-year period. And if it is not necessary that the alien be actually present within the territory of the United States for every moment of the five-year period, then the court is confronted with the question how much of the time may he be absent. This obviously raises a question of some difficulty. But the difficulty it presents must not lead the court into the absurdity of concluding that the continuous character of an alien's residence is fatally destroyed if, for any purpose and for any length of time, he temporarily goes beyond the country's borders. We think that each case of this kind must be decided according to its own circumstances. If an alien departs from the United States with no intention of returning, he may by that act lose his residence in this country, so that if, after a time, he again changes his mind and returns to this country, the continuous character of his previous residence has been fatally destroyed, and the five-year period of continuous residence will date from his return. If, however, he departs for a temporary purpose and with an intention of returning, which exists during the whole period of his absence, and at length does return, then the question of whether his absence has put an end to the continuous character of his residence is one which the court must determine according to the facts of the case.

In the case at bar the respondent was absent for nearly one-half of the prescribed period of five years. The purpose of requiring aliens applying for citizenship to reside continuously within the country for five years is not only to satisfy the government as to the good faith of the applicant and as to his good character, but it is also to afford the alien a sufficient opportunity to understand and familiarize himself with our institutions and mode of government. In the opinion of Congress five years is none too long a period for this purpose. That being the case, we have no doubt that an absence from the United States for a period of two years and two months from the time the alien arrived will preclude him from being entitled to naturalization five years from the date of his original arrival. Actual residence within the country for a little over half of the required time and a constructive residence for the balance of the time is not a compliance with the act of Congress.

The Naturalization Act of 1790 (Act March 26, 1790, c. 3, 1 Stat. 103), and that of 1795 (Act Jan. 29, 1795, c. 20, 1 Stat. 414),

and that of 1802 (Act April 14, 1802, c. 28, 2 Stat. 153), did not require aliens applying for citizenship to maintain a "continuous" residence within the country for the prescribed period. But Act March 3, 1813, c. 42, § 12, 2 Stat. 809, first provided that the alien must have resided in the United States "for the continued term of five years next preceding his admission," and added, "without being at any time during the said five years, out of the territory of the United States." The last-mentioned clause was repealed by Act June 26, 1848, c. 72, 9 Stat. 240. But since the act of 1813 the law has required residence for the continuous term of five years, or, as the act now reads, "for the continued term of five years." The fact that in the earliest acts a "continuous" residence was not required, while in the latter acts and in the existing law it must be for a "continued term," is significant. It is also significant that, while retaining "the continuous term" of the act of 1813, there has been eliminated the clause "without being at any time during the said five years, out of the territory of the United States." And while a resident domicile in this country might not be interrupted by transient absences animo revertendi, we are satisfied that for the purposes of this act it is interrupted by an absence which extends over a period of two years and two months. To hold otherwise, it seems to us, is to destroy and make of little effect the obvious purpose of Congress in establishing the continued term of five years.

This case is somewhat similar in its facts to that of United States v. Cantini, 212 Fed. 925, 129 C. C. A. 445 (1914), decided in the Third Circuit. In that case, as in this, the government sought to cancel a certificate of naturalization. The defendant came from Italy to the United States and had been in this country for more than nine years, when he returned to Italy to visit his parents for three months. For various reasons his stay there was prolonged. The court below found as a fact that he had never abandoned, nor intended to abandon, his residence in this country. He remained away, however, for two years, returning on August 22, 1910. Naturalization was granted him in 1911. The government asked to have the certificate canceled on the ground that he had not resided in the United States for the continued term of five years next preceding his admission. The District Court denied the relief asked, on the ground that, as there had been no change in his domicile during the period of his absence, his right to naturalization was not lost. The Court of Appeals reversed the case, saying that the undisputed facts before it seemed to establish the fact that the man had not resided continuously within the United States for five years preceding his application.

[3, 4] Before concluding this opinion it is proper to say that we do not think the District Court was without jurisdiction to consider the matter submitted to it. The claim was made that, as the government is given by section 11 of the Naturalization Act the right to appear in naturalization proceedings and to be heard in opposition, it is bound by the order of the court in granting naturalization, unless it sues out a writ of error. No writ of error was obtained. Instead the government filed a petition in the District Court asking for the cancellation of

the certificate. The petition was brought in May, 1915, and the decree admitting to citizenship was entered on April 13, 1915. The petition was dismissed, and this appeal was taken.

A proceeding for the naturalization of an alien is in a certain sense a judicial proceeding, which results in a judgment. But the United States is not for all purposes concluded thereby. The proceeding is not adversary in its nature. The government is not a necessary party to the proceeding, and no notice is required to be given to it. See Johannessen v. United States, 225 U. S. 227, 32 Sup. Ct. 613, 56 L. Ed. 1066 (1912). In that case the government filed a petition to cancel a certificate of citizenship alleged to have been fraudulently and illegally procured. The lower court overruled the demurrer to the petition and canceled the certificate, and the Supreme Court affirmed the decree. The petition was filed under section 15 of the act of 1906. In that case the original proceeding had been without notice to the government and was upon ex parte proofs. The decision, therefore, is confined to a judgment rendered under such circumstances. The Supreme Court refrained from expressing any opinion as to the effect of a judgment allowing naturalization in a case where the government had appeared and litigated the matter.

In the case at bar a representative of the Bureau of Naturalization had appeared before the District Court when the application for the certificate of citizenship was pending and placed before it the facts as to the applicant's absence in Ireland. The court thought that these facts did not deprive the respondent of his right to be naturalized, inasmuch as he had not lost his residence. After this decision the chief naturalization examiner in New York City requested the United States district attorney to institute this proceeding. It does not affirmatively appear in this record that any law officer of the government was heard in opposition in the proceeding originally had before the District Court, or that he was present or took any part in the proceedings. All that is disclosed is that some one connected with the Bureau of Naturalization was present and was heard in opposition. The representative of the Bureau was not the attorney for the government in the district in which the proceeding took place, and he was not even an attorney. His appearance at such hearings is as amicus curiæ, to present to the court such facts relative to the personal history of the several applicants as the Bureau's investigations may have disclosed. The order admitting the respondent to citizenship recites no appearance by the government on the hearing, no minutes of the testimony were taken, and no record preserved. Under such circumstances we do not think that the appearance of a representative of the Bureau in the proceedings is to be regarded as an appearance by the United States in the technical sense in which that word is used in judicial proceedings. The United States, therefore, is not so bound by the decree that it is not entitled to proceed by petition to cancel the certificate so issued. And it is not necessary that the proceeding to cancel be commenced before the District Judge who entered the order admitting the respondent to citizenship. The fact is quite immaterial that in the present case it was instituted before another District Judge of the same district exercising co-ordinate jurisdiction.

[5, 6] Section 15 of the act authorizes the district attorney to proceed by petition to set aside the certificate "on the ground of fraud or on the ground that such certificate was illegally procured." It is conceded that no fraud was practiced on the court. And it is said that, while the certificate in this case may have been erroneously granted, it was not illegally procured, and that therefore the right to proceed by petition does not exist. We do not agree to that view of the statute. The word "illegal" means contrary to law, and therefore we think that the word as employed in this particular statute may be construed to mean that, whenever an alien has obtained a certificate of citizenship which is unauthorized by the Naturalization Act, he has procured it "illegally," or contrary to law. Every statute must be construed with reference to the object intended to be accomplished by it. In order to ascertain this object it is proper to consider the occasion and necessity of its enactment and the statute should be given that construction which is best calculated to advance its object. In naturalization proceedings it is not usually the case that the government is represented by its law officers, or that minutes of the testimony are taken and a record preserved, upon which a writ of error or an appeal can be based. The particular case now before us is a good illustration of the practice. There is no record of the testimony that was taken at the original hearing before the District Judge, and if the district attorney had attempted to bring the matter before this court on writ of error or an appeal, we would have been precluded from passing upon the merits because of the absence of the testimony. Moreover the courts have decided that there is no right to review by writ of error the action of a District Court in a naturalization proceeding, it not being a "case" within the act of Congress conferring jurisdiction upon the Circuit Courts of Appeal "in all cases" etc. See United States v. Dolla, 177 Fed. 101, 100 C. C. A. 521 (5th Circuit); United States v. Neugebauer, 221 Fed. 938, 137 C. C. A. 508. There was reason enough, therefore, for the enactment of the provision authorizing the district attorney to proceed by petition in this class of cases, and we are not inclined to give to its language a meaning which would unnecessarily, and so far as we can see without good reason, narrow the object intended to be accomplished.

It may be said in passing that this court has in several cases had before it upon appeal the action of District Courts in naturalization proceedings. We have never had the question raised in any of them by counsel whether the court had jurisdiction to proceed upon appeal in such cases. The court's jurisdiction was not challenged in any of them, and without benefit of argument we were not disposed to decide the question. And the question is not now before us, and we express no opinion one way or the other concerning it. We have simply called attention to the matter for the purpose of showing that a serious doubt existed in the minds of the profession as to whether the right to review upon either writ of error or upon appeal existed.

We may also point out that in the cases in which this court reviewed upon appeal proceedings in naturalization the records disclose that the

United States attorney had appeared on behalf of the government in opposition to the applicant's petition at the final hearing in the District Court, and a record had been made of the testimony and proceedings there had. United States v. Cohen, 179 Fed. 834, 103 C. C. A. 28, 29 L. R. A. (N. S.) 829; United States v. Poslusny, 179 Fed. 836, 103 C. C. A. 324; United States v. Balsara, 180 Fed. 694, 103 C. C. A. 660; Yunghauss v. United States, 218 Fed. 168, 134 C. C. A. 67.

The Court of Appeals in the Third Circuit has evidently placed the same construction on section 15 of the act as that which we place upon it. For upon facts very similar to those in the case at bar, and which have already been stated in an earlier part of this opinion, it canceled the certificate upon petition. United States v. Cantini, supra. And there are a number of cases in the District Courts in which upon petition certificates have been canceled for errors of law. United States v. Plaistow (D. C.) 189 Fed. 1006; United States v. Nopoulos (D. C.) 225 Fed. 656; United States v. Albertini (D. C.) 206 Fed. 133; United States v. Van Der Molen (D. C.) 163 Fed. 650; United States v. Schurr (D. C.) 163 Fed. 648.

The decree dismissing the petition is reversed, with instructions to enter an order of cancellation, but without prejudice to the respondent's right to make a new application at the proper time.

HOUGH, District Judge (dissenting). Whether Mulvey shall be a citizen by virtue of the naturalization complained of seems unimportant—certainly to Mulvey, who has not appeared in this court. The substantial question is by what method shall error in naturalization be corrected?

It is plain from this record (and undenied) that every piece of evidence presented under this petition was laid before the court which granted naturalization, and also that the United States was represented at the hearing and then and there objected to Mulvey's admission. No fraud, in the sense of either suppressing truth or suggesting falsehood, is alleged or argued. There was no illegality on the part of Mulvey in applying for naturalization to that court, nor in telling the truth (as he did) about his history and movements. The only arguable point arising in or suggested by the naturalization proceeding was whether Mulvey's residence in this country had been continuous.

Procedure by this independent suit, instead of appeal from the naturalization order, is said to be justified by section 15 of the Naturalization Law, which authorizes and directs the institution of proceedings demanding the cancellation of certificates of citizenship "on the ground of fraud or on the ground that such certificate was illegally procured." There is a plain difference between illegality and irregularity or error. "Illegality" signifies "that which is contrary to the principles of law, and denotes a 'complete defect in the proceedings.'" People v. Kelly, 1 Abb. Prac. N. S. (N. Y.) 437. "Irregularity is want of adherence to some prescribed rule. * * * Illegality is predicable of radical defects only, and signifies that which is contrary

to the principles of law, as distinguishable from mere rules of procedure." Ex parte Mooney, 26 W. Va. 40 (53 Am. Rep. 59).[1] "Erroneous" connotes merely a mistake in the application of the law or the ascertainment of fact.

The only purpose of this suit is by a new action wholly independent of the original proceeding to lay the evidence upon which the naturalization judge legally, though perhaps erroneously, acted before another trial court in order to correct an alleged error in applying the law to admitted facts. Complainant's position is perhaps best shown by one phrase in the record where counsel (perhaps inadvertently) declared that Mulvey's certificate had been "illegally granted." It may have been erroneously granted, but the grant was not illegal, for such is not the effect of error in the exercise of lawful jurisdiction. "A judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous." Per Marshall, C. J., Ex parte Watkins, 3 Pet. at 203, 7 L. Ed. 650.

The question whether the statute referred to requires, or even excuses, the correction of error by a new suit, is I think a matter of considerable importance. The nature of naturalization proceedings in the United States has never been doubtful. The statutory method of acquiring citizenship has varied only in detail during the last century. In Spratt v. Spratt, 4 Pet. 393, 7 L. Ed. 897, Marshall, C. J., pointed out that the statutes—

"submit the decision on the right of aliens to admission as citizens to courts of record. They are to receive testimony, to compare it with the law, and to judge on both law and fact. This judgment is entered on record as the judgment of the court. It seems to us, if it be in legal form, to close all inquiry, and, like every other judgment, to be complete evidence of its own validity."

In Mutual Benefit, etc., Co. v. Tisdale, 91 U. S. 245, 23 L. Ed. 314, Hunt, J., said that the certificate of citizenship "is against all the world a judgment of citizenship." [2]

There was no difficulty in reviewing this naturalization order by an appeal as from a chancery decree. This has been done in this court in United States v. Cohen, 179 Fed. 834, 103 C. C. A. 28, 29 L. R. A. (N. S.) 829; United States v. Poslusny, 179 Fed. 836, 103 C. C. A. 324; United States v. Balsara, 180 Fed. 694, 103 C. C. A. 660; and Yunghauss v. United States, 218 Fed. 168, 134 C. C. A. 67. These cases

[1] This definition of illegality comes from Tidd's Practice, and has been adopted or favored in Ex parte Sewartz, 2 Tex. App. 74; Barton v. Saunders, 16 Or. 51, 16 Pac. 921, 8 Am. St. Rep. 261; Ex parte Gibson, 31 Cal. 619, 91 Am. Dec. 546; and Bronk v. State, 43 Fla. 461, 31 South. 248, 99 Am. St. Rep. 119, where many other cases are cited. See also Thompson v. Doty, 72 Ind. 336; People v. Liscomb, 60 N. Y. 559, 19 Am. Rep. 211.

[2] To the same effect see Campbell v. Gordon, 6 Cranch, 176, 3 L. Ed. 190; Ex parte Cregg, 2 Curtis, 98 Fed. Cas. No. 3,380; In re Coleman, 15 Blatch. 406, Fed. Cas. No. 2,980; Pintsch, etc., Co. v. Bergin (C. C.) 84 Fed. 140; McCarthy v. Marsh, 5 N. Y. 279; People v. Snyder, 41 N. Y. 397; State v. Hoeflinger, 35 Wis. 400; State v. Macdonald, 24 Minn. 58. And for a review of the matter in an independent suit to annul a certificate of naturalization on the ground of fraud, see United States v. Norsch (C. C.) 42 Fed. 417.

indicate that we have declined to follow United States v. Dolla, 177 Fed. 101, 100 C. C. A. 521, and United States v. Neugebauer, 221 Fed. 938, 137 C. C. A. 508. The word "case," in section 128, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1133 [Comp. St. 1913, § 1120]), is not used in so narrow a sense as to deprive this court of the duty of reviewing a final order in so serious a matter as citizenship. Therefore is cannot be contended that no remedy other than this original suit existed, which is the case in those circuits where the Dolla and Neugebauer decisions are in force.

Since, therefore, Mulvey's certificate was neither illegally procured nor granted, and since there was no fraud, it is clear to me that the statute by which it is sought to justify this petition does not cover the mere correction of error or irregularity. The statute finds its application to cases where the record of naturalization is fair, where no appeal upon that record would unfold to the appellate court any error, irregularity, or mistake, with the result that it is only by new matter and a new record that relief can be obtained.

There is nothing in Johannessen v. United States, 225 U. S. 227, at page 237, 32 Sup. Ct. 613, at page 615 (56 L. Ed. 1066), to contradict these views. Indeed, such a proceeding as this was expressly excluded from consideration when Pitney, J., said:

"What may be the effect of a judgment allowing naturalization in a case where the government has appeared and litigated the matter does not now concern us."

The majority decision herein gives to the United States (but not to the applicant) a choice of two methods of correcting errors in naturalization: It may either appeal direct or bring an action such as this, wherein it is sought (in effect) to reverse one decree by the entry of another, oftentimes in the same court. A more disorderly and undesirable practice I cannot imagine, and I believe it also to be unjustifiable, because section 15 of the act authorizes suits of this kind only for fraud and illegality, and not for the correction of error.

MOFFATT v. UNITED STATES.*

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

No. 4178.

1. CRIMINAL LAW ⟸279, 280(2)—PLEAS IN ABATEMENT—TIME OF FILING—SUFFICIENCY.

A plea in abatement, filed nine months after the return of an indictment, on the ground that the order of the court required 30 names to be drawn from the jury box, and that 24 of the persons summoned attended, from whom the grand jury was selected, was properly overruled, where it contained no allegation excusing the delay in filing the same, nor of any facts showing that any of the grand jurors were disqualified, or that defendant was in any way prejudiced by the manner in which they were selected.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 643, 644, 647, 648; Dec. Dig. ⟸279, 280(2).]

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

*Rehearing denied May 19, 1916.

2. POST OFFICE ⊂⊃48(4)—USING OF MAILS TO PROMOTE FRAUD—SUFFICIENCY OF INDICTMENT.
An indictment under Criminal Code (Act March 4, 1909, c. 321) § 215, 35 Stat. 1130 (Comp. St. 1913, § 10385), for using the mails to promote a scheme to defraud, is sufficient, where it sets out all the particulars constituting the offense of devising a scheme to defraud, and the use of the mails to promote such scheme, and the intent to defraud is manifest from the nature of the scheme itself.
[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 72; Dec. Dig. ⊂⊃48(4).]

3. POST OFFICE ⊂⊃49—USING MAILS TO PROMOTE FRAUD—EVIDENCE.
Evidence in a prosecution for using the mails to defraud that a letter was caused to be mailed by defendant, and that it was placed in a rented box at the post office to which it was addressed, from which it was obtained by the addressee, *held* sufficient to establish the allegation that defendant caused it to be delivered by mail.
[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84–86; Dec. Dig. ⊂⊃49.]

4. CRIMINAL LAW ⊂⊃371(1)—EVIDENCE—SUBSEQUENT ACTS OF DEFENDANT.
In cases involving fraud, or the intent with which an accused does an act, collateral facts and circumstances, and his other acts of a kindred character, both prior and subsequent, not too remote in time, are admissible in evidence.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830, 831; Dec. Dig. ⊂⊃371(1).]

5. CRIMINAL LAW ⊂⊃670—EVIDENCE—GENERAL SCOPE OF INQUIRY.
Evidence should be admitted, if competent and relevant, upon any issue or any phase of the case, and the party offering it need not explain the point or matter to which it is addressed, unless required to do so by the court.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 757, 1593–1596; Dec. Dig. ⊂⊃670.]

6. CRIMINAL LAW ⊂⊃824(8)—TRIAL—LIMITING EFFECT OF EVIDENCE.
It is not the duty of the court in a criminal case to explain and limit the bearing of evidence to the jury, in the absence of an appropriate request by the party desiring it done.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1999; Dec. Dig. ⊂⊃824(8).]

7. POST OFFICE ⊂⊃49—PROSECUTION FOR USING MAILS TO DEFRAUD—EVIDENCE.
Where an alleged scheme to defraud, to be carried out by the use of the mails, consisted of mailing circulars intended to induce the addressees to buy stock in an oil company, and which contained many representations as to the proved character of the property of the company, that the wells would continue to produce for many years, etc., evidence to show the condition of the wells and property within a reasonable time afterwards was admissible.
[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84–86; Dec. Dig. ⊂⊃49.]

8. POST OFFICE ⊂⊃35—USING MAILS TO DEFRAUD—ELEMENTS OF OFFENSE.
Criminal Code, § 215, making it an offense to use the mails to promote a scheme to defraud, is not confined to cases where false representations are made as to existing facts, but includes as well schemes to defraud by means of representations and promises as to the future.
[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55; Dec. Dig. ⊂⊃35.]

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

Criminal prosecution by the United States against Benjamin F. Moffatt. Judgment of conviction, and defendant brings error. Affirmed.

W. Knox Haynes, of Chicago, Ill., for plaintiff in error.

Charles A. Houts, Sp. Asst. U. S. Atty., of St. Louis, Mo. (Arthur L. Oliver, U. S. Atty., of St. Louis, Mo., on the brief), for the United States.

Before HOOK, Circuit Judge, and YOUMANS and ELLIOTT, District Judges.

ELLIOTT, District Judge. The plaintiff in error, Benjamin F. Moffatt, hereinafter referred to as the defendant, was indicted, charged with violations of section 215 of the Penal Code. The indictment contained six counts, and upon trial the jury returned a verdict of not guilty as to all of the counts in the indictment, except count No. 3, and as to that a verdict of guilty was returned. So much of the indictment as is material here is as follows:

"The grand jurors of the United States, impaneled and sworn in the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri at the September term thereof, in the year 1912, and inquiring for that division and district, upon their oaths present and charge that Benjamin F. Moffatt, late of the city of Chicago, county of Cook, state of Illinois, on the 2d day of December, 1910, did wrongfully and unlawfully devise a certain scheme and artifice for obtaining money and property from a class of persons herein in this count mentioned, residing within the United States, by means of false and fraudulent pretenses, representations, and promises, and thereupon converting such money and property to his own use, without repaying, or returning, or accounting for the same to such persons, and thereby defrauding said persons of the same, an essential and necessary part of which said scheme and artifice was the intentional use by him, the said Benjamin F. Moffatt, of the mails and post office establishment of the United States, that is to say, the scheme and artifice now here described, having on said 2d day of December, 1910, entered into a contract with the Buick Oil Company, a corporation organized and then existing under the laws of the state of California, with a capital stock of five million dollars ($5,000,000.00), divided into five million (5,000,000) shares, each of a par value of one dollar ($1.00), under the terms of which said contract said Benjamin F. Moffatt, together with one Frederick Lorenz and one Ben Levon, undertook to purchase, and said Buick Oil Company undertook to sell, five hundred thousand (500,000) shares of the capital stock of said Buick Oil Company (less such number of shares of said stock as had theretofore been issued under contracts which said Moffatt and others associated with him had theretofore had with said Buick Oil Company), at a price of fifteen cents (15 cents) for each said share, said Benjamin F. Moffatt conceived on the day in this count aforesaid a device and plan for obtaining from E. S. Briggs, Charles W. Barth, Solomon S. Goldberg, John R. Gregg, L. W. Ham, Frank Houts, Wm. B. Martin, Edward C. Speckart, Wm. Trapp, Mrs. Fannie Tyrill, Mrs. Mildred Wagner, and Andrew Walz, and from others to the grand jurors unknown, and from the public generally, by the sale to such persons of said shares of said capital stock of said corporation, and of such shares of stock in said corporation as said Benjamin F. Moffatt should thereafter be able to acquire, numerous large sums of money upon divers false and fraudulent pretenses, representations, and promises by the said Benjamin F. Moffatt, made and to be made in print from time to time in newspapers, letters, circular letters, and pamphlets, sent and to be sent by mail to such persons,

in which said newspapers, letters, circular letters, and pamphlets the said Benjamin F. Moffatt would and did represent (and said representations were reasonably calculated to cause said persons to believe) that the purchase of said stock by said persons was an advisable thing to do and would be a safe and profitable investment of their funds; that the stock which said Benjamin F. Moffatt would and did offer for sale was treasury stock of said Buick Oil Company, belonging to said Buick Oil Company, and that the proceeds of such sale thereof as said Benjamin F. Moffatt had and might thereafter make would and did go into the treasury of said Buick Oil Company; that in selling said stock said Benjamin F. Moffatt was acting for and on behalf of said Buick Oil Company; that said Benjamin F. Moffatt was the general manager of the Buick Oil Company, and that the offices maintained by him in the city of Chicago, state of Illinois, were the offices of said Buick Oil Company; that the proceeds of the sale of such of said stocks as should be and had been sold by said Benjamin F. Moffatt, less the bare cost of selling said stock, had been and was being used in the development of the properties of the Buick Oil Company; that quarterly dividends had been and would be paid upon said stock of said Buick Oil Company, and that constantly increasing dividends upon said stock would be paid; that divers advertisements, circulars, and letters which said Benjamin F. Moffatt would send and had sent to said persons advertising said stock for sale was authorized and signed by said Buick Oil Company, and by D. D. Buick, president of said Buick Oil Company, and by D. D. Buick, individually, and that the said Benjamin F. Moffatt was the only person through whom said stock could safely be purchased; whereas in truth and in fact, as he, the said Benjamin F. Moffatt, well knew at the time and place of so devising said scheme and artifice for obtaining money and property in this count of this indictment mentioned, in the manner and by the means in this count aforesaid, and of converting such money to his own use, and of defrauding the persons in this count referred to out of the same, and of committing the several offenses of unlawfully using the mails in the counts of this indictment (from 1 to 6, both inclusive), and as the grand jurors aforesaid, upon their oaths aforesaid, charge the facts to be, such purchases of said capital stock by said persons was an inadvisable thing to do, and would be an unsafe, unprofitable, and losing investment of their funds; that the stock which said Benjamin F. Moffatt would thereupon sell to such persons was not treasury stock of said Buick Oil Company, and did not belong to said Buick Oil Company, and the proceeds of the sale thereof would not and did not go into the treasury of said Buick Oil Company; that in the sale of said stock said Benjamin F. Moffatt was not and would not act for and on behalf of said Buick Oil Company, but would act for and on his own account; that said Benjamin F. Moffatt was not and would not be the general manager of said Buick Oil Company, and that he had no official connection with said Buick Oil Company, and that the offices maintained by said Benjamin F. Moffatt in Chicago would not be and were not offices of said Buick Oil Company; that the proceeds of the sale of the stock which said Benjamin F. Moffatt would and did sell, less the bare cost of selling said stock, did not and would not go into the development of the properties of said Buick Oil Company, but, on the contrary, said proceeds would be converted to the use of said Benjamin F. Moffatt; that quarterly and constantly increasing dividends had not been and would not be paid upon the outstanding stock of said Buick Oil Company; that the said advertisements, circulars, and letters which the said Benjamin F. Moffatt would and did send out in advertising said stock for sale, purporting to be authorized and signed by said Buick Oil Company, and by D. D. Buick, president of said Oil Company, and by D. D. Buick, individually, would not be and had not been authorized or signed by the Buick Oil Company, by D. D. Buick, president of the Buick Oil Company, or by D. D. Buick, individually, but that, on the contrary, said advertisements, circulars and letters, purporting to be so signed and authorized, would be and were sent out by said Benjamin F. Moffatt without the knowledge or consent and over the protest of said Buick Oil Company, D. D. Buick, president of said Buick Oil Company, and D. D. Buick, individually, and that said Benjamin F. Moffatt was not and would not be the only person from whom said stock could safely be purchased."

Omitting the overt acts set forth in the first count of the indictment, the third count, upon which the defendant was convicted, is as follows:

"Third Count. And the grand jurors aforesaid, upon their oaths aforesaid, do further present and charge that said Benjamin F. Moffatt, on or about the 16th day of December, 1910, so having devised the scheme and artifice for obtaining money and property from the class of persons referred to and described in the first count of this indictment by means of false and fraudulent pretenses, representations, and promises in said first count mentioned and described, and of defrauding said persons of their money and property by the means and in the manner in said first count aforesaid (the allegations of said first count descriptive of said scheme and artifice including the allegations of intent and knowledge on the part of said Benjamin F. Moffatt are by reference hereby incorporated in this count as fully as if here set forth and repeated), in and for executing said scheme and artifice and attempting so to do, and for the purpose and with the intention on his part of executing said scheme and artifice, and attempting so to do unlawfully, feloniously, and knowingly did cause to be delivered by mail by the post office establishment of the United States, according to the direction thereon, at the city of St. Louis, and within the division and district aforesaid, and within the jurisdiction of the court, a certain letter, dated at Chicago, Ill., and inclosed in an envelope and addressed and directed to 'Mr. E. S. Briggs, 418 Wainwright Bldg., St. Louis, Mo.,' and which said envelope then and there bore a return card as follows, to wit: 'Return in Five Days to Buick Oil Company, Room 420 Marquette Bldg., Chicago, Ill.,' and which said envelope and letter therein contained was by the said Benjamin F. Moffatt, at the time aforesaid, deposited and caused to be deposited in the mails of the United States, with an uncanceled 2-cent postage stamp thereon, at the city of Chicago, in the state of Illinois, for mailing and delivery, with the intent on the part of him, the said Benjamin F. Moffatt, that said letter and said envelope should be carried by the mails of the United States and delivered to said E. S. Briggs, one of the said persons so to be defrauded, and the person to whom it was directed, according to the directions thereon, at and in the city of St. Louis, state of Missouri, and which said letter aforesaid was thereupon delivered by mail by the post office establishment of the United States, according to the direction thereon, which said letter was as follows, to wit:

" 'Officers.

" 'D. D. Buick, Pres.
" 'J. B. Lehigh, Vice Pres.
" 'Stacy C. Lamb, Treas.
" 'J. M. Herndon, Sec.
" 'Thos. D. Buick, Asst. Sec.

Home Office.
Los Angeles, Cal.
Properties.
Maricipa, Cal.
Sunset, Cal.
Midway, Cal.

" 'Buick Oil Company, of California.

" 'Capital $5,000,000.

" 'D. D. Buick, President.

" 'Room 420–421 Marquette Building, Chicago, Ill.

" 'Last Opportunity to buy Shares at 50 Cents.

" 'We take this opportunity to notify you as a stockholder of this company that this is the very last opportunity you will have to purchase shares of this company at 50c. This company's shares go to 75c December 20th, and we positively will not accept any applications, unless reservations have already been made, for the sale of any shares at 50c after the date of advance.

" 'To the stockholders who wish to pay for their stock in full cash we desire to say that they may deduct 5% from the total amount of their remittance. This does not apply to stockholders who buy on the installment plan.

" 'The most important event heretofore recorded in the progress of this company transpired this week when our workmen began installing the casing for our well. The drilling has been stopped for a few days to allow this casing or pipe to be set in place. Drilling will begin immediately after this is done, which should be next Sunday or Monday.

"'As per our notice heretofore sent to you, Mr. Buick is now in California and is in charge of general directions of the company in the field. He has with him a party of stockholders, and he contemplates being able to show these stockholders, what it means to strike oil in this field, as he anticipates the coming in of our No. 1 well before these stockholders leave California.

"'If you desire to purchase any of these shares or to add to the holdings you already have in this company, we would advise you by all means to fill out the inclosed application, send your remittance with it and mail same not later than Saturday or Sunday of this week. In case you cannot send your remittance for a few days, you should write us to this effect, and definitely state when your first remittance will be received, we will be glad to hold the amount of shares you desire for a period of three days. This only applies to stockholders, and does not apply to stock which you may reserve for your relatives or friends, so that in making out the application, see that your name appears as the applicant even if you buy for some one else.

"'We are, with very best wishes,

"'Yours very truly,

Buick Oil Company,
"'Per B. F. Moffatt, Gen. Mgr.'

"Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States."

[1] This indictment was returned and filed in said court on the 12th day of December, A. D. 1912. Thereafter, on September 27, 1913, nine months after the filing of the indictment, the defendant Moffatt filed a plea in abatement. The substance of the plea is that the grand jury by which the said indictment was returned was not a valid and lawful grand jury of the United States, in that the selection and drawing of said jurors, constituting the panel, was not conducted in the manner and form provided by statute. It is further set forth in the plea that an order was made for the selection and drawing of the grand jurors, requiring that there be drawn from the jury box of said court a number of names in excess of the maximum number authorized and required by law for a grand jury, to wit, 30 names, and that pursuant to said order the names of 30 persons were drawn from said jury box; that among the said 30 names so drawn were the names of 17 persons constituting the grand jury which returned the said indictment. It is further set forth in said plea that a venire was issued commanding the marshal to summon said 30 persons whose names had been so drawn, and that he did summon said 30 persons to be and appear in said court, and in obedience to said summons there did appear on the 1st day of October, 1912, 24 of said persons so drawn and summoned, and that from and among said 24 persons so summoned, and so appearing in court as aforesaid, a grand jury of 17 persons were selected and impaneled by the court, and that said jury was not constituted by drawing not exceeding 23 names. It is further set forth that:

"Said supposed grand jury, so selected by the court as aforesaid, assumed to act as a legal grand jury for said division of said district, and without lawful and valid power to do did so act as a grand jury, to the great prejudice of this defendant, and in violation of the lawful and constitutional rights of this defendant, and on, to wit, the 12th day of December, 1912, return into this court and cause to be filed herein the said supposed indictment in this cause, whereby this defendant says he is prejudiced, and has been deprived of his liberty without due process of law, and has been held to answer for an infamous offense without valid and lawful presentation of indictment by a lawful grand jury. And this defendant says that all of the aforesaid orders and proceedings relating to the formation and selection of the aforesaid supposed grand jury and the act thereof in returning and causing to be filed said sup-

posed indictment appear of record in this court, and to the record thereof the defendant respectfully calls the attention of the court."

The transcript of record filed in this cause does not show that the United States attorney demurred to the plea, nor that a motion to strike was made. None of the records of the court with reference to the manner of drawing the jury, which records are referred to in the plea, are set forth in the transcript of record—simply the following order, October 1, 1913, overruling the plea in abatement:

"Now, at this day, come the parties hereto by their respective attorneys, and the plea in abatement filed by the said defendant is argued and submitted, and adjudged insufficient, and overruled by the court."

In view of the fact that there is no admission of the facts set forth in the plea, by demurrer or otherwise, we must assume that the court considered the allegations of the plea in abatement in the light of the record as to drawing the grand jury, to which reference was made in the said plea, and that the order adjudging the plea in abatement insufficient and overruling the same was made upon a consideration of the allegations of the plea and the record of the court as to the method of drawing and impaneling the grand jury. In the absence of a specific admission by demurrer or otherwise, and an entire absence of the record of the court as to the manner in which the grand jury was drawn and impaneled, the record here does not present this question for review.

It may be noted, also, that this plea contains no averment of specific facts showing that the defendant has been prejudiced or injured by the selection of the grand jurors in the manner alleged. It is not even alleged that any juror was disqualified, nor is it alleged that the grand jury was composed of jurors not selected pursuant to the order of the court, in the manner provided by law—simply that 24 responded to the summons, instead of the limited number of 23. No showing is made as to whether or not 1 of the 24 was disqualified or whether or not all except 17 were disqualified, and while it may follow that, if only 23 names had been drawn and 23 persons subpœnaed, instead of 30, the grand jury might have been differently composed, from this it cannot be inferred that injury or prejudice resulted to the defendant. Hyde v. United States, 225 U. S. 373, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614.

There is no allegation in the plea that defendant had not been held under arrest prior to the finding of the indictment, or that he did not know it was being investigated by the grand jury. No excuse whatever is attempted to be given in the plea for not interposing it sooner than more than nine months after the return and filing of the indictment. There is no allegation in the plea that the defendant was not present when the grand jury was selected, nor alleging that he was absent or that he was without the state, or, if without the state, when he came to the place where the court was held. There is no intimation in the plea of the time when the accused first ascertained the facts stated therein, nor any reason indicated for this long delay in filing the plea.

This is important, in view of the rules applicable to such pleas.

one of which strictly exacts the most explicit averments, and the other of which requires the plea to be presented with the greatest promptness —general rules which are applied, not merely to objections to the formation of a grand jury, but to all those matters of abatement, which in the technical sense are dilatory, and which, even if sustained, do not finally dispose of the subject-matter of the indictment. This plea does not allege want of knowledge of threatened prosecution, nor want of opportunity to present his objections earlier, nor assign any ground why exception was not taken or objections made before.

An objection of this kind should be made at the earliest day that the defendant has an opportunity to make it. Nineteen days after the indictment was filed was held too great a delay in Lowdon v. United States, 149 Fed. 674, 79 C. C. A. 361. A delay of 5 days was noted in treating a plea as insufficient in Agnew v. United States, 165 U. S. 36, 17 Sup. Ct. 235, 41 L. Ed. 624. Such a plea, filed 19 days after service of process on the indictment, and more than 2½ months after it was returned, and which contains no statement as to when the fact of the indictment or the matters alleged first became known to the defendant, comes too late. United States v. American Tobacco Co. (D. C.) 177 Fed. 774, 777.

Under the foregoing circumstances, even if the record was here, and it would sustain all of the allegations of the plea in abatement, the plea must be denied under the general rule of the federal courts, that omissions which do not impair any substantial right or prejudice the defendants, or accused, will be disregarded, unless otherwise required by positive statute. Section 1025, Revised Statutes (Comp. St. 1913, § 1691), declares that no indictment, found and presented by a grand jury in any Distirct or Circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment or other proceedings thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant. United States v. Benson et al. (C. C.) 31 Fed. 897–901. This statute, in effect, directs that the existence of irregularity, if error of form, shall not be presumed a wrong to the accused; but it must be shown to be so. Of the irregularities alleged by these pleas and which are subject to this rule, may be mentioned those as to impaneling the jury, the disqualification of jurors, etc.

If there were doubts whether this section includes irregularity in the entire procedure or only those of form in the indictment, the ruling of Mr. Justice Brewer, concurred in by Judge Thayer, in United States v. Molloy (C. C.) 31 Fed. 23, disposes of them in favor of the first proposition. United States v. Cobban (C. C.) 127 Fed. 713. A plea in abatement to an indictment, alleging that an order of the judge directing the selection of a certain number of names from each of several counties from which jurors were to be drawn constituted a manifest injury to the accused, without showing how accused was injured thereby, was insufficient. United States v. Merchants' & Miners' Transportation Co. et al. (C. C.) 187 Fed. 355.

And such a plea, on the ground of irregularity in the constitution of the grand jury, to be good, must allege facts showing defendant

was prejudiced thereby. That some members of the grand jury were, by order of the court, summoned by the marshal from the body of the district, without the drawing of names, is not such an irregularity as will affect the validity of an indictment, where such members were duly qualified. United States v. Nevin (D. C.) 199 Fed. 831–833. First, the record upon which the court determined such issue as was presented by the plea in abatement, is not here for review. Second, the plea in abatement is insufficient, considering such facts as are alleged, and as appear of record.

A demurrer was interposed and overruled. Defendant assigns error. The contention of the defendant is that the indictment was insufficient to confer jurisdiction upon the court to try the defendant, in that it does not appear from the description of the alleged scheme and artifice that an intent to defraud was an element thereof.

The uniform rule on this subject is that all of the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment or implication, and the charge must be made directly, and not inferentially, or by way of recital. The statute alleged to have been violated is directed against devising or intending to devise any scheme or artifice to defraud, to be effected by communication through the post office. A reference to the indictment as above set forth, discloses, as a foundation for this charge, a scheme to defraud, which the accused devised, with all such particulars as are essential to constitute the scheme and to acquaint the defendant with what he must meet at the trial. United States v. Hess, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516.

[2] The crime here charged is made up of acts and intent, and these must be set forth in the indictment with reasonable particularity, time, place, and circumstance. The essential requirements—indeed, all the particulars—constituting the offense of devising a scheme to defraud are set out at length in this indictment, and the intent to defraud is manifest from the nature of the scheme itself. This is sufficient. Walker v. United States, 152 Fed. 111, 81 C. C. A. 329. An indictment under this statute is sufficient if the averments bring the charge within the substance and true meaning of the statute. Causing to be delivered by mail by the post office establishment of the United States the letter set forth in count No. 3 of the indictment, in executing the scheme, is the gist of the offense denounced by the statute, and is fully covered by the plain terms of the indictment. It is the causing the delivery of this letter at the place named in the indictment, that conferred jurisdiction of this prosecution upon the trial court. Lemon v. United States, 164 Fed. 957, 90 C. C. A. 617; Gould v. United States, 209 Fed. 730, 126 C. C. A. 454.

It is contended that the intent to perpetrate the fraud must be alleged in the part of the indictment which follows the videlicet, and that it is not sufficient to allege it in the descriptive part of the indictment. This contention is without merit. It is sufficient if it is charged in any part of the indictment. United States v. Maxey (D. C.)

200 Fed. 997–1001; Lemon v. United States, 164 Fed. 953, 90 C. C. A. 617. In an indictment for mailing a letter in execution or attempted execution of a scheme to defraud, in violation of this statute, if the scheme is sufficiently outlined to show its design and adaptability to deceive and to fairly acquaint the accused with what he is required to meet, it answers the requirements of the statute. Brooks v. United States, 146 Fed. 223, 76 C. C. A. 581. The test to be applied is, not whether the material averments of this indictment might have been made more accurate and certain, but whether they plainly embrace in their terms both requirements, of notice of the ultimate facts to be proved against the accused, and specification thereof which will leave no second prosecution open for the alleged offense. If these requisites are sufficiently stated it is the duty of the court to uphold the indictment. Cochran v. United States, 157 U. S. 286, 15 Sup. Ct. 628, 39 L. Ed. 704; Rosen v. United States, 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; Markham v. United States, 160 U. S. 319, 16 Sup. Ct. 288, 40 L. Ed. 441.

Section 215 of the Penal Code only requires two things to complete the offense charged in this indictment, (1) That a scheme to defraud be devised; and (2) that, for the purpose of executing it, the defendant caused to be delivered by mail, by the post office establishment of the United States, the letter set forth in count 3 of the indictment, to the person therein named. Keeping the contention of the defendant in mind, an examination of the indictment above set forth discloses that it alleges that the defendant did wrongfully, etc., devise a certain scheme and artifice for obtaining money and property * * * by means of false and fraudulent pretenses, representations, and promises, and thereupon converting such money and property to his own use. Then follows an allegation that he had contracted to purchase 500,000 shares of stock in the Buick Oil Company, and after that the indictment proceeds to allege that he conceived and devised a plan for obtaining money and property from the persons named in the indictment by the sale to said persons of said shares of stock by divers false and fraudulent pretenses, representations, and promises, which were set out in the indictment, in specific terms setting forth the scheme and artifice above referred to.

The indictment then alleges, in substance, that the defendant at the time and place of devising the scheme and mailing the letter referred to in count 3, and of converting such money to his own use and of defrauding the persons in that count referred to, out of the same, well knew that said representations were false, and that it was his intent to convert the proceeds of all sales to his own use, contrary to the representations made by him. His intent to defraud clearly appears from the ordinary, plain interpretation of the language used in the indictment. It is clear from an examination of the indictment that it is charged in the indictment that this scheme and artifice consisted of false and fraudulent pretenses, representations, and promises, plainly setting them forth, and was devised by the defendant. It is alleged, not only that these representations and pretenses and promises were false, but that he knew them to be false, and that it was his intention

to defraud the persons named in the indictment, and that he would convert the money received by virtue of such false pretenses to his own use. Taking the entire averments of the indictment, we think they clearly charge both of the acts which section 215 of the Penal Code of the United States require to complete the offense charged, and the demurrer to the indictment was properly overruled.

[3] The next assignment of error insisted upon by the defendant is that the defendant's motion for an instructed verdict was erroneously denied—that the cause should not have been submitted to the jury. In this connection, it is contended by the defendant that the evidence to support the verdict is insufficient in that there is no evidence tending to show that the letter upon which the conviction is based was "*delivered by mail according to the directions thereon.*" The evidence in the case clearly shows that this letter, set forth in count 3 of the indictment, was by the defendant delivered or caused to be delivered at the post office establishment of the United States at Chicago, properly stamped, addressed "Mr. E. S. Briggs, 418 Wainwright Bldg., St. Louis, Mo." The letter and envelope were produced; the envelope was postmarked, "Chicago, Illinois, December 15, 1910." The addressee of this letter, Briggs, was placed on the witness stand and testified:

"Q. Now, Mr. Briggs, I hand you a letter marked Exhibit 51 and an envelope marked Exhibit 51a and I will ask you if you received that letter in that envelope through the United States mail at about the time of the postmark on the envelope? A. Yes, sir. Q. Now, did you receive this letter and envelope through the United States mail here at St. Louis? A. Yes, sir.

"Cross-Examination. Q. Mr. Briggs, who delivered this letter to you? A. Why, it come in the usual course of the mails, with my personal as well as business mail. It all come in at one time. Q. That is to say, the carrier brought it in? A. Yes, sir. Well, that is, we have in our office—we have what is called the mail room, and all the mail for all of the different railroad offices for the different officers first comes to that room, and he assorts it, and then—I really think that on the plan the railroads have adopted we have to go after the mail at the post office. They have a box here—a large box. Q. Well, you didn't receive this from the hands of anybody connected with the United States post office? A. No, sir; I did not."

The introduction of the letter was then objected to, on the ground the evidence did not show the letter had been delivered by the post office establishment in the city of St. Louis. In our opinion, under this undisputed testimony, this defendant caused the delivery of this letter at St. Louis, by the post office establishment of the United States, and that a delivery to the messenger at the post office was a delivery to Briggs. United States v. Safford (D. C.) 66 Fed. 942; United States v. Lee (C. C.) 90 Fed. 256; United States v. Bullington (C. C.) 170 Fed. 121.

The plain purpose of Congress in making it an offense to knowingly cause to be delivered by mail, according to the direction thereon, a letter, etc., was to confer jurisdiction upon the court at the place where the letter is delivered, to punish the offender, and the statute must not be so strictly construed as to defeat this plain intention of Congress. The defendant was admittedly the moving cause. The evidence shows that it was he that caused the preparation

of the inclosures, the paying of the postage, and the mailing of the letter at Chicago, with the intent and purpose that it should be delivered at St. Louis, and the fact that it was received at the post office in the city of St. Louis, instead of being delivered by the department itself at the special address, in no manner qualifies the intent and purpose with which the defendant deposited it. The delivery was in the city of St. Louis, in substantial compliance with such intent and purpose, and conferred the jurisdiction in this case intended by Congress when it defined the offense. We are of the opinion that this evidence was sufficient to justify the jury in finding that the defendant caused this letter to be delivered by mail according to the directions thereon, at St. Louis, Mo.

[4] A witness was allowed to testify over objection as to what was done in regard to oil wells on the property after the last date at which the mails were charged to have been fraudulently used, and whether the wells produced oil, and how long they continued productive. The objection of counsel for the accused was as follows:

"I object. The history of what was done there must end on the 10th of October (1911). That is the last day that Moffatt is charged with having knowledge of the conditions, and we cannot impute any fraudulent intent to Moffatt for something that occurred afterwards."

After the testimony was received counsel said:

"To make my record perfectly clear, I move at this point to strike out all that this witness has said in reference to conditions or operations after the 10th of October, 1911."

It will be observed that the objection was broad enough to challenge the admissibility of all evidence of acts and conditions after the date mentioned, including the acts of the accused himself. In other words, the objection on its face was not confined to the productiveness of the several oil wells, over which it might be said the accused had no control. It is quite true that an act which is not an offense when committed cannot be made one by the subsequent independent act of the person with which it has no connection (United States v. Fox, 95 U. S. 670, 24 L. Ed. 538); also that the criminal character of a transaction is to be determined by the conditions existing at the time (Norton v. United States, 205 Fed. 593, 123 C. C. A. 609); also that the intent with which an accused does a subsequent act cannot be imputed to him as of the prior date of the crime charged (United States v. Wootten [D. C.] 29 Fed. 702). These rules, however, do not conflict with or impair the long-established doctrine that in cases involving fraud, or the intent with which an accused does an act, collateral facts and circumstances, and his other acts of a kindred character, both prior and subsequent, not too remote in time, are admissible in evidence. See Allis v. United States, 155 U. S. 117, 119, 15 Sup. Ct. 36, 39 L. Ed. 91. Therefore, so far as the effort of counsel was to exclude the subsequent acts of the accused of the character mentioned, it was properly denied.

[5, 6] Evidence should be admitted, if competent and relevant upon any issue or any phase of a case. See Moore v. United States,

150 U. S. 57, 61, 14 Sup. Ct. 26, 37 L. Ed. 996. The party offering the evidence need not explain the point or matter to which it is addressed, unless required to do so by the court. Farnsworth v. Nevada Co., 102 Fed. 578, 42 C. C. A. 509. Nor in the absence of an appropriate request by the opposing party is it the duty of the court to explain and limit the bearing of evidence to the jury. The duty to make the request rests upon the party who desires it done. In Elliott v. Peirsol, 1 Pet. 328, 338, 7 L. Ed. 164, the court said:

"Courts of justice are not obliged to modify the propositions submitted by counsel, so as to make them fit the case. If they do not fit, that is enough to authorize their rejection. * * * If any part of it (the evidence) was incompetent, the court might, on a general motion to exclude the whole, have excluded such parts; but the court was not obliged to do so."

"Relevancy does not depend upon the conclusiveness of the testimony offered, but upon its legitimate tendency to establish a controverted fact." Interstate Commerce Commission v. Baird, 194 U. S. 25–44, 24 Sup. Ct. 563, 569 (48 L. Ed. 860).

In Columbian Ins. Co. v. Lawrence, 2 Pet. 24, 44, 7 L. Ed. 335, Marshall, C. J., said:

"It is undoubtedly true that questions respecting the admissibility of evidence are entirely distinct from those which respect its sufficiency or effect. They arise in different stages of the trial, and cannot, with strict propriety, be propounded at the same time."

A recognized method of securing the limitation of evidence to its legitimate bearing is by a request for an instruction to the jury. Connecticut Mutual Life Ins. Co. v. Hillmon, 188 U. S. 208, 23 Sup. Ct. 294, 47 L. Ed. 446; Southern Pacific v. Schoer, 114 Fed. 466, 52 C. C. A. 268, 57 L. R. A. 707.

[7] But, aside from the foregoing, the evidence of the subsequent result was admissible in another aspect of the case. One of the features of the scheme to defraud charged in the indictment was the use of "false and fraudulent pretenses, representations, and promises" reasonably calculated to induce persons to believe that the purchase of the oil stock would be a safe and profitable investment of their funds. There was abundant evidence that the accused did not confine himself to a permissible puffing or commendation of the enterprise, as to which there is a limit (Horn v. United States, 182 Fed. 721, 105 C. C. A. 163); nor to representations of existing conditions with respect to the property. Had he done so, it might fairly be urged that he should not be affected by a subsequent failure beyond his control, such as a failure to find oil or an early exhaustion of the flow of wells which were sunk. The same might fairly be urged had his assurances of the future been honestly though mistakenly made. The letters and literature which he caused to be circulated through the mails for the purpose of inducing purchases of stock were filled with positive and extravagant statements of prospective and enduring value, and the evidence of a fraudulent intent in making them was clear and convincing. Among other things he represented that he regarded the stock as destined to be worth several hundred per cent. of the price asked, within a year; that the venture was said to be "a successful producing enterprise";

that certain conditions proved "that the Kern County wells will be producing oil for hundreds of years"; that experts say "this sort of thing [the running of oil from gushers into lakes] will continue in this field when the known oil fields of the world are exhausted"; that "it is estimated that under every acre of California oil lands lie over 500,000 barrels of oil"; that "you can see from the various lines of proof that we have given you just how this property proves itself to be the equal of any in California's famous field"; that the stock would be a permanent investment and a source of large income during the declining years of the purchasers; "Let Mother Earth from her stores of inexhaustible wealth be your banker;" that the records showed that the percentage of failures in that oil district was "exactly 2 per cent"; that the company will be made the greatest oil producer in the world; that investment in the stock "is no longer speculative," and so on and so on. The question "What was the outcome?" naturally suggests itself to the mind, and evidence of what happened within a reasonable time afterwards, that the predictions and assurances failed, was relevant to the issue that was being tried. Of course it remained to be shown that the accused did not act honestly, but with a fraudulent intent. If he desired to have the evidence in question accordingly limited in its application to the case it was his duty to make a seasonable and appropriate request for the purpose. Being relevant the court properly admitted it.

[8] There can be an honest, though mistaken, judgment of the future from existing conditions; even sincere but visionary optimism is allowable. But there can also be alluring suggestions and predictions of what will come to pass, put forth without reasonable warrant and with the fraudulent intent to profit by inducing belief and reliance among the credulous and uninformed. In fact, that is one of the most successful methods of defrauding well-meaning people, who hope to relieve the stress of limited incomes. It is not essential that such schemes be addressed only to cupidity or desire of ill-gotten gain. The closer they are conducted along the lines of legitimate enterprises the more effective to defraud they become. In Durland v. United States, 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709, there was an attempt to confine the statute to cases of false pretenses as at common law, in which there must be a misrepresentation as to an existing fact, but the court held that "it includes everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future. The significant fact is the intent and purpose." It was also said that it would strip the statute "of value to confine it to such cases as disclose an actual misrepresentation as to some existing fact, and exclude those in which is only the alluring of a specious and glittering promise." In commenting on the Durland Case, this court said, in Brooks v. United States, 146 Fed. 223, 76 C. C. A. 581, that:

> The statute "contemplates any scheme involving matters of enforceable or unenforceable contract, representation of facts, expression of opinions, or assurances of past, present, or future conditions, provided only it was designed and reasonably adapted to deceive and defraud. * * * If the intent and purpose is to deceive and defraud the unwary, it matters not what form the project is made to take."

Complaint is also made that the district attorney made an argument to the jury on the fact that one of the wells made some money for a time, but lasted about a year. Counsel for the accused said:

"I object to that statement, that the well lasted about a year. There was some evidence to that effect, but it was stricken out by order of the court."

As to this it is enough to say that the sole ground of objection was that the testimony to which the district attorney referred had been stricken out and was no longer in the case. Counsel was in error; the testimony had not been stricken out.

The judgment below is affirmed.

SAMUELS v. UNITED STATES.

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

No. 4475.

1. INDICTMENT AND INFORMATION ⊜98—RULES FOR DETERMINING SUFFICIENCY.

In determining the sufficiency of an indictment, each count must be treated as a whole, and not merely as a part thereof.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 269; Dec. Dig. ⊜98.]

2. POST OFFICE ⊜48(4)—USING MAILS TO DEFRAUD—INDICTMENT.

In an indictment, under Criminal Code (Act March 4, 1909, c. 321) § 215, 35 Stat. 1130 (Comp. St. 1913, § 10385), for using the mails to promote a scheme to defraud, it is not necessary to use the word "knowingly," in charging the deposit of letters in the mails by defendant, where that is necessarily implied from the other averments.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 72; Dec. Dig. ⊜48(4).]

3. POST OFFICE ⊜48(4)—USING MAILS TO DEFRAUD—INDICTMENT.

That a defendant, charged with using the mails to defraud by sending out letters and circulars containing false representations as to the virtues of a medicine made and sold by him, as shown by the letters set out in the indictment, merely copied testimonials, obtained from users, containing statements as to benefits derived from such use, does not render the indictment insufficient, where it is alleged that he knew the representations made therein to be false.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 72; Dec. Dig. ⊜48(4).]

4. CRIMINAL LAW ⊜371(1)—PROSECUTION FOR USING MAILS TO DEFRAUD—EVIDENCE OF OTHER OFFENSES.

In a prosecution for using the mails to promote a scheme to defraud, evidence of other advertisements by the defendant besides those contained in the letters set out in the indictment, but of a similar nature, as also of other false claims, is admissible on the question of fraudulent intent, especially when committed continuously and for a long period of time.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830, 831; Dec. Dig. ⊜371(1).]

5. POST OFFICE ⊂=49—PROSECUTION FOR USING MAILS TO DEFRAUD—EVIDENCE.
In such case the fact that letters sent by defendant through the mails were in response to decoy letters sent by post office inspectors does not render them inadmissible.
[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84–86; Dec. Dig. ⊂=49.]

6. CRIMINAL LAW ⊂=479—OPINION EVIDENCE—COMPETENCY OF EXPERTS.
An experienced chemist *held*, under the facts shown, qualified to testify as an expert as to the therapeutic value of a medicine which he had analyzed.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1067, 1068; Dec. Dig. ⊂=479.]

7. CRIMINAL LAW ⊂=439—PROSECUTION FOR USING MAILS TO DEFRAUD—EVIDENCE.
On the trial of a defendant, charged with using the mails to promote a scheme to defraud, by sending through the mails letters and circulars containing false representations as to the value of a medicine made and sold by him, and also that he was a great scientist, a book published by him, treating of the eye, was inadmissible to prove the latter claim, which could only be established by witnesses who were competent to testify on the subject.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1025; Dec. Dig. ⊂=439.]

8. CRIMINAL LAW ⊂=676—TRIAL—LIMITING NUMBER OF WITNESSES—DISCRETION OF COURT.
It is within the discretion of the trial court to limit the number of witnesses a defendant charged with a criminal offense may introduce on a single point in issue, and unless it appears clearly that there has been an abuse of discretion, which was prejudicial to defendant, an appellate court will not consider it cause for reversal.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1608; Dec. Dig. ⊂=676.]

9. CRIMINAL LAW ⊂=711—TRIAL—LIMITING TIME FOR ARGUMENT.
It is within the discretion of the trial court to limit the time for argument in a criminal case.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1657; Dec. Dig. ⊂=711.]

10. POST OFFICE ⊂=49—PROSECUTION FOR USING MAILS TO DEFRAUD—SUFFICIENCY OF EVIDENCE.
Evidence in a prosecution for using the mails to promote a scheme to defraud *held* sufficient to require the submission of the case to the jury.
[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84–86; Dec. Dig. ⊂=49.]

11. POST OFFICE ⊂=50—PROSECUTION FOR USING MAILS TO DEFRAUD—INSTRUCTIONS.
In a prosecution for using the mails to promote a scheme to defraud, by making representations in letters and circulars sent through the mail as to the curative properties of an article made and sold as a medicine, a vital issue is as to the intent of defendant, to which his knowledge of the truth or falsity of the representations is pertinent; and the testimony of users of the remedy as to its beneficial effect, while admissible, is not determinative of such issue, and a refusal to instruct to that effect is not error.
[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 87–89; Dec. Dig. ⊂=50.]

12. POST OFFICE ⇐50—PROSECUTION FOR USING MAILS TO DEFRAUD—INSTRUCTIONS.

Instructions given in a prosecution for using the mails to promote a scheme to defraud considered, and *held* without error.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 87-89; Dec. Dig. ⇐50.]

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

Criminal prosecution by the United States against Henry Samuels. Judgment of conviction, and defendant brings error. Affirmed.

Jean Madalene and S. B. Amidon, both of Wichita, Kan. (William W. Hooper, of Leavenworth, Kan., on the brief), for plaintiff in error.

Fred Robertson, U. S. Atty., of Kansas City, Kan. (Francis M. Brady, Asst. U. S. Atty., of Kansas City, Kan., on the brief), for the United States.

Before ADAMS and CARLAND, Circuit Judges, and TRIEBER, District Judge.

TRIEBER, District Judge. The plaintiff in error, defendant in the court below, was indicted in 11 counts for violations of section 215 of the Penal Code, and, upon a trial having been found guilty on all of the counts, prosecutes this writ of error to obtain a reversal.

There are 108 assignments of error, many of them mere repetitions. The assignments necessary to consider are: (1) The sufficiency of each of the counts in the indictment. (2) The admission of evidence offered by the government, alleged to be incompetent. (3) Rejecting certain evidence offered on behalf of the defendant. (4) Error in refusing a directed verdict of not guilty. (5) Error in limiting the number of witnesses intended to be introduced on behalf of the defendant. (6) Error in limiting counsel in their arguments to 30 minutes for each side. (7) Error in refusing special instructions asked on behalf of the defendant. (8) Errors in the charge of the court to the jury.

The scheme to defraud in each of the counts was the same. They only differ as to the contents of the letters sent through the mails, and the parties to whom they were addressed. The scheme to defraud was described as follows:

"That he, the defendant, advertised in many parts of the United States, in letters, newspapers, printed circulars, and papers, to the effect that he was a scientist, and that by reason of his scientific study and knowledge he was the originator, discoverer, owner, proprietor, and possessor of a wonderful remedy, of great value, to be used in treating many diseases of the human body; that said remedy was a colorless liquid made from a secret formula, which had taken many years of his life to accomplish, and which he alone knew, and kept as a secret; that he advertised himself as Professor H. Samuels, and said remedy was known and advertised by him under the name of 'Prof. H. Samuels Systematic Remedy,' and that, because of the many wonderful cures attributed to his said remedy by those who had used it, he had decided to merge his individual interest into a more active organization, as he was growing old, and his remedy was of such great value to suffering humanity, as claimed by his many patients, that he was unwilling to deny suffering humanity the great benefits which his systematic remedy would

bring to many people; that therefore he had placed his secret formula, from which said remedy was made, in the hands of a newly organized company, with a solemn injunction that his work should go on uninterruptedly, and the company upon whom these responsibilities now devolved, and who would henceforth prepare Prof. Samuels Systematic Remedy from his original secret formula, had been organized under the name of the 'Prof. H. Samuels Remedy Company (Not Inc.),' with headquarters at Wichita, Kan.; that by the said advertising herein mentioned he would invite, incite, solicit, and induce all people suffering with diseases to communicate with and write to said company, and that the Prof. Samuels Remedy Company would continue to prepare said remedy from the original formula, and that under their direction it would be the same preparation as he had theretofore been selling throughout the United States, which had become so well and favorably known in all parts of the Union, by reason of the beneficial use thereof, which would be and was recited and attested to and vouched for by testimonials and statements of many and various persons, in letters, advertisements, and papers which, from time to time, he had and would and did prepare and cause to be made and prepared for distribution, and distribute and cause the same to be distributed to the public generally; that he would and did represent himself to be the only living person who treats through the eye many diseases, viz., cataracts, blindness, granulated lids, sore eyes, fits, eczema, kidney and bladder troubles, catarrh and deafness, heart trouble, asthma, nervous prostration, hay fever, dropsy, tumor, paralysis, epilepsy, neuralgia, goiter, and many other diseases of the human body; that many persons had used this wonderful remedy on complicated diseases, and many other ills of various kinds, and that wonderful and apparently miraculous cures had been performed by said remedy; that complicated diseases and many other ills were banished by dropping said colorless liquid in the eye; that his remedy was based on scientific principles; that he would, by artful, cunning, misleading, and carefully prepared letters and articles and printed statements, deceive those who read them, and induce them to order and buy said Prof. H. Samuels Systematic Remedy, with the belief and understanding that it had cured and would cure the many diseases and ills hereinbefore mentioned, and thereby secure as his victims those who did not understand and know much, if anything, about science and medicine, and its effect; that by testimonials and letters which he had procured from time to time, and which he would procure from time to time, from various persons, and publish and advertise the same to the public generally in newspaper advertisements and circulars, he would and did hold out and represent to the public that he was working wonderful and remarkable cures in such diseases, and did thereby in effect represent that he was working wonderful and remarkable cures in many and various diseases of a serious kind and nature; that his medicine was a wonderful medicine of great therapeutic value, and was a valuable remedy for many diseases; that it was to be used by dropping said liquid medicine in the eye, and having it come in contact with the nerves of the eye, and its curative effects would be conducted by the nerves to the various parts of the human system; that as a part of said scheme he would and did secure the testimonials of persons who claimed themselves to have been cured of some disease by his alleged systematic remedy; that as an additional part of said scheme he would advertise to the public generally that he had deposited two thousand ($2,000) dollars in a bank of Wichita, Kan., and instructed the said bank to pay said two thousand ($2,000) dollars to the first person who would prove the testimonial letters printed in his advertisements were not genuine; that the letters, papers, and advertisements and testimonials herein mentioned are too lengthy, numerous, voluminous, and otherwise unfit to set out herein, and for that reason are not set forth; that he, the said Henry Samuels, designed and intended, by means aforesaid, to cause and induce divers and various persons, residents within the United States, to communicate and open correspondence with him, under the style and address of 'Prof. H. Samuels Remedy Company (Not Inc.), of Wichita, Kan.,' by making them believe that they might be cured or benefited by the use of his said Systematic Remedy, and, having induced and caused said persons to communicate with him as aforesaid, he further designed, by letters and circulars which he would send to said persons, to

induce them to send and forward to him, the said Henry Samuels, under the name of Prof. H. Samuels Remedy Company, many and various sums of money, money orders, checks, and property of value, for said pretended Systematic Remedy; that he, the said Henry Samuels, then and there and at all the times herein mentioned, designed and intended to unlawfully and feloniously appropriate and convert said money and property to his own use for personal gain, and to return therefor to said persons his pretended Systematic Remedy for their supposed diseases, which said remedy was of no value."

The indictment then proceeds to negative all the claims made by him:

That "he knew that many of the pretenses, promises and statements set forth in said letters, newspapers, and circulars used by him in furtherance of his said scheme and artifice to defraud were false and misleading and deceptive; and he knew that the testimonials were in reality obtained from persons who did not know whether they had been cured or not by said Systematic Remedy —all of which he, the said Henry Samuels, unlawfully and feloniously did, with the intent then and there to cheat and defraud any and all persons whomsoever might be so induced as aforesaid to become victims of his said scheme and artifice to defraud."

The indictment then charges that for the purpose of carrying out and executing the scheme and artifice to defraud he did, on certain days named in the indictment, "with the intent as aforesaid unlawfully and willfully and feloniously place and cause to be placed in the post office establishment of the United States at Wichita, Kan., in said division and district, the same being a part of the post office establishment of the United States, and an authorized depository for mail," certain letters which were addressed to the parties named in the indictment, and copies of the letters are set out in full. The letters in the first, second, third, and fourth counts are identical, but addressed to different persons and mailed on different days. The letters set out in the fifth, sixth, and eighth counts are identical, and the letters set out in the seventh, ninth, tenth, and eleventh counts are identical.

[1] In determining the sufficiency of the indictment, each count must be treated as a whole, and not merely as a part thereof. Dealy v. United States, 152 U. S. 539, 14 Sup. Ct. 680, 38 L. Ed. 545; Horn v. United States, 182 Fed. 721, 105 C. C. A. 163; Hyde v. United States, 198 Fed. 610, 119 C. C. A. 493.

[2] It is claimed that the indictment is fatally defective, because it does not charge that he deposited, or caused to be deposited, in the post office of the United States, the letters set out in the indictment "knowingly," although each count charges that he devised a scheme and artifice to defraud "unlawfully, knowingly, fraudulently, designedly, and falsely." The statute does not require it, for it does not in this connection use the word "knowingly"; and, this being a statutory offense, it is only necessary to charge it in the general language of the statute, provided that the description is accompanied by a statement of all the particulars essential to constitute the offense, or crime, and to acquaint the accused with the nature of the charge. United States v. Hess, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516; Brooks v. United States, 146 Fed. 224, 76 C. C. A. 581; Lemon v. United States, 164 Fed. 593, 90 C. C. A. 617.

It is true that, in order to constitute the offense charged, the de-

fendant must have either deposited these letters in the post office, to be carried through the mails to the parties to whom they were addressed, or caused it to be done, knowing that they were for the purpose of carrying into effect the scheme to defraud charged in the indictment. But each count did, in effect, charge it. The language used is that he "did then and there, and on or about [naming the day], with the intent as aforesaid, unlawfully and willfully and feloniously place and cause to be placed in the post office establishment of the United States," etc., the letters set out in the indictment. This clearly was sufficient. Felton v. United States, 96 U. S. 699, 24 L. Ed. 875; Spur v. United States, 174 U. S. 728–734, 19 Sup. Ct. 812, 43 L. Ed. 1150; Horn v. United States, 182 Fed. 721, 105 C. C. A. 163.

[3] It is next claimed that in the letters and advertisements the defendant only claimed what had been said, or written, to him by those who had used his preparation, and therefore these representations were not his, but those of his patients. But the gist of the offense is, not what others thought, but whether he knew them to be false. Sending them out with knowledge that they were false, he made them his own. Moses v. United States, 221 Fed. 863, 137 C. C. A. 433.

The court committed no error in overruling the motion to quash the indictment, and the motion in arrest of judgment filed after the conviction, as the indictment states all the facts with much greater particularity than the law requires, and clearly states the facts which constitute a scheme to defraud, and the use of the mails for the purpose of promoting it. Colburn v. United States, 223 Fed. 590, 139 C. C. A. 136, where Judge Adams, speaking for this court, fully summarized the law applicable to prosecutions of this class.

[4] Did the court err in the admission of the evidence offered by the government? It is claimed that the admission of the advertisements of the defendant, published in many newspapers, paying to one advertising firm as much as $175,000 in one year for this advertising, and which were sent broadcast to thousands of persons, was prejudicial error, and also the admission of the letters from various parties, claiming to suffer from many different ailments—one from a broken nose; another from rupture; another from syphilis; one from goiter; one from a bullet wound in the thigh—and asking whether or not his remedy would cure them. To these letters he replied that from the testimonials in his possession other persons had been cured from such ailments by the use of his medicine.

The medicine, as he described it in his circulars, was a clear liquid, and to be administered through the eyes, and would serve as a natural nerve vitalizer. In his replies to these letters he explained that:

> "The optic nerve is the only large nerve that comes to the surface, and the use of this medicine will affect every part of the body, thus causing the different organs of the body to perform their proper functions."

The ground assigned for the alleged error is that these claims and advertisements were not described in any of the counts of the indictment, and therefore should not have been admitted. The fact that these letters, circulars, and advertisements were not set out in the

indictment does not prevent their admissibility, in a case of this nature. As the fraudulent intent is one of the material allegations in the indictment, evidence of other and similar ventures by the accused are properly admissible as bearing on the question of intent. The intention of a person charged with a crime can hardly ever be shown by direct evidence, and for this reason it is permissible to introduce evidence of other acts of a similar nature, especially when committed continuously and for a long period of time, thereby establishing the fraudulent intent. Withaup v. United States, 127 Fed. 530, 62 C. C. A. 328; Olson v. United States, 133 Fed. 849, 67 C. C. A. 21; Colt v. United States, 190 Fed. 305, 111 C. C. A. 205; Schultz v. United States, 200 Fed. 234, 118 C. C. A. 420; Trent v. United States, 228 Fed. 648, 143 C. C. A. 170.

This also applies to the testimony that "Blind Joe," who it was claimed by the defendant, in some of his circulars, had been cured of his blindness by the use of this medicine, was not in fact so cured, but was totally blind up to the time of his death.

[5] Nor is the objection to the admissibility of the letters sent by the defendant through the mails in response to decoy letters of post office inspectors well taken. Grimm v. United States, 156 U. S. 604, 610, 15 Sup. Ct. 470, 39 L. Ed. 550; Scott v. United States, 172 U. S. 344, 19 Sup. Ct. 209, 43 L. Ed. 471; Ackley v. United States, 200 Fed. 217, 118 C. C. A. 403.

[6] It is next claimed that it was error to admit the opinion of Mr. Nelson relative to the therapeutic value of the medicine, because the witness, although he had qualified as an experienced chemist, was not shown to be qualified to testify as an expert physician. Mr. Nelson had analyzed the defendant's medicine, and testified that it was a solution of hydrant water, containing some salt and sugar, and some slight traces of calcium and magnesium phosphates, and a very minute trace of boracic acid. He was asked whether these traces were of sufficient quantity to have any therapeutic value or force. He had testified that he had not studied medicine, but that from his experience and knowledge of chemistry he knew whether the preparation had any contents that had a therapeutic value as a medicine.

There was no error in this, for it was for the jury to determine what weight to give to his evidence on that point, taking into consideration the witness' knowledge and experience. But, even if it had been error, it was not prejudicial, as four physicians of learning and experience, and who had properly qualified as experts, testified to the same effect.

Nor was it error to permit Dr. Dorsey to answer the hypothetical question put to him, as to the effect of a preparation containing the ingredients found by the chemists by proper analysis. There was nothing of an assumed character in the question. It was based upon testimony in the case.

The evidence that the defendant is not a great scientist, a man of scientific education, and a man of letters and learning, as claimed in his advertisements, and which was charged in the indictment to be untrue, was admissible, although the witness testified that his

testimony was based on an acquaintance with the defendant 20 years before, at the time when the defendant was a middle-aged man. It is unusual that a man who, when middle-aged, has no scientific training or knowledge, should in old age become a great scientist. In any event it was admissible as a circumstance, the defendant having an opportunity to show that since then he had by study become a great scientist. There was no prejudicial error.

Did the court commit error in excluding certain evidence offered by the defendant? It is claimed that the court erred in refusing to permit the defendant, on the cross-examination of Dr. Dorsey, to practically introduce Gray's work on Anatomy, by asking him question after question from that book. As this was new matter, on which Dr. Dorsey had not been examined on his direct examination, it was properly excluded. It is true the witness might have been examined as to the value of Dr. Gray's work, with which, he testified, he was familiar; but, if the defendant wanted to introduce that work as evidence, he should have offered it as his own testimony, and for that purpose he might have made Dr. Dorsey his own witness at the proper time.

[7] Nor was it error for the court to refuse to admit in evidence a copy of the defendant's publication on the eye. At best it was merely a self-serving statement. If he wanted to prove that he was a great scientist by reason of having written and published that book, he should have introduced witnesses who were qualified to testify on that point. The jury was not the proper body to examine the book and determine from it whether he was a great scientist or not. Besides no foundation had been laid to prove the real author of the book. He may have employed a scientist to write it and published it as his own work.

[8] Did the court err in limiting the number of witnesses offered by the defendant for the purpose of proving by them that they had been cured of many different ailments by the use of the defendant's preparation? It appears that, after 35 witnesses had testified on behalf of the defendant on that point, the court announced that only 6 more witnesses would be permitted to testify along that line. After these 6 witnesses had testified, the defendant wanted to introduce 20 or 25 more witnesses, some of them as to other diseases, of which, it was claimed, they had been cured by the use of this preparation, and to which no other witnesses had testified.

At best this evidence was merely cumulative, and it was a matter of discretion for the trial judge to determine whether any more witnesses would be permitted to testify after 41 witnesses had done so. This is a matter which must be left to the discretion of the trial judge, and unless it appears clearly that there had been an abuse of the discretion, which was prejudicial to the defendant, the appellate court will not consider it cause for reversal. Mergentheim v. State, 107 Ind. 567, 8 N. E. 568. In our opinion there was no such abuse.

[9] This also applies to the action of the court in limiting the time for argument, each side being given the same time. Lucas v. Commonwealth, 149 Ky. 495, 149 S. W. 861, 42 L. R. A. (N. S.) 209, a

murder trial, in which counsel were limited in their argument to 30 minutes a side. In this case the issues were few, and not complicated, and in our opinion the court did not abuse the discretion necessarily reposed in it.

[10] It is claimed that the court should have instructed the jury to return a verdict of not guilty. The testimony is very voluminous, and it will serve no useful purpose to prolong this opinion by setting it out in detail. We have carefully read and considered it, and we are satisfied that the facts established were of such a nature that it was proper for the court to submit the case to the jury for final determination.

The extravagant claims made for the preparation to cure almost all the diseases known, many of them of a nature which can only be cured by surgery; the undisputed fact that the preparation contained nothing but ordinary hydrant water of the city of Wichita, where it was prepared, with a little salt and sugar in it, the minute trace of boracic acid found in it being indigenous to the hydrant water of that city; the high price charged for it, at first $5 a bottle, afterwards $3 a bottle, when the cost of its preparation was trifling; the testimony of the physicians that it had no therapeutic value whatever—all these proofs certainly justified the submission of the case to the jury to determine whether the so-called medicine was merely a scheme to defraud, and that the mails had been used for the purpose of carrying it out.

[11] Did the court err in refusing certain instructions asked on behalf of the defendant? One of the important questions in issue was what the defendant knew to be the true facts, and not what others believed. If he knew that the medicine was not a cure for the many ailments claimed for it, and in fact for none, the fact that many of those who used it believed that it had cured them would be no defense, no more than the defendant could have been found guilty, because some of those who had used his medicine did not obtain the relief expected from it, if, as a reasonable man he honestly believed, or had reasonable cause to believe, that it possessed the curative properties he claimed for it. The evidence of his patients bore on his intent, and therefore was properly admitted by the court; but it was for the jury to determine from all the evidence what the defendant's intention was, regardless of what some, or all of his patients believed. Harrison v. United States, 200 Fed. 662, 119 C. C. A. 78; Moses v. United States, supra.

In School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90, and Post v. United States, 135 Fed. 1, 67 C. C. A. 569, 70 L. R. A. 989, relied on by the defendant, the material issues were whether mental or magnetic healers were within the meaning of the statute, when they honestly believed in the efficacy of their belief, and it was held that, as it was a recognized school of healing, believed in by a large number of people, it was not a scheme to defraud, if the defendant believed in it in good faith. It is a well-known fact that a very large and intelligent class of people believe that Christian Science, and other similar beliefs, which teach that faith

alone, without the aid of drugs or surgery, can effect cures for many diseases.

Nor is United States v. Johnson, 221 U. S. 488, 31 Sup. Ct. 627, 55 L. Ed. 823, applicable to the facts in this case. That was a prosecution for the violation of the Pure Food and Drug Act of June 30, 1906 (34 Stat. 768, c. 3915 [Comp. St. 1913, §§ 8717–8728]), and the only question for determination was whether the false statements of the curative powers of the medicine printed on the label were within the provisions of that act? The court held that they were not. By Act Aug. 23, 1912, c. 352, 37 Stat. 417 (Comp. St. 1913, § 8724), this was remedied, and in Seven Cases, Eckman's Alternatives v. United States, 239 U. S. 510, 36 Sup. Ct. 190, 60 L. Ed. ——, the Supreme Court held such false claims were within the amendatory act, and that the act was constitutional. This case also explains and distinguishes the School of Magnetic Healing Case.

Nor is Bruce v. United States, 202 Fed. 98, 120 C. C. A. 370, applicable to the facts in this case. Although there was evidence tending to show that many physicians indorsed a treatment for the morphine habit by the use of a medicine containing morphine, if administered in gradually reduced quantities, the court refused to give an instruction submitting that question to the jury. This was held to be error. In the instant case the evidence of the government tended to show that the preparation sold by the defendant, and which he claimed to be of great curative powers, was not even a medicine, and that he must have known that fact. As stated in the Seven Cases Eckman's Alternatives Case:

"That false and fraudulent representations may be made with respect to the curative effect of substances is obvious. It is said that the owner has the right to give his views regarding the effect of his drugs. But state of mind is itself a fact, and may be a material fact, and false and fraudulent representations may be made about it; and persons who make or deal in substances or compositions alleged to be curative are in a position to have superior knowledge, and may be held to good faith in their statements [citing authorities]. It cannot be said, for example, that one who should put inert matter or a worthless composition in the channels of trade, labeled or described in an accompanying circular as a cure for disease, when he knows it is not, is beyond the reach of the lawmaking power."

Other special instructions asked on behalf of the defendant, and which were refused by the court, were fully covered by the charge of the court to the jury, and those not so covered were clearly erroneous, and properly refused.

[12] It is next claimed that the court erred in its charge to the jury when it said:

"If you find beyond a reasonable doubt, from the witnesses offered here, what this remedy consisted of, then inquire whether or not a reasonable man, knowing the contents of the remedy, would or could believe it to be a curative remedy."

In determining the correctness of a general charge to the jury, it will not do to take certain excerpts and complain of these. The well-established rule is that the charge must be taken as a whole, and if, so taken, it states the law correctly, there is no cause for reversal. Horn v. United States, supra. The above excerpt was given in con-

nection with a full statement about the presumption of innocence and the burden on the government to prove all material allegations beyond a reasonable doubt, and the question submitted to the jury was whether the defendant was engaged in prosecuting a scheme and device for getting money from others for the so-called remedy, which he knew would not and could not cure the ailments of those to whom he was selling it, and for the purpose of carrying out this scheme he used the mails as charged in the indictment. The court said:

"The defendant was selling what he called a remedy, and as he was selling a remedy he is presumed to have known what it contained, and, knowing what it contained, did he believe it to be a remedy for the diseases for which he was offering it for sale? If he believed that in good faith, he had a right to conduct the business. But if, knowing the contents of this remedy, he knew it did not have the curative properties, * * * then he was using a scheme to defraud those who purchased from him. * * * Now, gentlemen, I think you understand the issues which are presented to you in this case for your determination. It is not a question in this case what others may have thought about this matter at all, except in so far as what others said or wrote might tend to prove or disprove what the defendant thought. The question is what the defendant knew and intended. If he intended to devise a scheme to defraud, or had devised one, and used the mails as charged in the different counts of this indictment in carrying out that scheme, then he must be convicted, if you believe that beyond a reasonable doubt; but, if not, he must be acquitted."

Nor did the court err in its charge to the jury when it returned for further instructions. The jury asked this question:

"Shall we follow the evidence introduced as to Mr. Samuels' belief, his own belief, in the efficacy of the treatment?"

The court in response to this question told the jury:

"Why, gentlemen, I charged you that this case depends upon—so far as whether the defendant had devised a scheme to defraud, depends upon—the character of business that the defendant was doing. So long as one honestly engages in business, although he may be mistaken, if he is honestly mistaken, this statute does not apply. This act applies to a case where one has devised a scheme to defraud others, and uses the mails in executing that scheme or attempting to execute it. Now allow me to instance. A man running a retail business may buy goods from the trade far in excess of his ability to pay for them, but if he honestly believes he can pay for them, and intends to pay for them, that is one thing; but if he buys, not intending to pay, then he is using his business as a scheme, a cloak to defraud."

Thereupon another question was asked by the jury:

"Whether or not—the question of his intelligence, the question of the use of common sense, in determining whether or not he knew whether his medicine would cure or not. In other words, we did not have any evidence as to the defendant's intelligence?"

To this question the court responded:

"Well, now, gentlemen, a jury is composed of reasonable human beings. In the absence of proof to the contrary, a jury presumes that other human beings are reasonable creatures. So, in arriving at matters of this kind, you use your intelligence. You look at motives; and where the conduct of any one is brought into controversy, and the intelligence or lack of intelligence of such person is not shown by the evidence, you presume he is a person of average intelligence or reason; that he is a reasonable creature. If, however, the question of the intelligence of the party comes up in the evidence, and there is proof on that subject, then you follow the evidence. But in the ab-

sence of any proof you presume that the person is of average intelligence, that he is a reasonable human creature."

We can see nothing prejudicial in this. The law presumes every person to be of ordinary intelligence, unless he is shown to be otherwise, and certainly a man who claims to be a great scientist, and of great expertness in medical science, would, in the absence of evidence to the contrary, be presumed to be of ordinary intelligence.

A careful examination of the voluminous record and the many authorities which able counsel have cited to us fail to show any prejudicial error.

The judgment is affirmed.

THE W. H. GILBERT.

(Circuit Court of Appeals, Sixth Circuit. April 12, 1916.)

No. 2751.

COLLISION ⊜71(2)—MOVING AND ANCHORED VESSELS—FOG.

A steamer with a tow passing down the St. Clair river in the early morning in a dense fog *held* in fault for a collision with a vessel anchored so as to leave a clear channel of 1,000 feet on the American side, and, which was continuously sounding a fog bell, on the ground that she failed to maintain an efficient and attentive lookout.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig. ⊜71(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 admiralty for collision by G. A. Garretson and S. P. Shane, receivers of the Gilchrist Transportation Company, against the steamer W. H. Gilbert; the Pittsburgh Steamship Company, claimant. Decree for libelants (211 Fed. 754), and claimant appeals. Affirmed.

This is a libel in admiralty brought by Garretson and Shane, Receivers of the Gilchrist Transportation Co., the owner of the steamer City of Genoa, against the steamer W. H. Gilbert, for damages caused by the sinking of the Genoa in a collision occurring in the channel of the St. Clair River, at a point between Sarnia, on the Canadian side, and Port Huron, on the American side, alleged to have been caused solely by fault in the navigation of the Gilbert. The Pittsburgh Steamship Co., owner of the Gilbert, answered the libel as claimant, denying that the collision was due to the fault of the Gilbert, alleging that it was caused solely by the fault of the Genoa, and claiming damages to the Gilbert; but no cross libel was filed. The Boston Insurance Co. and other underwriters, insurers of the cargo of the Genoa, filed an intervening petition setting up their claim for damages thereto. It was stipulated that if the Gilbert should be held responsible for the collision, the Pittsburgh Steamship Co. was entitled to limit its liability for damages to the libelants and interveners to the sum of $53,375.03, with interest; that the damages to the libelants, as owners of the Genoa, amounted, including interest, to $33,639.06; and that the damages to the interveners, as insurers of the cargo of the Genoa, amounted, including interest, to $82,690.05.

The trial judge found that the collision was caused solely by the fault of the Gilbert; and it was thereupon decreed that the libelants and intervening petitioners recover of the Pittsburgh Steamship Co., claimant of the Gilbert, the said sum of $53,375.03, with interest, amounting to $62,760.14,

pro rata upon their respective claims; from which decree the Pittsburgh Steamship Co. has appealed to this court.

The opinion of Day, District Judge (211 Fed. 754), clearly states the case and his conclusions thereon.

Hoyt, Dustin, Kelley, McKeehan & Andrews, of Cleveland, Ohio (H. A. Kelley and G. W. Cottrell, both of Cleveland, Ohio, of counsel), for appellant.

A. J. Gilchrist and H. D. Goulder, both of Cleveland, Ohio, for appellees.

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

SANFORD, District Judge, after making the foregoing statement of facts, delivered the opinion of the court:

It is conceded, at the outset, that as the damages to the insurers of the cargo of the Genoa, which largely exceeded the liability of the appellant, are, in the event of fault on the part of the Gilbert, a prior claim against that vessel, independently of the question of joint liability on the part of the Genoa, the only material question presented for review under this appeal is whether or not the trial court was in error in holding the collision to have been due to fault on the part of the Gilbert, regardless of whether there was also joint fault on the part of the Genoa.

On behalf of the appellant it is earnestly insisted that the evidence discloses no fault whatever in the navigation of the Gilbert, and that as to her the collision was due to inevitable accident or inscrutable fault.

A part of the testimony in the court below was taken by deposition. However, by far the greater portion was taken orally in the presence of the court; the witnesses testifying in open court, including, among others, five of the crew of the Gilbert, two of the crew of her barge and three of the crew of the Genoa.

Without determining whether the evidence sustains the conclusion of the trial judge that the Gilbert was at fault in the manner in which her course was shaped across the river in the fog at the time of the collision, causing her to over-run her expected turning place and collide with the Genoa, we are of opinion that it does sustain his conclusion that the Gilbert was in fault in failing to maintain an efficient and attentive lookout, whereby the fog bell of the Genoa might have been heard and the collision avoided.

Proceeding, as the Gilbert was, in a fog, encumbered by a tow, down the navigable channel of a much traveled river, the maintenance of an efficient and attentive lookout was imperatively required.

The undisputed testimony shows that the fog bell of the Genoa, which was of the standard size, was rung continuously from the time of her anchorage until the collision, at intervals of not exceeding two minutes, as required by law. This was shown by the testimony of the captain and three other members of the crew of the Genoa, and by four shore witnesses located at various points in Sarnia, all of whom testified, in substance, to the continuous ringing of this bell at regular

intervals. It was also heard by the mate of the tug Fischer, which came down the river from one-half to three-quarters of a mile ahead of the Gilbert. He first heard this fog bell when about two hundred feet from the docks just above Butler Street, in Port Huron, on the American side, that is, about five-eighths of a mile above the place of collision, and thereafter heard the bell continuously ringing as the tug passed down the river on the American side. It was also heard by the captain and mate of the steamer Lakeland, which came down the river ahead of the Gilbert, but on account of the fog rounded to and turned back up the river at or a little above Butler Street. Her captain heard the Genoa's fog bell when down near Butler Street; and the mate heard it both when making the turn there and also in going up the river afterwards.

According to the Gilbert's captain, she entered the fog at Butler Street at 4:35 and the collision took place at 4:40. During the five minutes that had elapsed, in which the Gilbert had traveled more than half a mile, the fog bell of the Genoa must have rung at least twice. It was not, however, heard on either of these occasions by any one on the Gilbert; neither by her captain, who was on the pilot house attending to the steering of the boat and the time at which he should make his turn; the wheelsman, who was on the pilot house giving attention to his course; the mate, who was on the pilot house with the captain and wheelsman, and states that he was merely standing as a lookout, as the captain had charge of the boat; nor the watchman, who was stationed as a lookout on the forecastle deck. This watchman was then nineteen years of age. He had been a watchman on the lake for only one year, and was then sailing his second season. He states, generally, that he was giving his entire attention to looking ahead and listening, and was standing a good lookout; but admits on cross-examination that he was not expecting to hear any bell, or anything in particular, and that if the Lakeland heard the fog bell of the Genoa over on the Port Huron side, it would have been natural that he should have heard it, and that he can not think of any explanation why he did not hear it.

It is true that the fog bell of the Genoa was located on the after side of the foremast, only eight feet above the deck, and behind her texas and pilot house, which extended five feet above the bell. While, however, this location would to a certain extent obstruct the sound of the bell in front of the vessel, we are of opinion that its location does not satisfactorily explain the failure on the part of the Gilbert to hear its ringing. Not only does the evidence fail to affirmatively disclose that the width of the forward deck houses of the Genoa were such as to interpose any obstruction to the sound of the bell in the direction from which the Gilbert was approaching, but the fact that the fog bell could be heard by a vessel approaching from this direction is demonstrated by the fact that it was in fact heard by the captain and mate of the Lakeland, while making a turn at Butler Street, at practically the same point as that at which the Gilbert entered the fog and in practically the same direction from the Genoa as that from which the Gilbert was approaching. The mate of the Fischer also

heard this fog bell ringing when he was abreast of Butler Street; although the course of the Fischer at that time was probably nearer the American shore than that afterwards taken by the Gilbert. Neither can the failure of the Gilbert to hear the Genoa's bell be satisfactorily explained on the supposition that the stern of the Genoa had swung towards the Canadian shore so as to bring her forward deck houses between the Gilbert and the location of the bell. There is no evidence whatever that the current would cause her to swing to any substantial extent; nor of any wind that would cause her thus to shift; and no evidence whatever that there was in fact any material change in her position after she had once settled down. Furthermore, the angle of incidence at which she was struck by the Gilbert, namely, about four points, or forty-five degrees, when taken in connection with the general location and the bend in the river at Sarnia, clearly shows that the Genoa was lying at the time of the collision in substantially the same position as that in which she had come to rest, that is, tailing down the stream about parallel to the dock. Nor is there anything, other than mere conjecture, to support the theory that the failure of the Gilbert to hear the bell may have been due to synchronism of sound, caused by coincidence between the ringing of the Genoa's fog bell and the sounding of the whistle which was being blown at intervals of one minute on the Gilbert; there being no evidence whatever as to this matter. There is likewise no evidence whatever to support the theory of supposed areas of inaudibility, due to atmospheric conditions, preventing the Gilbert from hearing the Genoa's bell.

The trial judge, who heard the testimony of the watchman on the Gilbert and the other members of its crew and had an opportunity to observe their appearance and demeanor, was of opinion that the watchman was young and inexperienced; that if he had properly listened for signals this accident would not have happened; and that the only reason that the fog bell of the Genoa was not heard upon the Gilbert was the inefficiency or inattention of the lookout maintained by it.

After careful consideration of all the evidence, we are of opinion that this conclusion was correct. Furthermore, independently of this conclusion on our part, we should be constrained to reach the same result, under the well settled principle in appeals in admiralty, that where the trial judge has heard the witnesses and had an opportunity of weighing their intelligence and candor, the decree of the district court will not be reversed upon questions of fact depending upon conflicting evidence, unless there is a decided preponderance against the decree. City of Cleveland v. Chisholm (6th Cir.), 90 Fed. 431, 434, 33 C. C. A. 157, and citations. This conclusion renders unnecessary a detailed consideration of the several assignments of error relied on by the appellant. And for the reasons above stated, it appearing that the Gilbert was in fault in failing to maintain a sufficient and proper lookout, whereby the fog bell of the Genoa might have been heard and the collision avoided, the decree below will be affirmed, with costs.

CIHAK v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 21, 1916.)

No. 4503.

INTOXICATING LIQUORS ⊂231—PROSECUTION FOR ILLEGAL SALE—EVIDENCE.
On the trial of a defendant charged with selling intoxicating liquor within a prohibited territory, the article sold being a liquid put up in labeled bottles, which defendant received packed in barrels, purporting on the labels to be nonintoxicating, and not shown to be a distilled, malt, or vinous liquor, where the prosecution introduced witnesses who testified that the contents of some of the bottles drank by them had an intoxicating effect, defendant was entitled to show by other witnesses that the contents of other bottles similarly labeled and from the same barrel, which they drank, had no such effect upon them; the weight of such evidence being for the jury.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 291; Dec. Dig. ⊂231.]

In Error to the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

Criminal prosecution of Frank Cihak. Judgment of conviction, and defendant brings error. Reversed.

Edward E. Wagner, of Sioux Falls, S. D. (John E. Tipton, of Geddes, S. D., and Robert J. Gamble and George J. Danforth, both of Sioux Falls, S. D., on the brief), for plaintiff in error.

E. W. Fiske, Asst. U. S. Atty., of Sioux Falls, S. D. (Robert P. Stewart, U. S. Atty., and George Philip, Asst. U. S. Atty., 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. By an agreement dated December 31, 1892, and ratified by Congress on August 15, 1894, the Yankton Tribe of Dakota or Sioux Indians ceded a portion of their reservation to the government of the United States. The record of this transaction will be found in "An act making appropriations for current and contingent expenses of the Indian Department and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-five, and for other purposes." 28 Stat. 286. By article 17 of this agreement it is provided:

"No intoxicating liquors nor other intoxicants shall ever be sold or given away upon any of the lands by this agreement ceded and sold to the United States, nor upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the treaty between the said Indians and the United States, dated April 19th, 1858, and as afterwards surveyed and set off to the said Indians. The penalty for the violation of this provision shall be such as Congress may prescribe in the act ratifying this agreement." 28 Stat. 318.

The act of Congress ratifying this agreement provided:

"That every person who shall sell or give away any intoxicating liquors or other intoxicants upon any of the lands by said agreement ceded, or upon

any of the lands included in the Yankton Sioux Indian reservation as created by the treaty of April nineteenth, eighteen hundred and fifty-eight, shall be punishable by imprisonment for not more than two years and by a fine of not more than three hundred dollars." 28 Stat. 319.

The plaintiff in error, hereafter called the defendant, was indicted, tried, convicted, and sentenced for selling intoxicating liquors upon the portion of this reservation ceded to the United States. The indictment in the first count charged sales to Arthur Stone and in the second count charged sales to Rufus Picotte. The evidence of the government showed that Arthur Stone and Rufus Picotte each bought of the defendant five bottles of a drink called Clearo. They each drank three of the bottles and turned two of them over to the authorities. One of these thus turned over was examined by Professor F. V. Rayl. He testified that he took a course in chemistry in Wabash College and was a teacher in the same branch in the high school, that he could make an analysis of liquids and determine the percentage of alcohol contained therein, and that one of the bottles of Clearo bought by either Stone or Picotte and turned over to the government had been analyzed by him and that it contained 2.23 per cent. of alcohol.

We entertain no doubt that Professor Rayl was a competent witness on this subject, but it is not for us to say that his testimony was conclusive on the defendant. The four bottles turned over to the government were produced and marked Exhibits A, B, C, and D. Each had a label upon which was printed:

"Guaranteed by Clearo Mfg. & Bottling Works under the Food and Drugs Act, June 30th, 1906.

"Sold in Temperance Communities.

"Clearo.

"[Trade-Mark]

"This is a Healthful, Refreshing, Invigorating and Satisfying Beer, made especially for use as a Temperance Beverage.

"Clearo Manufacturing and Bottling Works, Distributors.

"Be sure to keep this Bottle in a Cold Place. Chicago, Illinois."

The government called Arthur Stone, who testified:

"I drank some of it; it was beer. I drank three of the bottles that I purchased, and it had an effect upon me. I felt kind of funny, and I know the funny feeling was the result of drinking the stuff I purchased from Cihak; it made me pretty near drunk."

And on cross-examination:

"The liquor I purchased from Mr. Cihak there was called Clearo. I bought five bottles in all, and I drank three and turned over two to Mr. Obershaw. I did not drink those bottles right one after the other. I drank one, and in a little while after I drank another one, and then in a little while I drank another one. Then I purchased two and left the pool hall. As a result of drinking this Clearo I felt different to what I ordinarily did. I began to feel funny after I drank the second one. I drank those three bottles about 15 or 20 minutes apart, and within about three-quarters of an hour, then I felt funny. I told Picotte and Obershaw about feeling funny. They told me I had better quit drinking it. I got thick-tongued, so I couldn't talk good. I didn't get drunk; I just felt good."

The government then called Rufus Picotte, who testified that he bought some of the liquor from the defendant:

"I drank three, and know the taste of beer and alcohol. These three bottles which I drank gave me a funny feeling; it had the same effect that alcohol and beer usually have upon me when I drank it. I turned the other two bottles over to Mr. Obershaw; they were similar to exhibits A, B, C, and D."

And on cross-examination he testified that:

"I discovered that the drink had some effect on me when I drank the last bottle."

The defendant called Mr. Wellington Palmitier, who testified:

"On the 4th day of February, 1914, I was acquainted with and had drunk this liquor called Clearo. Q. How long had you been acquainted with that drink at that time? (Objected to unless the questions are confined to the Exhibits A, B, C, and D; no proper foundation laid.)

"The Court: Sustained. (Defendant excepted.)

"At the time I bought and drank this liquid called Clearo at the defendant's place in February, it was contained in bottles, the labels resembling those that are offered here in evidence. Q. Are you acquainted with and have you drank that kind of liquor that was purchased there out of similar bottles and bearing the same label, in all appearances the same as the liquid offered in evidence? (Objected to on the ground that no proper foundation has been laid, and the question does not call for an answer relating to the exhibits offered in evidence.)

"The Court. Do you expect to follow this up, and show by competent proof that these bottles were filled with the same kind of liquid he drank?

"Mr. Tipton: Counsel states to the court that in view of the fact that it was brought out in the evidence of the government that persons were seen there in a seemingly intoxicated condition—were seen at this defendant's pool hall drinking this kind of liquid and in a seemingly intoxicated condition —that this evidence is offered in rebuttal of that.

"The Court: The objection is sustained. (Defendant excepted.)

"Mr. Tipton: Counsel will state to the court that he now offers to prove by this witness on the stand, and by other competent witnesses, and desires to recall the defendant to show, that this liquid called Clearo is a common soft drink, ordinarily sold on the reservation, and that has been sold at this particular place since the year 1910 in bottles of this same kind, and that so far as may be known the circumstances indicate that it is the same kind of liquid as was sold to the witnesses Arthur Stone and Mr. Picotte, and offers to show that the liquid is not an intoxicating liquor and does not produce that effect.

"Mr. Fiske: Plaintiff objects to the offer, on the ground that no proper foundation has been laid for the introduction of the same, and on the further ground that any testimony relating to the contents of any liquid or liquor not contained in the Exhibits A, B, C, and D is irrelevant, incompetent, and immaterial.

"The Court: Sustained. The court is of the opinion that whether or not the liquor is intoxicating cannot be proven by showing what effect other liquors may have had, whether in the same kind of bottles or not. There is no assurance here that the liquors that were drank were of the same character as the liquors sold to these witnesses; no assurance that because a bottle is labeled Clearo that it contains Clearo. There is only one way of proving; that is, by proving the effect of it, or by an analysis. (To all of which the defendant excepted.)"

The defendant, Frank Cihak, was then recalled for further direct examination, and testified as follows:

"I bought this liquid called Clearo from the fellow where I bought the pool hall; it was in barrels; these bottles were so many each in barrels; a barrel contained 120 bottles. Q. And do you know if this liquid called

Clearo that is here is the same kind of liquid or liquor that you have been selling there right along to other people; does it come from the same barrels and bottles, the same description, bought at the same place?

"Mr. Fiske: Objected to, no proper foundation laid, the witness not having shown himself competent to testify, and on the further ground that it is immaterial.

"The Court: Sustained. (Defendant excepted.)

"Q. Mr. Cihak, have you sold to Mr. Palmitier, Mr. Janda, Mr. Hormstra, and Mr. Bousa this same kind of liquor that you sold to Arthur Stone, and have you sold to them that since December, 1914?

"Mr. Fiske: Objected to, as calling for the conclusion of the witness, and for the further reason that it is not material, unless it is shown by competent testimony that the bottles sold contained the same liquid of the same amount of alcohol as the exhibits in evidence.

"The Court: Sustained. (Defendant excepted.)

"Mr. Tipton: The defendant now at this time offers to prove by the defendant that he has sold the same kind and quantity of liquor contained in the bottles that are offered in evidence and that were sold to witnesses Stone and Picotte to the persons mentioned in his offer heretofore made, and to prove by those witnesses that they have drank this liquid in ordinary quantities and that the liquor does not produce any effects of intoxication.

"Mr. Fiske: To which offer plaintiff objects, unless the showing is made by competent testimony proving that the liquor contained in Exhibits A, B, C, and D, in evidence, is the same liquor, or the same contents, as sold to the witnesses.

"The Court: Sustained; it is immaterial. (Defendant excepted.)"

There is nothing in the record to show that the liquors in question were malt or fermented liquors. Under such circumstances it is usually requisite to show whether or not the liquors were intoxicating. In Bell v. State, 91 Ga. 227, 18 S. E. 288, it was held a conviction could not be sustained for the sale of rice beer, without proof that rice beer was intoxicating. The same was in effect held in Connolly v. Atlanta, 79 Ga. 664, 4 S. E. 263, in reference to the sale of New Era beer, and in Com. v. Gavin, 160 Mass. 523, 36 N. E. 484, and Com. v. O'Keane, 152 Mass. 584, 26 N. E. 97, in reference to hop beer, and in Com. v. Blos, 116 Mass. 56, with reference to Schenck beer, and in Marks v. State, 159 Ala. 71, 48 South. 864, 133 Am. St. Rep. 20, in reference to mead or metheglin, and in Klare v. State, 43 Ind. 483, in reference to common brewer's beer, and in Gourley v. Com., 140 Ky. 221, 131 S. W. 34, 48 L. R. A. (N. S.) 315, with reference to malt mead.

We do not understand the court below held that evidence was not admissible as to the intoxicating effect of liquors other than distilled, malt, or vinous liquors, the character of which is so well known that the courts take judicial notice of it; but the court seemed to think that the identification of the liquors here sold and the liquor sold to the other witnesses was not sufficient. We can but think the court erred in its ruling on this subject. The liquors were acquired in bottles in barrels and were similarly marked, and we think that, in the absence of evidence to the contrary, they should have been assumed to be of the same character as those sold to Stone and Picotte. The government had been allowed to offer evidence of the effect of the liquor sold to Stone and Picotte upon the parties who consumed it, and the like evidence should have been admitted for the defendant; but we would not be understood as holding that it is admissible solely because

the government had offered the same class of evidence. We think it was admissible by the defense for whatever it was worth, even though the government had offered no evidence of this particular class. We realize that liquors may be intoxicating within the meaning of the law, and yet, taken in ordinary quantities, have substantially no effect upon a given witness, by reason of his long use of intoxicating liquors; but that only tends to affect the weight of the evidence, not its admissibility.

We cannot agree with the District Court that when liquors are shipped in bottles in barrels, and are all labeled alike, and there is no evidence but that they are of the same character, and evidence is offered that some of the bottles contained liquor which was intoxicating, it is not admissible to show the effect of other of the same class of liquors upon others, although, of course, the jury must determine in each case whether the liquors were in fact the same or not.

There are many other questions presented; but they may not again arise, and we will not consider them.

The case is reversed and remanded, with directions to the trial court to set aside the verdict and grant a new trial.

KLEIST v. BREITUNG et ux.

(Circuit Court of Appeals, Second Circuit. April 11, 1916.)

No. 215.

1. HUSBAND AND WIFE ⟸333(9)—ACTION FOR ALIENATION OF WIFE—SUFFICIENCY OF EVIDENCE.

Evidence *held* insufficient to show that defendants, who were the parents of plaintiff's wife, through malice or other improper motives, alienated her affections from plaintiff, or in fact that they tried in any way to so alienate her affections.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1124; Dec. Dig. ⟸333(9).]

2. HUSBAND AND WIFE ⟸324—ALIENATION OF WIFE—RIGHT OF ACTION AGAINST WIFE'S PARENTS.

Parents are justified in giving counsel and advice to a daughter, who has contracted a marriage with a man who is believed by them to be wholly unfitted to make her happy and to support her properly, and if they act without malice, and are prompted by affection for their daughter and solicitude for her health and happiness, they cannot be held liable for alienation.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1118; Dec. Dig. ⟸324.]

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

Action at law by Max Frederick Kleist against Edward N. Breitung and Charlotte M. Breitung. Judgment for defendants, and plaintiff brings error. Affirmed.

E. C. Crowley, of New York City, for plaintiff in error.

Marvin, Hooker & Roosevelt, of New York City (Delancey Nicoll and Courtland V. Anable, both of New York City, S. W. Shaull, of Tropico,

Cal., and Henry S. Hooker, of New York City, of counsel), for defendants in error.

Before COXE and WARD, Circuit Judges, and MAYER, District Judge.

COXE, Circuit Judge. [1] There can be no doubt that the secret marriage contracted between the plaintiff and the defendants' daughter was a mesalliance calculated to excite the gravest apprehensions for the future happiness of their daughter who was their only child. The plaintiff was five years her senior and had been employed as a coachman by a family residing next door to the defendants at Marquette, Mich., and was intimate with their servants. The marriage took place in New York and was not discovered by the defendants until a week later, while they were guests of the St. Regis hotel. The first interview between the plaintiff and the defendants occurred at the hotel on December 2, 1913. The conduct of the defendants on that and subsequent occasions must be gauged by their disappointment, mortification and chagrin on finding that their only daughter had contracted a marriage which in all probability would wreck her happiness and end in disaster. The words used by a distracted mother in such circumstances may be attributed as well to grief at the discovery that her daughter's career has ended in an unfortunate marriage, as to malice. That a woman in such circumstances should be calm, judicial and friendly at her first interview with the man who has caused her this mortification and sorrow is hardly to be expected. It is alleged that she said to the plaintiff:

"We are going to annul the marriage and if you don't annul it, why she will get a divorce from you anyway."

That she said this is denied by the defendants, but, assuming that it was said, it does not show malice, but rather a very limited knowledge of the law on the part of an agitated mother. It was perfectly natural that both the defendants should inquire into the details of the marriage for the purpose of having it annulled if illegal. The plaintiff's testimony that Breitung threatened to have him arrested for stealing his (Breitung's) silk socks is in the same category. If the threat were made seriously it was while Breitung was still angry over the discovery of the secret marriage. Nothing ever came of the threat and both parties, apparently, agreed to the fulfillment of the antenuptial agreement between the plaintiff and Juliet that she should live at home until he was able to care for her properly, and in the meantime the marriage was to be kept a secret. Breitung promised to get the plaintiff employment and offered him a place in a mine in New Mexico where he could learn mining engineering. If he made good he was to have Juliet in six months and was to correspond with her in the meantime. The plaintiff testified:

"When I accepted the position Mrs. Breitung put her arm around me, told me 'I hope you will do well down in this new place and I hope Juliet will be with you some day.'"

All this seems wholly incompatible with the presence of malice. The pretense that the defendants kept the young people apart is not

sustained by the proof, especially in view of the testimony of the plaintiff. On cross-examination he was asked as follows:

"Q. Now, Kleist, is it not true that your wife and yourself made an agreement to get married and not to live together? A. Yes, sir, for a short time until she came out in society. Q. Is it not true that the agreement was that you were to get married and not to live together until you were established and able to support her? A. Yes, I think we had that agreement between us. Q. And that in the meanwhile she was to live with her parents? A. Yes, she was to go back to live with them. Q. And you were to find employment and establish yourself in life so that you could support her? A. Yes, until she came out in society. Q. Until you were able to support her, wasn't that the agreement? A. No, not all of it. Q. Was not that a part of it? A. As soon as she came out in society whether I had a position or not she would come with me."

Up to the time that the plaintiff left New York, on Christmas Day, 1913, there is no proof that the wife's affections had been alienated. In answer to the motion to dismiss the complaint at the close of the evidence, counsel for the plaintiff stated as follows:

"Then, thirdly, we have the fact that up to the time of the departure of the plaintiff for the West on Christmas Day, 1913, the love continued; that is to say, one of the most ardent of all the love letters was written on the night before Christmas and received Christmas Day, so that we have, up to the time of the plaintiff's departure for the West, this condition of affection continuing, so that the change that has occurred must have begun during the absence of the plaintiff."

Manifestly the assertion that the alleged improper acts of the defendants, prior to the plaintiff's departure for the West, show a desire to alienate his wife's affections must be abandoned, in view of that admission that all the efforts of the defendants had utterly failed to alienate her affections.

There is absolutely no testimony of any act on the part of the defendants, or either of them, after the plaintiff's departure which can be regarded as an attempt to alienate their daughter's affections. Her account of the conversations with the plaintiff after his return from the southwest does not indicate that there was any disposition on the part of the defendants, or either of them, to influence her against her husband. The first talk was over the telephone, Juliet having called up the plaintiff to make an engagement with him to meet her at the Waldorf hotel on the following day.

At the meeting the next day the plaintiff, Juliet and her father were present. The plaintiff's account of this interview is as follows:

"I was rather glad to see Juliet and I just shook hands with her. She seemed to back away from me, and I said, 'What is all the trouble?' She said, 'I just wanted to tell you that I don't love you any more.' I says, 'That's funny; you loved me before I went away.' 'Well,' she says, 'I realize that I made a mistake.' I says, 'Won't you come with me now; I can make you happy?' She says, 'No, I don't think I will.' Her father then spoke up and says, 'Yes, Juliet, you better go along, probably he can make you happy.'"

Surely there was nothing in all this to indicate malice on the part of the father; so far as it went his advice to his daughter was to make an attempt to live with her husband. In short, we are convinced that should the case be sent back for a new trial and should a ver-

dict be rendered for the plaintiff, it would be the duty of the court to set it aside as against the evidence.

An examination of the testimony convinces us that, in view of all the circumstances, the conduct of the defendants was more conservative than that which would naturally be expected from the majority of parents. The difference in surroundings, the inability of plaintiff to support his wife, the secrecy of the wedding and all the circumstances connected with the marriage were calculated to produce outbursts of anger, disappointment and resentment. To the parents this ill-advised marriage may well have seemed the end of their daughter's happiness and they would have been less than human if they had not given expression to their resentment at the sudden termination of the ambitious career which they had probably marked out for their daughter. When, however, the first outbursts of anger were over, their conduct indicated a determination to make the best of a deplorable situation. As might be expected, the daughter's opinion changed, not from anything the defendants said or did, but because she had discovered that the plaintiff was not the Sir Galahad she had imagined him to be. His letter of March 24th from New Mexico may have had a tendency to enlighten her on this subject. He says, inter alia:

"It is terrible for you to lie so much do you not know that you will be sorry for it. It will hurt you and your family very much. If they would only do the right thing by me. *But* I have to labor like a Mexican Single Jacking in a mine. I am strong and have stood it without a murmur but I will stand it no longer. Have telegrams telling me to return to New York immediately which I *will do.* If I do not hear from you immediately. It is best that I get a divorce from you and you let free I love you dearly Juliet and you did too, when I left. I still have all the letters you wrote me. It will be evidence. *I do not wish to make trouble in no way.* But I have been mistreated in many ways.

"Your husband, Max."

[2] The law applicable to these facts is very clear and is, perhaps, nowhere better stated than in Hutchison v. Peck, 5 Johnson, 196. The opinion of Chief Justice Kent is quoted by both parties and is as follows:

"I am also for a new trial. If the defendant did not stand in the relation of father to the plaintiff's wife, I should not, perhaps, be inclined to interfere with the verdict. But that relationship gives the case a new and peculiar interest; this is the first action of the kind I have met with, brought against the father. A father's house is always open to his children; and whether they be married or unmarried, it is still to them a refuge from evil, and a consolation in distress. Natural affection establishes and consecrates this asylum. The father is under even a legal obligation to maintain his children and grandchildren, if he be competent, and they unable to maintain themselves; and according to Lord Coke it is 'nature's profession to assist, maintain and console the child.' I should require, therefore, more proof to sustain the action against the father than against a stranger. It ought to appear either that he detains the wife against her will, or that he entices her away from her husband from improper motives. Bad or unworthy motives cannot be presumed. They ought to be positively shown, or necessarily deduced from the facts and circumstances detailed. This principle appears to me to preserve in due dependence upon each other and to maintain in harmony the equally strong and sacred interests of the parent and the husband. The quo animo ought, then, in this case, to have been made the test of inquiry and the rule of decision. The Judge told the jury that if the defendant was not actuated by improper motives, it would go very far in mitigation of dam-

ages. I think the instruction should have gone further, and the jury have been informed that, in such a case, the verdict should be for the defendant. I am, accordingly, of the opinion that a new trial should be awarded, with costs to abide the event of the suit."

In Multer v. Knibbs, 193 Mass. 556, 79 N. E. 762, 9 L. R. A. (N. S.) 322, 9 Ann. Cas. 958, the court says:

"There is a material difference between the acts of a parent and those of a mere intermeddler. * * * It is proper for him to give to his daughter such advice and to bring such motives of persuasion or inducement to bear upon her as he fairly and honestly considers to be called for by her best interests. * * * And the burden is upon the plaintiff to show that the defendant has been prompted by malice in what he has said and done, and to overcome the presumption that he acted under the influence of natural affection and for what he believed to be the real good of his child."

In Beisel v. Gerlach, 221 Pa. 232, 70 Atl. 721, 18 L. R. A. (N. S.) 516, the court said:

"In actions of this character the question is whether the father was moved by malice and without justification, or by a proper parental regard for the welfare and happiness of his child. * * * A jury in the absence of sufficient evidence should not be permitted to guess at or conjecture about the rights and liabilities of parents and children in this class of cases."

The law is clearly established, at least in this jurisdiction, that parents are justified in giving counsel and advice to a daughter who has contracted a marriage with a man who is believed by her father to be wholly unfitted to make her happy and to support her properly. If he acts without malice and is prompted by affection for his daughter and solicitude for her health and happiness, he cannot be held liable for alienation. In short, the law takes a practical common-sense view of such situations as are here disclosed; it recognizes the relation of parent and child as well as the relation of husband and wife and in no case has a parent, who has acted in good faith, been mulcted in damages for advising, protecting and sheltering a daughter who has contracted an ill-advised marriage with a man who is unable to support her properly.

The judgment is affirmed with costs.

CONTINENTAL PUBLIC WORKS CO. v. STEIN.

(Circuit Court of Appeals, Second Circuit. April 18, 1916.)

No. 180.

1. MASTER AND SERVANT ⇐121(3)—INJURIES TO SERVANT—STATUTES—"FACTORY"—"MANUFACTURING."

Labor Law N. Y. (Consol. Laws, c. 31) § 2 defined the term "factory" as including any mill, workshop, or other manufacturing or business establishment where one or more persons are employed at labor, and Laws 1914, c. 512, amends it so as to declare that the term "factory" shall be construed to include any mill, workshop, or any manufacturing or business establishment, and all buildings, sheds, structures, or other places used for or in connection therewith, where one or more persons are employed at labor, and that work shall be deemed to be done for

factory wherever it is done at any place upon work of the factory upon any materials entering into the product of the factory. Public contractors, in laying a highway, used an asphalt mixing machine, which mixed stone and asphalt for use in the road, and which was connected with other appliances for use in laying the product. *Held*, that covering the stone with asphalt was "manufacturing" and the appliances and plant used therewith constituted a "factory," within the act.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 229; Dec. Dig. ⊂⊃121(3).

For other definitions, see Words and Phrases, First and Second Series, Factory; Manufacture.]

2. MASTER AND SERVANT ⊂⊃286(22)—GUARDING MACHINERY—FACTORY—QUESTION OF LAW.

Whether a plant, consisting of machinery used in preparing road materials, constitutes a factory, within Labor Law N. Y. § 2, as amended by Laws 1914, c. 512, is a question of law for the court.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1028; Dec. Dig. ⊂⊃286(22).]

3. APPEAL AND ERROR ⊂⊃1062(4)—REVIEW—HARMLESS ERROR.

The erroneous submission of a question of law to the jury is harmless, where the jury correctly decided the question.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4215–4217; Dec. Dig. ⊂⊃1062(4).]

4. MASTER AND SERVANT ⊂⊃121(1)—INJURIES TO SERVANT—FAILURE TO GUARD APPLIANCES.

Under Labor Law N. Y. § 81, as amended by Laws 1913, c. 286, requiring all screws and parts of revolving shafting to be countersunk, protected with suitable covering, and all machinery to be guarded, and section 200, making an employer liable when an injury to a servant results from a defect in the ways, works, machinery, or plant, which arose, or which had not been remedied, because of the negligence of the employer, an employer, whose premises constituted a factory within the act, is liable for any injury resulting from failure to properly guard machinery; the violation of the act constituting negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 228; Dec. Dig. ⊂⊃121(1).]

5. APPEAL AND ERROR ⊂⊃169—PRESENTATION OF GROUND OF REVIEW IN COURT BELOW—NECESSITY.

Questions not raised below, ruled on, and to which no exceptions were preserved, cannot be raised by assignments of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1018–1034; Dec. Dig. ⊂⊃169.]

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

Action by William Ulysses Stein against the Continental Public Works Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Alfred E. Holmes, of New York City (Clayton J. Heermance, of New York City, of counsel), for plaintiff in error.

C. Andrade, Jr., of New York City, for defendant in error.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. This action was brought to recover for personal injuries and the plaintiff below, hereinafter referred to as plaintiff, obtained a verdict in the sum of $2,250. The action was

brought under a common-law count and under the Labor Law of the state of New York.

The plaintiff was employed by defendant in its asphalt mixing plant at Ashokan, N. Y. The defendant was engaged in laying a public highway, and in the prosecution of its work used what is commonly termed an asphalt mixer, in which asphalt and stone were mixed together and the stone was covered with asphalt as it passed through the machine. The plant consisted of a number of different machines, such as an engine, portable boiler, road rollers, a series of drums, elevators, measuring box, and a mixing machine. These were united to form one plant, and were connected and operated by various sprockets, shafts, driving chains, etc.

The plaintiff had been in the employment of defendant since the year 1911. At the time of the accident, which happened on Sunday, October 19, 1913, the plaintiff was engaged in the supervision, installation, and operation of the asphalt machinery. After the machinery had been set up under his direction the plant was put into operation on Saturday, the day prior to the accident, and several wagon loads of asphalt were made. On Sunday more asphalt was produced, and the machinery was then shut down on account of the weather. It had been found that the machinery did not work satisfactorily; that there was a chain rubbing on an angle iron. The plaintiff had called in a blacksmith to show him how to remedy the defect. He had his coat thrown over his arm, and while stooping down and pointing to the place where the chain rubbed the angle iron his coat was caught against an exposed set screw, and he was pulled down and against the machine, and suffered the injury for which the action is brought. The exposed screw which caused the injury projected about three-quarters of an inch from the face of the collar, and was not protected as required by section 81 of the New York Labor Law, as amended by chapter 286 of Laws of 1913, which reads as follows:

"Protection of Employés Operating Machinery; Dust Creating Machinery; Lighting of Factories and Workrooms.

"1. The owner or person in charge of a factory where machinery is used, shall provide, as may be required by the rules and regulations of the Industrial Board, belt shifters or other mechanical contrivances for the purpose of throwing on or off belts on pulleys. * * * All set screws, keys, bolts and all parts projecting beyond the surface of revolving shafting shall be countersunk or provided with suitable covering, and machinery of every description shall be properly guarded and provided with proper safety appliances or devices. * * *"

And section 200 of the Labor Law makes the employer liable:

"When personal injury is caused to an employé who is himself in the exercise of due care and diligence at the time:

"1. By reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer which arose from or had not been discovered or remedied owing to the negligence of the employer or of any person in the service of the employer and entrusted by him with the duty of seeing that the ways, works, machinery, or plant, were in proper condition."

The plaintiff's complaint sets up two causes of action: (1) Under the common law; and (2) under the Labor Law of New York.

[1-3] We shall consider whether under the Labor Law the plaintiff was entitled to recover. The defendant insists that the asphalt mixer was not a factory under that law. The statutory provisions define the term. The law of 1909 (chapter 36, § 2) reads as follows:

"Factory. The term 'factory' when used in this chapter, shall be construed to include also any mill, workshop or other manufacturing or business establishment where one or more persons are employed at labor."

This section was further amended by chapter 512 of the Laws of 1914 to read as follows:

"Factory; work for a factory. The term 'factory,' when used in this chapter, shall be construed to include any mill, workshop, or other manufacturing or business establishment and all buildings, sheds, structures or other places used for or in connection therewith, where one or more persons are employed at labor, except power houses, * * * sheds and other structures owned or operated by a public service corporation, other than construction or repair shops, subject to the jurisdiction of the public service commission under the public service commissions law. Work shall be deemed to be done for a factory within the meaning of this chapter whenever it is done at any place, upon the work of a factory or upon any of the materials entering into the product of the factory, whether under contract or arrangement with any person in charge of or connected with such factory directly or indirectly through the instrumentality of one or more contractors or other third persons."

The New York Court of Appeals, in Shannahan v. Empire Engineering Co., 204 N. Y. 543, 98 N. E. 9, 44 L. R. A. (N. S.) 1185, has defined a "factory" as follows:

"A factory is a structure or plant where something is made or manufactured from raw or partly wrought materials into forms suitable for use. This is the primary definition, which was extended by the statute so as to include any 'mill, workshop or other manufacturing or business establishment where one or more persons are employed at labor.' The term 'business establishment,' as thus used, means one resembling a mill, workshop, or other manufacturing establishment. It is confined to things of the same general character as those named. It does not mean all business establishments where one or more persons are employed at labor, but only those engaged to some extent at least in manufacturing of some kind. Obviously it does not include a hotel, grocery, store, and many other business establishments where one or more persons are employed at labor."

We have no doubt that the business in which the defendant engaged in running asphalt and stone through its "mixer" and covering the stone with asphalt as it passed through the machine, thus producing a product to be used in constructing a street, was that of "manufacturing." And if a factory is a plant "where something is made or manufactured from raw or partly wrought materials into forms suitable for use," then this plant where the accident occurred was a "factory" under the act.

The trial court submitted to the jury the question of whether the defendant's plant is a factory. In this the court was in error. Whether or not it is a factory is a question of law. Casey v. Barber Asphalt Co., 202 Fed. 1, 120 C. C. A. 243. But as the jury reached the right conclusion no harm was done.

[4] As the place is a factory within the meaning of the Labor Law, then the question is whether the defendant complied with that provision of the law which requires that all set screws and all parts projecting beyond the surface of revolving shafting shall be counter-

sunk or provided with suitable covering and that all machinery shall be properly guarded, etc. The evidence clearly shows that there was an exposed set screw on a revolving shaft. That fact is not seriously disputed. The superintendent of the work, one Watson, called by defendant, was asked on cross-examination whether he knew that the machine had exposed set screws, and replied: "I knew that that shaft had exposed set screws."

The trial judge charged the jury as respects this law as follows:

"An employer who violates this law is guilty of negligence, and you do not need to bother as to whether you think it is negligence or do not think it is negligence to have set screws exposed, and under those circumstances the law says that it is his duty to do it, and if he violates that duty he is liable for the consequences."

This was strictly in accordance with the understanding of the courts as to the effect of the statute. The employer must comply with its requirements at his peril. If he does not, he must answer for the injuries which are caused by his failure to do what the statute made it his duty to do. Violation of the statute is per se proof of negligence. We placed this construction on the act in Steel & Masonry Contracting Co. v. Reilly, 210 Fed. 437, 127 C. C. A. 169 (1913). And such is the construction which the courts of New York put on it. They hold the act mandatory where it is practicable to guard the machine, and the burden of showing that it is impracticable to guard it, or that its location removes it from danger to employés, is upon the person or corporation maintaining it. Scott v. International Paper Co., 204 N. Y. 49, 97 N. E. 413; Welch v. Waterbury, 206 N. Y. 522, 100 N. E. 426; Amberg v. Kinley, 214 N. Y. 531, 108 N. E. 830, L. R. A. 1915E, 519. And as in the case at bar there was no claim made and no proof introduced to show that it was not practicable to guard the machine, or that its location removed it from danger to employés, we think the trial judge was justified in saying that in violating the act as it did, it was liable as a matter of law.

It is said that section 81 of the Labor Law is inapplicable, because the injury happened while the machinery was being installed. But a witness called by the defendant was asked whether, just before this accident occurred, the plant had been completed, and he replied that "it was complete." And on cross-examination he was asked: "On October 19, 1913, I understand that this plant was erected and completed and ready for operation?" To which he replied: "It was; yes."

[5] There are 36 assignments of error, and only 4 are based on an exception. The law is well settled in the federal courts that an assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the court below and rulings asked thereon. 2 Desty's Federal Procedure, 1265; Ansbro v. United States, 159 U. S. 695, 16 Sup. Ct. 187, 40 L. Ed. 310; Norris v. Jackson, 9 Wall. 125, 19 L. Ed. 608. And as to the assignments of error based on exceptions actually taken we see in none of them any reason for sending this case back for a new trial. If they were errors, and we do not decide that they were, they were not prejudicial.

Judgment affirmed.

HAWGOOD & AVERY TRANSIT CO. v. MEAFORD TRANSP. CO.

SAME v. WILLIAMS.

(Circuit Court of Appeals, Sixth Circuit. May 10, 1916.)

Nos. 2741, 2811.

1. COLLISION ⟸123—BREAKING OF RUDDER—PRESUMPTION AND BURDEN OF PROOF.

Where a collision was caused by the breaking of the rudderstock of one of the vessels, there is a presumption of fault on her part, and she has the burden of proof to establish the defense of inevitable accident.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 259–261; Dec. Dig. ⟸123.]

2. COLLISION ⟸125—BREAKING OF RUDDERSTOCK.

Evidence *held* insufficient to sustain the burden resting upon a vessel to prove the breaking of her rudderstock, which caused a collision, was due to inevitable accident, resulting from latent defects in the stock, but rather tending to show that the stock was insufficient in size; it being a 9-inch stock placed in the vessel when she was originally built, although she had been rebuilt, her draft and tonnage increased, and her length increased from 360 feet to 432 feet, which under the classification of the Great Lakes Registry required a stock 10 inches in diameter.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 266–279; Dec. Dig. ⟸125.]

Evans, District Judge, dissenting.

Appeals from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Suit in admiralty for collision by the Meaford Transportation Company, owner of the steamer Bothnia, against the steamer S. S. Curry, the Hawgood & Avery Transit Company, claimant, and Ellen Williams, administratrix of the estate of William Arthur Williams, deceased, intervener. Decrees for libelant and intervener, and claimant appeals. Affirmed.

H. D. Goulder, of Cleveland, Ohio, for appellant.

C. E. Kremer, of Chicago, Ill., for appellees Meaford Transp. Co. and others.

G. L. Canfield, of Detroit, Mich., for appellee Williams.

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

KNAPPEN, Circuit Judge. The steamer Bothnia, owned by the Meaford Transportation Company, suffered collision in the St. Clair river with the steamer Curry, owned by the Hawgood & Avery Transit Company, resulting in the sinking of the Bothnia and the death of one of her crew. The Bothnia's owner filed libel (No. 2741) on account of damages to the ship and her cargo and the losses incurred by members of her crew. The administratrix of the deceased seaman filed libel (No. 2811) to recover for his death, right of action for negligent injuries causing death being given by the Michigan statute. 3 Comp. Laws Mich. §§ 10427 and 10428.

In each case, the District Court found the Curry solely at fault, and decreed accordingly. The collision occurred at about midday; the Bothnia was downbound and on the American side; the Curry was upbound and in about the middle of the navigable channel, which at this point was about 800 feet wide. Shortly before the collision the two steamers had made a port to port passing agreement. The steamer Mackinac, also upbound and astern of the Curry, had made an agreement with the latter to pass her on her starboard hand. As the Mackinac was overhauling the Curry, the latter sheered sharply to port, striking the Bothnia. The sheer was occasioned by the breaking of the Curry's rudderstock (the shaft which supports and operates the rudder blade) and the resulting loss of the rudder. The sole fault on the Curry's part now relied on is the insufficiency of her rudderstock in size and strength. In each case the defense is inevitable accident due to hidden defects in the stock. In both cases the important testimony was taken in the presence of the trial judge, who found that the rudderstock contained originally no inherent defect, and that its breaking was due solely to weakness resulting from insufficient size. The Curry's owner brought in the Mackinac in an attempt to establish her liability for the damage occasioned by the sinking of the Bothnia, as well as the injuries sustained by the Curry; but the Mackinac was exonerated and she has passed out of the case. There is no claim that the Bothnia was in fault.

[1] The manner of the accident raises a presumption of negligence, and the burden of establishing inevitable accident rests upon the Curry. We need only refer to the decisions of this court in The Olympia, 61 Fed. 120, 122, 9 C. C. A. 393; Bradley v. Sullivan, 209 Fed. 833, 834, 126 C. C. A. 557; The Steamer E. M. Peck, 228 Fed. 481, 143 C. C. A. 63.

The hidden defects relied upon by respondent are the alleged presence of an excessive amount of slag or cinder in and undue crystallization of the metal of the stock. The evidence fails to satisfy us that there was any undue amount of slag or cinder. While two expert witnesses for respondent testified to the discovery of particles of slag or cinder at the point of the break, one of these witnesses said it occurs "in that sort of iron generally," and that he saw nothing wrong except the "granular formation" or crystallization; and while the other witness, after testifying that the presence of slag in this kind of iron is common, in reply to a question whether "there is an unusual amount of slag there," said, "I think there is," we are not impressed that such was the case. The normal life of a rudderstock is at least the life of the ship.

It is beyond dispute, however, that the break was due to abnormal crystallization; that long-continued vibration would tend to crystallize the iron; and that long-continued use of the stock "beyond its ordinary power of elasticity" would sufficiently account for the excessive crystallization found in the metal of the stock at the point of fracture. It is also beyond dispute that crystallization from use would be more rapid if the stock was too small or weak. The only question is whether there was excessive crystallization inherent in the manu-

facture, or whether the condition was the result of long-continued and excessive strain.

Apart from the question whether the rudderstock was large enough to conform to safe practice, the evidence, in our opinion, more strongly tended to show that the break resulted from weakness due to long-continued strain, rather than from defects originally inherent in the metal. One of respondent's expert witnesses speaks of the crystallization found as "a granular formation through the vibration and aging of it," and gives it as his opinion that the break was due to "a long course of vibrations." There was evidence of some wear just below the clamp, where the stock broke, as well as some "slip bands" in the place of fracture whose presence was said to be due to use. Unless, then, it is affirmatively established that the stock was large enough for the use to which it was put, the defense of latent defect fails.

The Curry, as built in 1893, was 360 feet between perpendiculars; her beam was 45 feet, her depth 26 feet, her certified tonnage about 3,200, her draft 15 to 16 feet, and her speed about 15 miles; her rudderstock was 9 inches in diameter. Later, as the channels were deepened, her tonnage was increased to 3,500, her draft then being about 16 feet. As the channels were still later deepened, the tonnage was increased to about 4,800, when she drew about 18 feet. In 1905 she was cut in two amidships, and 72 feet inserted, her length being thus 432 feet. Her beam and depth were unchanged. Her engines were moved aft (one of them taken out), her power reduced one-third, and her speed brought down to about 10 miles. Her rudder area was increased about 5 per cent. (an added weight of about 750 pounds), but the old rudderstock was retained without change. Since she was lengthened she has carried nearly 7,000 tons and has drawn at times 20 feet. At the time of the collision she was carrying 6,200 tons of coal and drew 17 feet 6 inches fore and aft. The Great Lakes Registry was established in 1896, three years after the Curry was built and nine years before she was rebuilt. Seventy-five to 90 per cent. of the boats on the Great Lakes follow the classifications of the Great Lakes Registry, whose rules, made by a committee of shipbuilders and experts, call for a 10-inch rudderstock for a vessel 432 feet long. As the strength of stocks varies as the squares of their diameters, a 10-inch stock has practically 25 per cent. more strength than a 9-inch stock—or as 100 is to 81.

If the Great Lakes classification is to be accepted, the defense of inevitable accident fails. But respondent presents several reasons why that classification should not be followed. In the first place, it is alleged that according to the rules of the Lloyds, the British Corporation, and the American Bureau of Shipping, a 9-inch rudderstock or less is called for by the Curry as rebuilt; but the vessels built under these classifications are designed almost entirely for ocean service, and it seems clear that in the Great Lakes service larger rudderstocks are required than in ocean service, on account of the greater strain in the lake service, due to the necessity of turning the vessel quickly in meeting and passing other vessels (as well as in frequent docking), often in narrow and sometimes in tortuous river channels, and against a cur-

rent, frequently requiring a hard and sudden putting over of the rudder.

It is also urged that the Great Lakes classification of rudderstock sizes is inaccurate, in that it is based solely on the length of the vessel, and so fails to take into account, as asserted, the factors recognized by the other organizations referred to, as well as by text-writers, as controlling—such factors being generally the area of the rudder blade, the "center of effort" of the rudder, and the speed of the vessel, its length being said to be taken into account only as it affects the area of the rudder blade.

But assuming that the factors mentioned are theoretically the proper ones to be taken into account, and that formulas based thereon yield more or less accurate results, yet such formulas are at the best only theoretical and approximate; for, as said by one of respondent's witnesses, it is impossible to determine accurately the center of pressure on the rudder and to compute accurately the pressure on it. Manifestly, an increased strain on the blade increases the strain on the stock, and the pressure and strain vary with the angle of the blade and are increased by hard and sudden putting over of the rudder. We are also satisfied that the resistance offered by the vessel's displacement, at least to the extent represented by the plane of its submerged area, whose factors are length and depth, directly affects the strain upon the stock, especially in case of the sudden and hard putting over of the rudder, as when the vessel is being handled in a heavy sea or in "close quarters," or, even if the effect of the displacement plane upon the strains to the rudderstock should be called indirect, a relation between the two surely exists, at least to the extent that the same rudder must be put harder over with a long boat than with a short one, both moving at the same speed, in order to get the same swing in the same time.

Again, it is urged that the effect of different speeds upon the rudderstock varies with the square of the speed, and that the decrease in speed, due to the rebuilding of the boat, more than compensates for the added length.

Granting the truth of the first proposition, all other things being equal, yet not only is speed but one factor in determining the required strength of stock, but it is doubtless true, especially in the lake service, that the strain upon the rudder is frequently greatest when the vessel is proceeding at moderate speed, as in the case of hard and sudden putting over of the rudder. Indeed, it seems obvious that the slower the speed the larger the rudder needed for easy steering, and the greater the speed the less deflection of the rudder blade is required for turning. It seems to come to this: That however scientifically and theoretically formulas may be worked out, security lies only in increasing the theoretical strain under the most favorable conditions by a factor of safety large enough to cover all unfavorable conditions and excessive strains; and it is possible that the practical difference between the Great Lakes Registry and one or more of the other organizations referred to lies in the employment by the former of a larger factor of safety.

Nor does it follow from the fact that under the Great Lakes classification the length of the vessel determines the size of rudderstock that the factors recognized by the other organizations are ignored; it may well be that the length of the boat, taking into account the somewhat special class of lake freighters (and thus their approximate relations of displacement and speed), has proven in practice fully as accurate a measure of required rudderstock as the formulas used by organizations concerned principally with ocean traffic. Nor, having in mind the character of the board which makes the requirements, is it likely that the formulas and experience embodied in other classifications have been overlooked. On the contrary, the measurable interrelation between its requirements and those of the other organizations (so far as they appear in the record) tends to suggest the contrary.

Again, it is argued that vessels on the Great Lakes of 432 feet length have now generally a beam of about 50 feet (instead of the Curry's 45 feet) and a depth of 30 feet (as against the Curry's 26 feet), as well as a larger rudder blade than the Curry's and that the Great Lakes classification assumes that vessels built under its rules will conform to such type and so will have the same proportionate speed and dimensions; and it appears that a few boats built over as was the Curry have rudderstocks (presumably their old ones) which are smaller than now called for, and as small as 9 inches in diameter, and that a few of such rebuilt boats are favorably rated in the Great Lakes Registry. This argument has weight, but not sufficient, we think, to overthrow the force of the existing rules, in view of the facts that a 10-inch rudderstock is prescribed for a boat 432 feet in length and only 27 feet in depth, that the same sized rudderstock is prescribed for boats varying in length several feet, that 9 inches is the minimum now recognized for boats of the length of the Curry before rebuilding, that the latter's speed is but slightly less than the average boat now built of her class, that for several years past no new vessels of the Curry's length have been built for service on the Great Lakes with a rudderstock less than 9¾ inches in diameter, and that the rating given the rebuilt boats referred to may have taken into account special considerations not appearing here.

We are impressed by the fact that a rudderstock which presumably, when originally put in, was not considered larger than safety demanded (and would not now be so considered for a boat of the Curry's previous dimensions), has been made to do duty in a vessel whose submerged plane is 50 per cent. greater than when the ship was first used, and whose actual tonnage carried has been at least doubled; and we think it reasonable that this increased displacement and increased load have added to the strain upon the rudderstock.

The fact that the break occurred after several years of excessive use, rather than when first so used, has no tendency to show that the break was not the result of wear and strain due to too small a stock; nor would even the fact that the rudder was being subjected at the instant of the break to no unusual strain be controlling. As Judge Tuttle aptly said:

"It seldom is possible, when some part of a machine is too weak, to tell just why it breaks at that particular instant."

The rudderstock was confessedly weak at the time, and the break doubtless resulted from putting the rudder "hard down" and quickly when proceeding against the current, and through fear of the effect (probably by way of suction) of the Mackinac's nearness in passing. It goes almost without saying that a latent defect which would excuse the Curry can only be an original structural weakness in the metal fiber of the stock; for assuming, without so holding, that a submission to the judgment of reputable builders of the question of the size of stock necessary for the rebuilt boat would protect respondent, the record fails clearly to show that the question of size of stock was submitted to the independent judgment of a builder, as distinguished from that of the owner. The old stock was presumably retained largely for the sake of economy, although, of course, in the view that it was sufficient.

It is a significant fact, impressing us, as it did Judge Tuttle, that:

"There never was a new ship built on these lakes as long as the Curry, with a rudderstock as small as this one."

Taking the entire record into account, we are satisfied the rudderstock broke because it was too small. We also think respondent has failed to sustain the burden of showing that in continuing the use of the rudderstock in question it exercised the high degree of care and foresight necessary, under the decisions of the Supreme Court and of this court, to maintain the defense of inevitable accident.

The decree of the District Court in each case is accordingly affirmed, with costs.

EVANS, District Judge. I cannot rid myself of the conviction that the owners of the Curry used due care in selecting its rudderstock when she was built and in retaining it when she was lengthened, that this was demonstrated by the direct testimony and by 19 years of active use, which brought no visible sign of any defect previous to the collision with the Bothnia, that under these circumstances she should not be held to have absolutely guaranteed its soundness, and consequently that the breaking of the rudderstock on that occasion was the result of inevitable accident, as that phrase is defined by the authorities.

Upon these grounds it seems to me, though the result may be harsh, that the rule stated and applied by the Supreme Court in The Morning Light, 2 Wall. 550, 560, 17 L. Ed. 862, by this court in The Olympia, 61 Fed. 120, 9 C. C. A. 393, by Judge Benedict in The Flowergate (D. C.) 31 Fed. 762, and by Judge Toulmin in The Lizzie Frank (D. C.) 31 Fed. 477, upon substantially similar conditions, should govern our decision, with the result that the judgment be reversed.

CRIM v. RICE et al.

SAME v. TRIEST et al.

(Circuit Court of Appeals, Second Circuit. April 11, 1916.)

Nos. 254, 255.

1. EQUITY ⊜151—PLEADING—SCANDAL.
Where a bill charged fraudulent conduct against an attorney, without stating any facts to support the charge, such charge is scandalous, and should be stricken from the bill.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 380–382; Dec. Dig. ⊜151.]

2. BANKRUPTCY ⊜302(1)—ACTIONS BY TRUSTEE—PLEADING—SUFFICIENCY.
A bill by a trustee, attacking transactions and transfers by the bankrupt and payments of interest to the transferees, who at the time of the transfers were creditors, *held* insufficient to state any cause of action.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 456; Dec. Dig. ⊜302(1).]

3. EQUITY ⊜362—PLEADING—BILL.
Under Supreme Court equity rule 25 (33 Sup. Ct. xxv), declaring that it shall be sufficient that a bill in equity shall contain a short and simple statement of the ultimate facts upon which relief is sought, a bill containing many repetitions, redundancies, and statements of conclusions is subject to attack under rule 29 (33 Sup. Ct. xxvi).

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 758–761; Dec. Dig. ⊜362.]

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

Bills by John W. Crim, as trustee in bankruptcy, against Edwin T. Rice and others, and against Hans Triest and others. From decrees dismissing the bills, complainant appeals. Affirmed, and bills referred to District Court, to strike improper matter.

These are appeals by plaintiff, a trustee in bankruptcy, from four decrees entered in favor of various defendants (and coming up on two records), dismissing the bill of complaint, which is the same in both records. For brevity, defendants will be referred to as follows: Triest and Schramme as the "bankrupts," and the partnership of H. Marquardt & Co., composed of Triest and Schramme as the "partnership"; H. Marquardt & Co., Incorporated, as the "Company"; Banco Oriental and Descuento Espanol as the "Mexican banks"; various domestic banks and bankers as the "domestic banks"; Colonial Products Importing Company as "Colonial Company"; Standard Storage Warehouse Company as the "Standard Company"; and the remaining defendants as Ingersoll, Mitchell, Rice, and Edmunds.

R. M. Cahoone, of Brooklyn, N. Y., and John S. Wise, Jr., of New York City, for appellant.

Montague Lessler, J. N. Rosenberg, and A. A. Michell, all of New York City, for appellees Triest and others.

Steele & Otis, of New York City, for appellee Chatham & Phenix Nat. Bank.

Whitridge, Butler & Rice, of New York City, for appellee Brown Bros. & Co.

Frank M. Patterson, of New York City, for appellee Mechanics' & Metals Nat. Bank.

Rosenberg, Levis & Ball, of New York City (James N. Rosenberg, of New York City, of counsel), for appellees Rice and another.

Before WARD and ROGERS, Circuit Judges, and MAYER, District Judge.

MAYER, District Judge (after stating the facts as above). The bill charges that: (1) On August 13, 1913, the bankrupts individually and as copartners of the partnership were adjudged bankrupts and plaintiff qualified as trustee in bankruptcy on October 30, 1913. (2) One Ingersoll was president of Colonial Company and solely the representative and agent of the bankrupts, who owned Colonial Company and conducted it as a part of their partnership business; for some time prior to November 1, 1911, bankrupts, partnership, Colonial Company, and Ingersoll were insolvent. (3) On or about November 1, 1911, designing to hinder, delay, and defraud the creditors of all the foregoing persons and businesses, the bankrupts, Ingersoll and others, unknown to plaintiff, entered into a plan to go through the formality of dissolving the partnership and to transfer its assets and those of Colonial Company to the control of themselves and the Mexican banks, which were creditors of the bankrupts—to an amount, as later appears, of over $300,000. The bankrupts declared the partnership dissolved, constituted Triest the liquidating partner, and transferred all the assets of the partnership and Colonial Company to the Company.

Having thus set forth that all the property was transferred, the bill alleges (4) that the Company was organized under the laws of New York, the good will and trade-name of the partnership transferred to it, as well as "large amounts of property, choses in action, rights, concessions, cash and claims"; but in the same paragraph it is charged "that no cash whatever was put into" the Company, except pretended cash subscriptions to stock made by the Mexican banks, this cash being loaned by the Company to the bankrupts, who paid it back to the Mexican banks, pretending to be in extinguishment and satisfaction of the debts due these banks from the partnership, so that the only assets which the Company received were certain properties, worth less than $80,000, which had been pledged by the bankrupts with the Mexican banks, and which, by agreement, were sold for the benefit of the Mexican banks and with no benefit to the Company.

In this somewhat bewildering situation, it next appears that all of the property of the bankrupts was transferred to the Mexican banks, except such as was "retained by the bankrupts or paid" to other creditors. In other words, everything was transferred except what was not transferred; but what was transferred and what was not transferred remained a mystery to the reader of the pleading. Charges of fraud and conspiracy and conclusions of fact are liberally and indiscriminately mingled with confused allegations of fact. As nearly as we can spell out what is meant up to this point in the bill, it appears that a failing partnership decided to liquidate, transferred for that purpose its assets, or some of them, to a corporation in which large

creditors took stock for their claims, that some pledged assets were sold for the benefit of the pledgees, and some assets were transferred to these same acknowledged creditors.

We now come to an entirely different transaction concerning parties having no relation to or with the Mexican banks. The bill goes on to allege that (5) the bankrupts and Ingersoll controlled the Standard Company, a corporation engaged in the storage warehouse business; (6) that the bankrupts stored and pretended to store merchandise in the warehouses of the Standard Company and issued forged and falsified negotiable warehouse receipts, of which they hypothecated a large amount with the domestic banks; (7) that about March 1, 1912, the domestic banks discovered these frauds, and knew about March 1, 1912, that the bankrupts, the partnership and Ingersoll were insolvent and had transferred their assets to the Company. There is no allegation that the partnership was in fact insolvent on March 1, 1912, and, so far as the bill enlightens us, it may not have been insolvent in view of the alleged extinguishment of debts; but, construing the bill most favorably to plaintiff, we will assume that it sets forth that the domestic banks knew that the partnership was insolvent on March 1, 1912.

The bill proceeds to state (8) that the domestic banks and defendants Rice and Edmunds entered into an agreement with the bankrupts and Ingersoll whereby the domestic banks took $200,000 of preferred and common stock of the Company for their debts and designated an employé of one of the banks as a director of the Company. We are not informed as to what was the capitalization of the Company, and therefore cannot ascertain from the bill what per cent. of the total issue is represented by the stock taken by the bankers—non constat it was a just percentage.

The next allegations are (9) that it was agreed the Company should pay the bankrupts and Ingersoll large salaries (though what these salaries were is not stated), and that from these salaries they should pay to Rice and Edmunds, as trustees, an amount equal to the interest upon the debts to the domestic banks, and that Rice and Edmunds should pay over these interest amounts to the domestic banks; (10) that amounts aggregating $11,470.72 over a period of two years were paid to certain of the domestic banks, and "other and further sums" not identified as to payee or amount. It is further alleged that (11) Rice and Edmunds knew of the insolvency of the partnership, and knew "all the facts herein contained and set forth," but nowhere is it alleged that Rice, Edmunds, or the domestic banks had anything whatever to do with the transactions with the Mexican banks, or were in any manner parties thereto, or had any relations of any kind with those banks.

[1] Finally, it is alleged (12) that defendant Michell, "an attorney and counselor at law at this bar, has been an active participant, director, designor, and operator and conspirator with the other defendants," from which the inference can be drawn that wrongful acts have been done by Michell, as an attorney. This grave charge is not supported by a single allegation of fact, and the bill as to this defendant is summarily dismissed, and this allegation (nineteenth) is ordered stricken

from the record and the files of this court, and referred to the District Court for similar action.

[2] Again eliminating epithets and conclusions of fact contained in the bill, what we make out of this part of the bill is that the domestic banks, discovering that serious frauds had been practiced upon them, took stock in the Company in the hope of saving the debts due them, safeguarded themselves by representation on the directorate of the Company, and made provision for the payment of interest to them. We agree with Judge Hough that the bill fails to set forth any facts constituting either a transaction offensive to section 44 of the New York Personal Property Law (known as the Bulk Sales Law [Consol. Laws, c. 41]), or transfers or conveyances in fraud of creditors in violation of section 35 of the same statute.

At most, the bill shows that the Mexican and domestic banks were preferred creditors. Appellant states in his brief that "it is not the contention of appellant that a debtor may not make a preferential payment," and it is elementary that preferences are not in themselves fraudulent, that they are often made in good faith, and, in the absence of fraud, must stand unless they come within the four months period prescribed by the bankruptcy statute.

The transactions with the Mexican banks were long prior to the bankruptcy, as was the alleged agreement with the domestic banks. The only transactions which may be within the four months period are those which are indefinitely alleged in paragraph seventeenth, where it is stated that the bankrupts and Ingersoll paid certain interest amounts to five domestic banks "up to March, 1914."

It is not only doubtful whether the bill contains the allegations necessary to state a cause of action to recover preferential payments, but in addition, there is nothing in paragraph seventeenth to show these payments of interest during the four months period; for that paragraph does not contain any information as to whether the payments were made after August 13, 1913, the date of adjudication of bankruptcy, or at a time anterior to the four months period.

[3] In connection with this bill, we think it desirable to call attention to that part of rule 25 of the Supreme Court equity rules (33 Sup. Ct. xxv), which provides:

"Hereafter it shall be sufficient that a bill in equity shall contain, in addition to the usual caption: * * * Third, a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence."

The purpose of the rule is manifest, and it is unnecessary to insert in a bill extraneous matter, which cannot afford information either to the court or opposing litigants. In this bill, many allegations are either repetitious or are phrased in language foreign to properly drawn pleadings. Thus we find that a defendant was "the agent, representative, straw man, employé, dummy, tool, and operator of the bankrupt defendants"; that defendants were guilty of "designing, contriving, and conspiring to swindle, cheat, deceive, hinder, delay, and defraud" creditors; that certain acts were "devices, fences, screens, and cloaks and legal disguises"; that one of the defendants "has been an active

participant, director, designor, and operator and conspirator"; that certain banks "have escaped publicity and criticism by the authorities for their negligence in lending money. * * *"

If, because of these expressions and the diffuse character of the bill, a motion had been made under rule 29 (33 Sup. Ct. xxvi), for failure to comply with rule 25, we think the District Court would have been justified in granting the motion on that ground.

The decrees are affirmed, with costs to defendants appearing by separate solicitors, all defendants appearing by one solicitor to have one bill of costs. It is further directed that paragraph nineteenth of the bill be stricken from the record and files of this court, and the bill referred to the District Court for similar action.

UNITED COPPER SECURITIES CO. v. AMALGAMATED COPPER CO. et al.

(Circuit Court of Appeals, Second Circuit. April 11, 1916.)

No. 120.

1. APPEAL AND ERROR ⟸870(5)—REVIEW—DECISIONS REVIEWABLE.
As there can be no writ of error until after final judgment, and as orders sustaining demurrers to the complaint, which necessitated plaintiff's pleading anew, are a part of the record, such orders will be reviewed on writ of error, after judgment dismissing the complaint.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3496, 3506–3508; Dec. Dig. ⟸870(5).]

2. EXECUTORS AND ADMINISTRATORS ⟸444(1)—COMPLAINT—SUFFICIENCY.
Where it was sought to hold executors liable for the acts of their decedents, the complaint is not objectionable, because charging them in their representative capacity.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1813, 1814, 1837–1841; Dec. Dig. ⟸444(1).]

3. MONOPOLIES ⟸28—COMPLAINT—SUFFICIENCY.
In an action under Sherman Act July 2, 1890, c. 647, § 7, 26 Stat. 210 (Comp. St. 1913, § 8829), for treble damages for a conspiracy in restraint of trade between defendants' testators and others, the dates of the death of the decedents, as well as of the accomplishment of the conspiracy, should be pleaded.

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

4. MONOPOLIES ⟸28—ACTIONS—PLEADING.
In an action under Sherman Act, § 7, for damages resulting to individuals from a conspiracy to injure them and also certain corporations in which they were stockholders, allegations as to the conspiracy against the corporations are proper, although the individuals could not recover for the corporate injury.

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

5. MONOPOLIES ⟸28—ACTIONS—DEFENSES.
In an action under Sherman Act, § 7, for injuries resulting from a conspiracy to perfect a monopoly, it is immaterial that the person injured

was not engaged in interstate commerce; it being sufficient if such person was directly affected.

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

6. STATUTES ⊂⊃222—FEDERAL STATUTES—CONSTRUCTION.

Where there is no statutory provision to guide it, a federal statute must be construed with reference to the common law existing prior to the Declaration of Independence; there being no federal common law.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 301; Dec. Dig. ⊂⊃222.]

7. ASSIGNMENTS ⊂⊃26—ACTIONS ASSIGNABLE—MONOPOLIES.

A right of action for property injuries, based on a violation of the Sherman Act and brought under section 7, is assignable; the action being a civil action, which could be assigned at common law.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 48–52; Dec. Dig. ⊂⊃26.]

8. ABATEMENT AND REVIVAL ⊂⊃57—SURVIVOR OF ACTIONS—MONOPOLIES.

Where recovery for the results of a monopolistic conspiracy is sought under Sherman Act, § 7, the action will survive against the estate of decedent, in case he secured some benefit at the expense of plaintiff.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 286–293; Dec. Dig. ⊂⊃57.]

Learned Hand, District Judge, dissenting in part.

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

Action by the United Copper Securities Company against the Amalgamated Copper Company and others. The complaint was ordered dismissed, and plaintiff brings error. Reversed and remanded.

F. E. M. Bullowa, of New York City, for plaintiff in error.

Louis Marshall, of New York City, for defendant in error Adolph Lewisohn.

Shearman & Sterling, of New York City (John A. Garver, of New York City, of counsel), for defendants in error Amalgamated Copper Co. and others.

Hoadly, Lauterbach & Johnson, of New York City (Edward Lauterbach, Alfred H. Townley, and Henry Siegrist, all of New York City, of counsel), for defendants in error Frederick Lewisohn and others.

Before COXE and WARD, Circuit Judges, and LEARNED HAND, District Judge.

WARD, Circuit Judge. This is a writ of error to a judgment dismissing the complaint in an action to recover treble damages under section 7 of the Sherman Act. Owing to orders made from time to time sustaining objections to the successive complaints, the one dismissed, the third amended complaint, was the fourth in number served.

[1] As the plaintiff was compelled to plead in accordance with these orders, from which there can be no writ or error in the federal court until after final judgment, and as they are a part of the record brought up by the writ of error, we must consider the assignments of error made in respect to them.

[2] The complaint charged a conspiracy entered into by certain decedents in their lifetime and by their executors after their death. The court by order of February 14, 1914, directed the words charging the executors to be stricken out, wherever they occurred. This was right, so far as the charge against them was for their own acts, but not so far as it was attempted to hold the estate of their testators liable. The pleader should have charged the executors officially for the acts of their testators and individually for their own acts.

[3] The same order required the plaintiff to state the dates of death of the decedents and the date of the accomplishment of the conspiracy or conspiracies charged and of the incorporation of the defendant the Amalgamated Copper Company. We think that the defendants were entitled to these particulars.

[4] By order of the same date the court directed allegations to be stricken out of the complaint as to the value of the stock of the United Copper Company and to the effect that there was an interstate traffic in the securities of copper companies, especially of the copper companies in which the defendants and the assignors of the plaintiff were respectively interested, and that in some of them the plaintiff's assignors had controlling interests, whose value depended upon unrestricted competition. We know of no such business as interstate traffic in copper securities, and think that any injury done was an injury to the corporations, to be asserted by them. Nevertheless we think the allegation of a conspiracy to destroy certain copper companies, for instance, the United Copper Company and the Montana Ore Purchasing Company, was properly pleaded as proof of the conspiracy whereby the plaintiff's assignors were injured, notwithstanding that they were interested as stockholders of the companies and could not recover damages for corporate injuries.

The court also ordered allegations to be stricken out to the effect that the defendants had attempted to bribe and then subsequently threatened a judge, and had caused the works of one of the copper companies in which the plaintiff's assignors were interested to be set on fire and the water supply intended to protect it to be cut off. These allegations were certainly relevant to the charge of a conspiracy, and, if the plaintiff expected to prove such facts at the trial, it was very proper in it to give notice of them. We do not, however, understand that the court intended that the allegations should be entirely stricken out, but only that they should be made against such of the defendants as the plaintiff intended to charge. There seems to us no error in this.

By order of May 18, 1914, the allegation that the plaintiff had acquired the cause of action of Arthur P. Heinze as trustee of certain securities was properly stricken out, because such a cause of action, if any, was a corporate one. The other particulars which the court required the plaintiff to state we think were properly ordered.

We think the order of July 30, resettled September 17, 1914, was proper.

[5] The foregoing, we think, will sufficiently indicate what amendments the plaintiff may make to its present complaint, if it apply for leave to do so to the court below. The judge of the District Court, on

defendant's motion, struck out the third amended complaint, apparently on the ground that plaintiff's assignors were not engaged in interstate commerce, and also that plaintiff's theories as to its cause of action might be tested in this court before trial. There is nothing in the Sherman Act confining the right to recover under section 7 to persons engaged in interstate commerce, or whose business or property injured is interstate commerce. If there were a doubt on the subject, it would be instantly laid by the case of Chattanooga Foundry & Pipe Works v. Atlanta, 203 U. S. 396.[1] The person injured must be engaged in a business directly, or at least not remotely, affected by the conspiracy complained of. One who had rented offices to corporations absorbed by an illegal combination could not recover for losing them as tenants, nor a lawyer regularly retained for losing them as clients. But here the pleader set up that the defendants, as a part of their conspiracy to monopolize the copper market, intended and designed to destroy the business, financial standing, and credit of the plaintiff's assignors, who were alleged to be engaged in organizing, promoting, and financing companies for mining, dealing in, and shipping copper; some of them being the very corporations which the defendants conspired to acquire. We have no doubt that a good cause of action is stated in the complaint.

[6-8] The serious questions are: First, was the cause of action assignable, so that this plaintiff may maintain the suit? and, second, did it survive as against the estates of deceased persons? There being no federal common law distinct from the common law of the states (Smith v. Alabama, 124 U. S. 478, 8 Sup. Ct. 564, 31 L. Ed. 508), a federal court, in construing a federal statute such as that before us, where there is no statutory provision to guide it, must refer to the common law existing at the time of the Declaration of Independence. This was done on a question of evidence in Moore v. U. S., 91 U. S. 271, 23 L. Ed. 346. And in Schreiber v. Sharpless, 110 U. S. 76, 3 Sup. Ct. 423, 28 L. Ed. 65, a suit to recover penalties for infringement of copyright, the plaintiff sought to bring in the executors of the defendant, who had died pending the suit. The subject was regulated by a federal statute, section 955, Rev. St. U. S. (Comp. St. 1913, § 1592), providing that the representatives of plaintiffs or defendants who have died before final judgment may be brought in as parties when the cause of action survives at law. No federal statute defining what actions should survive, the question was to what law must the court resort? It referred at once to the common law, and finding that under it actions for penalties did not survive, held they did not survive under the copyright law. There can, of course, be no pretense that section 7 of the Sherman Act provides a penalty. It awards civil damages, which are made exemplary by virtue of being trebled.

It must be admitted that at common law the maxim "Actio personalis moritur cum persona" was literally enforced. It was first limited by the remedial statute of 4 Edward III, c. 7, de bonis asportatis in vita testatoris, which gave executors the same right of action for trespasses to his personal estate that the decedent had. Sergeant Williams wrote a valuable note on the case of Wheatley v. Lane, 1 Saunders, 216(a). He said, following Emerson v. Emerson, 1 Ventris, 187, that though

[1] 27 Sup. Ct. 65, 51 L. Ed. 241.

the word used in the statute was "trespasses" it had been "expounded largely" and extended to other cases within the equity—that is, the meaning and intent—of the statute. An instance is Rutland v. Rutland, Croke's Reports (Elizabeth) 377, in which it was held that executors could maintain trover under the statute, and in Williams v. Carey, 4 Modern Reports, 403, an executor's action against a sheriff for a false return was held to be for an injury to his decedent's personal estate within the equity of the statute. This broad construction was recognized in Twycross v. Grant, 4 C. P. D. 40, and Hatchard v. Mege, 18 Q. B. D. 771. The injury complained of is to the estate of the plaintiff's assignors and not to them personally. Our examination of the common law justifies us in finding that this cause of action is assignable.

We come to this conclusion willingly, because it would seem to be most inequitable that the representatives of an individual or of a corporation whose business has been wrongfully destroyed shall be denied all remedy because of the death or corporate dissolution of the party they represent.

The second question is more doubtful, but it was held in U. S. v. Daniel, 6 How. 11, 12 L. Ed. 323, an action against the executors of a sheriff for a false return, that such a cause of action, being ex delicto, would not survive against executors, unless the decedent secured some benefit at the expense of the sufferer. This exception will be a matter of proof, and is not a reason for striking the executors out as parties.

The judgment is reversed.

LEARNED HAND, District Judge. I concur except that I think we should not review the earlier orders. Such orders as those making pleadings more definite and certain, or numbering the causes of action separately, or granting bill of particulars, should under no circumstances come before this court; they do not involve any final decision on substantial rights and should be within the power of the court which prepares the cause for trial. An order striking out an allegation from a pleading may, however, go to the merits of the case, and in such a case should be reviewable. If, for example, in the case at bar, the third amended complaint had been sufficient, but only because of some allegation struck out in one of the prior orders, the correctness of so much of that order should be raised. However, the third amended complaint was sufficient as it stood, and it is not necessary to consider whether any allegations struck out earlier were material or not. If any of those allegations were erroneously stricken out, the plaintiff may still offer the proof on the trial, and take an exception to its exclusion. Such an exception will raise not only the technical validity of the order, but, what is much more important, whether the proof excluded was of enough consequence to affect the result; the question will come up like any other exception to the exclusion of evidence. As the case now comes up the orders striking out the allegations are moot, and should not be decided. The question whether by accepting the privilege of amendment conferred by the orders striking out, the plaintiff waived any rights to appeal, was not urged upon the argument; it should not be decided, in my judgment.

McLAUGHLIN et al. v. ST. LOUIS SOUTHWESTERN RY. CO.

(Circuit Court of Appeals, Eighth Circuit. February 28, 1916. Rehearing Denied May 1, 1916.)

No. 4514.

1. HIGHWAYS ⟸148—ASSESSMENTS—ENFORCEMENT—INJUNCTION—JURISDICTION—ADEQUATE REMEDY AT LAW.

Road Law Ark. (Acts 1913, p. 882) § 13, provides that the findings of a county court, fixing the assessments of benefits or damages on account of the building of a road, shall have the effect of a judgment against all property in the district, and that any landowner may appeal therefrom to the circuit court. The general laws of the state provide for appeals from the latter court to the Supreme Court of the state. *Held*, that a federal court of equity is without jurisdiction of a suit by a landowner to enjoin enforcement of such an assessment, where the jurisdiction of the county court to make it is not questioned; the remedy at law being plain, adequate, and complete.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 399–403; Dec. Dig. ⟸148.]

2. COURTS ⟸259—JURISDICTION—FEDERAL COURTS—EFFECT OF STATE LEGISLATION.

Provisions of the Constitution or statutes of a state cannot enlarge the jurisdiction of a federal court of equity, as restricted by Judicial Code (Act March 3, 1911, c. 231) § 267, 36 Stat. 1163 (Comp. St. 1913, § 1244).

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 795, 796; Dec. Dig. ⟸259.]

3. HIGHWAYS ⟸148—ASSESSMENTS—ENFORCEMENT—INJUNCTION—JURISDICTION—ADEQUATE REMEDY AT LAW.

The law of Arkansas, as established by the decisions of its Supreme Court, does not give a court of equity jurisdiction to enjoin collection of a tax based on an excessive or erroneous assessment, where the statute provides an adequate remedy by appeal from the assessment.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 399–403; Dec. Dig. ⟸148.]

Appeal from the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

Suit in equity by the St. Louis Southwestern Railway Company against W. H. McLaughlin and others. Decree for complainant, and defendants appeal. Reversed.

J. F. Loughborough, of Little Rock, Ark., and Charles A. Walls, of Lonoke, Ark. (W. E. Hemingway, George B. Rose, D. H. Cantrell, and V. M. Miles, all of Little Rock, Ark., on the brief), for appellants.

W. T. Wooldridge, of Pine Bluff, Ark. (Edward A. Haid and A. L. Burford, both of St. Louis, Mo., and F. G. Bridges, of Pine Bluff, Ark., on the brief), for appellee.

Before ADAMS and CARLAND, Circuit Judges.

CARLAND, Circuit Judge. The appellants have appealed from a decree which adjudged that the assessment of benefits in the sum of $20,000 against the appellee by the board of assessors of road improvement district No. 5, of Lonoke county, Ark., was void, and which perpetually enjoined said board, the board of commissioners of said

district, E. M. High, as county clerk, and Pat M. Swain, as collector, from enforcing or attempting to enforce any collection of taxes based upon said assessment.

[1] This decree was entered upon pleadings and proofs upon a bill in equity filed by appellee, a Missouri corporation. It was contended in the court below by appellants that the court had no jurisdiction as a court of equity, for the reason that it appeared that appellee had a plain, adequate, and complete remedy at law. This objection was overruled, and such ruling is assigned as error. The facts bearing on this question appear in the record as follows:

On July 29, 1913, the county court of Lonoke county, Ark., pursuant to law, created and established road improvement district No. 5, in said county. The district included within its boundaries certain lands of appellee. The court subsequently appointed a board of commissioners and a board of assessors for said district. On May 6, 1914, the board of commissioners filed in the county court an assessment of benefits made and certified by the board of assessors. May 16, 1914, appellee filed exceptions to said assessment, to which exceptions counsel for the board of assessors filed a reply. On May 21, 1914, after a hearing upon notice previously given to all persons interested, said court equalized and approved said assessment of benefits. The assessment estimated appellee's benefits resulting from the road improvement at $20,000. June 18, 1914, appellee appealed from said judgment of the county court to the circuit court of Lonoke county. August 11, 1914, appellee dismissed the appeal. The bill in the present case was filed May 28, 1914, and alleged that the assessment of benefits was unlawful, illegal, unauthorized, and void for the following reasons: That appellee's property located within the improvement district would not, and could not, receive any benefits from the improvement to be made; that the assessment was arbitrarily made, without regard to the benefits that would accrue to appellee's property; and that the assessment was unjust and unequal as compared with the assessment made against other lands within the district similarly located. There was nothing alleged in the bill attacking the jurisdiction of the county court to render the judgment which it did, nor was the bill a bill of review.

Act Gen. Assem. Ark. 1913, No. 212, § 13, provides with reference to the judgment of the county court, such as is here in question, as follows:

"Sec. 13. At the hearing provided for in the preceding section and after the county court shall have considered the assessments, it shall enter its findings thereon, either confirming the assessments, increasing or diminishing same. The finding of the county court shall have the force and effect of a judgment against all property in said district.

"Any owner of real property within the district may appeal from the judgment fixing the assessment of benefits or damages within ten days in the same manner as provided in section 4 of this act, but such appeal shall affect only the tract of land concerning which said appeal is taken, and if no appeal is taken within that time, such judgment shall be deemed conclusive and binding upon all property within the bounds of the district, and upon the owners thereof and any owner of the real property within the district may within a like time appeal from any order of the court refusing to enter such a judgment."

We have in the statute cited a provision that the finding of the county court shall have the force and effect of a judgment, and an appeal is allowed to the circuit court of the county, and by general law an appeal is allowed from the circuit court to the Supreme Court. In our opinion there was provided a plain, adequate, and complete remedy at law for appellee to correct any errors in the assessment of which it complains in its bill. In determining the question as to whether the court below had jurisdiction as a court of equity, we may well start with section 267 of the Judicial Code which reads as follows:

"Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law."

In New York Guaranty Co. v. Memphis Water Co., 107 U. S. 205–214, 2 Sup. Ct. 279, 286 [27 L. Ed. 484], the Supreme Court said: "This enactment certainly means something." Counsel for appellee, however, for the purpose of showing that the court below had jurisdiction of this action in equity cites article 16, § 13, Constitution of Arkansas, which reads as follows:

"Any citizen of any county, city or town may institute suit in behalf of himself and all others interested, to protect the inhabitants thereof against the enforcement of any illegal exactions whatever."

He also cites section 3966 of Kirby's Digest of the Statutes of Arkansas, which reads as follows:

"The judge of the circuit court may grant injunctions and restraining orders in all cases of illegal or unauthorized taxes and assessments by county, city or other local tribunals, boards or officers."

[2] Counsel then argue that the provision of the Constitution and laws of Arkansas, above cited, can be invoked for the purpose of conferring jurisdiction in equity upon the United States District Court, sitting in Arkansas, to entertain the present action. The result of such a contention, if it may be maintained, is to hold that the people of Arkansas, in framing a Constitution, and the General Assembly thereof, in the enactment of laws, may enlarge or limit the jurisdiction of the federal court sitting in equity. Not only that, but that they may repeal section 267 of the Judicial Code. We should hesitate some time before adopting views which would lead to such a result.

The case of Cummings v. National Bank, 101 U. S. 153, 25 L. Ed. 903, is cited as sustaining the position of counsel for appellee in this case. We do not think the Supreme Court in the case cited intended to hold that the Legislature of the state of Ohio could repeal section 267 of the Judicial Code, or what was section 723 of the Revised Statutes of the United States. We think the authority of Cummings v. Bank, supra, so far as the question of jurisdiction is concerned, was greatly weakened, if not overruled, by the case of Whitehead v. Shattuck, 138 U. S. 146, 11 Sup. Ct. 276, 34 L. Ed. 873.

In the Shattuck Case, the plaintiff alleged that he was the owner in fee of certain described lands in Iowa, and that the defendants were in the possession and enjoyment of the property, claiming title

under certain documents purporting to transfer the same, but which were fraudulent and void. The Supreme Court held that the plaintiff had an adequate remedy at law in ejectment. The plaintiff in order to show that the federal court had jurisdiction in equity of his case cited a provision of the Code of Iowa. The Supreme Court, in disposing of this contention, used the following language:

"The Code of Iowa enacts that 'an action to determine and quiet the title to real property may be brought by any one having or claiming an interest therein, whether in or out of possession of the same, against any person claiming title thereto, though not in possession' [Code Iowa 1873, § 3273], implying that the action may be brought against one in possession of the property. And such has been the construction of the provision by the courts of that state. Lewis v. Soule, 52 Iowa, 11 [2 N. W. 400]; Lees v. Wetmore, 58 Iowa, 170 [12 N. W. 238]. If that be its meaning, an action like the present can be maintained in the courts of that state, where equitable and legal remedies are enforced by the same system of procedure and by the same tribunals. It thus enlarges the powers of a court of equity, as exercised in the state courts; but the law of that state cannot control the proceedings in the federal courts, so as to do away with the force of the law of Congress declaring that 'suits in equity shall not be sustained in either of the courts of the United States, in any case where a plain, adequate and complete remedy may be had at law,' or the constitutional right of parties in actions at law to a trial by a jury. The state, it is true, may create new rights and prescribe the remedies for enforcing them, and, if those remedies are substantially consistent with the ordinary modes of proceeding in equity, there is no reason why they should not be enforced in the courts of the United States, and such we understand to be the effect of the decision in Clark v. Smith, 13 Pet. 195 [10 L. Ed. 123], and In re Broderick's Will, 21 Wall. 503 [22 L. Ed. 599]."

The case of Indiana Manufacturing Co. v. Koehne, 188 U. S. 681, 23 Sup. Ct. 452, 47 L. Ed. 651, was a suit in equity to enjoin the collection of taxes. The United States Circuit Court for the District of Indiana dismissed the bill. By reference to the general tax laws of Indiana of 1891, as amended by the act of 1895 (Laws Ind. 1895, c. 36, § 4), it appeared that the statement made by the taxpayer to the assessor is by him delivered to the county auditor, who in turn delivers it to a board of review which values and assesses the taxpayer's property. This board of review makes the original assessment. Any taxpayer may appeal from the assessment to the state board of tax commissioners. Upon such an appeal the state board, if it decides that the property is assessable, may make such assessment, increasing or reducing it, as it may decide proper. The act of 1853 (Rev. St. Ind. 1881, §§ 5813, 5814) provides for the recovery of taxes wrongfully paid. The Supreme Court, in holding that the plaintiff had an adequate remedy at law, said:

"Under that law the complainant was bound in the first place to appeal from the decision of the board of review, which included the letters patent in the value of the shares of stock of the corporation. Such appeal would, by the provision of the statute, be taken to the state board of tax commissioners, and if that board affirmed the decision of the board of review the corporation could pay the tax and immediately file a petition with the board of county commissioners to recover it back under the act of 1853, above referred to. An appeal is given from the refusal of that board to repay the tax. 3 Rev. St. Ind. § 7917, Ed. of 1894; Shultz v. Board, etc., 20 Ind. 178; State v. Board, etc., 63 Ind. 497, 501. This appeal would be taken to the circuit court, and by the general law an appeal lies from that court to either the Appellate Court or the Supreme Court of the state, according to the amount

involved. * * * We are not convinced that the act of 1853 has been repealed, and the remedy thereby provided being sufficient, we hold complainant had an adequate remedy at law."

In the case of Singer Sewing Machine Co. v. Benedict, 229 U. S. 481, 33 Sup. Ct. 942, 57 L. Ed. 1288, a statute of the state of Colorado, which allowed a taxpayer to recover back taxes erroneously assessed, was held to provide an adequate remedy at law. The cases of Union Pacific Railroad Co. v. Commissioners of Weld County, 217 Fed. 540, 133 C. C. A. 392, A., T. & Santa Fé v. Commissioners of Douglas Co., 225 Fed. 978, — C. C. A. —, Singer Sewing Machine Co. v. Benedict, 179 Fed. 628, 103 C. C. A. 186, Pittsburg Railway Co. v. Board of Public Works, 172 U. S. 32, 19 Sup. Ct. 90, 43 L. Ed. 354, Shelton v. Platt, 139 U. S. 591, 11 Sup. Ct. 646, 35 L. Ed. 273, Stanley v. Supervisors of Albany, 121 U. S. 535, 7 Sup. Ct. 1234, 30 L. Ed. 1000, are to the same effect.

[3] We have thus far assumed that the Constitution and laws of Arkansas, as above cited, conferred jurisdiction upon the state courts of Arkansas to enjoin the collection of taxes in cases like the one at bar; that is, where the gist of the action is an assault upon an erroneous assessment of property for taxation. We refuse to assent to the proposition that, if they do, they can be made available for the purpose of conferring jurisdiction upon the United States District Court for Arkansas in a case like the present one. But the Arkansas cases do not seem to have decided that in a case like the present one the tax may be enjoined.

The case of Arlington Hotel Co. v. Buchanan, 110 Ark. 34, 160 S. W. 895, was one where the hotel company complained that its assessment had been erroneously increased by the deputy assessor from $151,000 to $172,000, and that no notice had been given to the company of this unauthorized increase. To correct this error, and to prevent this illegal imposition, the hotel company instituted an action in the Garland county chancery court to restrain the collection of so much of the tax then extended upon the tax books in the hands of the defendant collector as was based upon the difference between the assessment as the same appeared and what it should be. The Supreme Court of Arkansas, in deciding that, the case being one involving merely an alleged error of the assessor in fixing the valuation of the property, it was beyond the province of a court of equity to review, said:

"The statutory remedy of the plaintiff was complete to redress the wrong done by the excessive assessment. Courts of equity under those circumstances have no jurisdiction to review the action of the assessing board. In the recent case of Clay County v. Brown Lumber Company, 90 Ark. 413 [119 S. W. 251], we said that 'when a mode, in the nature of an appeal, is prescribed by the statute, a failure to invoke the statutory remedy within the time and manner prescribed precludes relief by any other proceedings.'"

In the Board of Equalization Cases, 49 Ark. 533, 6 S. W. 1, it was said:

"And where an adequate remedy in the nature of an appeal is provided, as is done in our statute, the better opinion is that a mere error of judgment on the part of the board or a mistake in their conclusion, though arrived at without evidence where evidence is required, is not available in a collateral

issue. The taxpayer must pursue the remedy provided for his relief or abide would follow in permitting the taxpayer to select arbitrarily his own time by the finding of the board [citing numerous authorities]. Great mischief and tribunal to test the correctness of an assessment. An overvaluation in an assessment cannot, therefore, be corrected by injunction or certiorari. Randle v. Williams, 18 Ark. 380; Moore v. Turner, 43 Ark. 257, and cases cited. The only remedy is by proof of the fact that the assessment is too high, on appeal or application to the county court in the mode and within the time pointed out by statute."

The cases of Vaughan v. Bowie, 30 Ark. 278, Brodie v. McCabe, 33 Ark. 690, Cole v. Blackwell, 38 Ark. 271, St. Louis Southwestern Ry. Co. v. Kavanaugh, 78 Ark. 468, 96 S. W. 409, Little Rock v. Barton, 33 Ark. 441, Dreyfus v. Boone, 88 Ark. 353, 114 S. W. 718, Merwin v. Fussell, 93 Ark. 336, 124 S. W. 1021, and Harrison v. Norton, 104 Ark. 16, 148 S. W. 497, are entirely consistent with the above decisions when the facts in each case are examined.

So far as we have been able to examine the Arkansas cases, where the assault upon the tax is for an excessive assessment, the Supreme Court has held the remedy by injunction to be unavailing. This court, in the case of Stonebraker v. Hunter, 215 Fed. 67, 131 C. C. A. 375, decided that a statute of Oklahoma conferring power upon the state courts in that state to enjoin the illegal levy of any tax, charge, or assessment, was not available to confer jurisdiction upon a federal court sitting in that state, for the reason that the statute as construed by the Supreme Court of Oklahoma did not allow the maintenance of suits in equity to enjoin a tax, except in those cases where injunctions were recognized by courts of equity. It is alleged in the bill in this case that, as the tax upon the assessment levied would be payable by installments over a number of years, the bringing of this action would save a multiplicity of suits; but appellee cannot be heard to urge this as a ground of jurisdiction, where a simple appeal from the county court would have settled the whole controversy in one case.

In conclusion, it is our opinion that the court below ought to have dismissed the case for want of jurisdiction as a court of equity, for the reason that appellee had a plain, adequate, and complete remedy at law in the appeal given by the laws of Arkansas; and as it is our opinion that the appellee was confined to the remedy by appeal, we reverse the decree below, and remand the case, with directions to dismiss the bill.

PITTSBURGH & BUFFALO CO. v. DUNCAN et al.

(Circuit Court of Appeals, Sixth Circuit. May 2, 1916.)

No. 2760.

1. CORPORATIONS ⟸188—LIABILITY OF ONE CORPORATION FOR CONTRACTS OF ANOTHER—INDENTITY OF STOCK CONTROL.

The mere fact that the stockholders in two corporations are the same, or that one corporation exercises a control over the other through ownership of its stock, or through identity of its stockholders, does not make either the agent of the other, nor does it merge them into one, so as to

make a contract of one binding upon the other, where each corporation is separately organized under a distinct charter.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 704, 705; Dec. Dig. ⇐188.]

2. CORPORATIONS ⇐188—IDENTITY OF STOCKHOLDERS—LEGAL EFFECT.

While the legal fiction of distinct corporate existence will be disregarded, when necessary to prevent fraud, or when a corporation is so organized and controlled and its affairs so conducted as to make it only an adjunct or instrumentality of another, it requires a strong case to induce a court of equity to consider two corporations as one, on account of one owning all the capital stock of the other.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 704, 705; Dec. Dig. ⇐188.]

3. CORPORATIONS ⇐188—LIABILITY OF ONE CORPORATION FOR CONTRACTS OF ANOTHER—IDENTITY OF STOCK CONTROL.

A corporation *held* not liable on contracts of other corporations in which it owned no stock, where its business was separately conducted and the stockholders were not all the same, although the same persons owned a controlling interest in each.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 704, 705; Dec. Dig. ⇐188.]

Appeal from the District Court of the United States for the Northern District of Ohio; John H. Clarke, Judge.

Suit in equity by the Central Trust Company of New York, trustee, against the Wheeling & Lake Erie Railroad Company. From an order made on application of W. M. Duncan, receiver, for instructions, the Pittsburgh & Buffalo Company appeals. Reversed.

M. A. Copeland, of Cleveland, Ohio, for appellant.

T. M. Kirby, of Cleveland, Ohio, for appellees.

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

KNAPPEN, Circuit Judge. The Wheeling & Lake Erie Railroad Company was under receivership by appointment of the District Court for the Northern District of Ohio. The appellant, Pittsburgh & Buffalo Company (an Ohio corporation), was a wholesale dealer in coal at Cleveland; it delivered to the receiver fuel coal at an agreed price of $2,182.19, and for which the receiver was indebted to appellant. The Cleveland & Pittsburgh Coal Company (an Ohio corporation) was a retail coal dealer at Cleveland; it owed the receiver for freight and demurrage $1,453.46. The Pittsburgh-Buffalo Company (a Pennsylvania corporation) was a coal mine owner and operator; it also owed the receiver $160.96 for repairs on cars.

The receiver claimed the right to offset the indebtedness of the two last-named companies to him against his indebtedness to appellant. The latter denied such right. The receiver's right of set-off was based upon certain facts stipulated in connection with the receiver's application to the District Court for instructions, in which application appellant joined. These facts may be thus summarized:

Appellant's capital stock of $20,000 was held by seven persons, including the Johnetta Coal Company, whose holding was $^{47}/_{200}$ of the entire amount. The Cleveland & Pittsburgh Coal Company's stock

of $100,000 was held by six persons, including the Johnetta Coal Company, whose holding was 737/1000 of the entire amount. With one exception, the other stockholders in the two last-named companies were the same, although, as in the case of the Johnetta Company, their respective holdings of the capital stock of the two corporations were in each case different. Appellant's largest stockholder, John H. Jones (the exception above referred to), held no stock in the Cleveland & Pittsburgh Company. The Johnetta Coal Company was controlled by the Jones brothers (the Jones interests), and was organized for the purpose of holding the stock, bonds, and securities of the so-called "Jones Companies"; the Jones brothers being heavily interested in and controlling the policy of the Pittsburgh-Buffalo Company and the Four States Coal & Coke Company, which was also a coal mine owner and operator. They also controlled a number of subsidiary companies (including appellant and the Cleveland & Pittsburgh Coal Company), all of whom had extensive dealings with the two mining companies "and among themselves," and were known as "the Jones Companies." The parties, including the receiver, who did business with these companies, generally knew that they were controlled by the Jones brothers. The two mining companies, the Johnetta Coal Company, and a number of subsidiary companies are in the hands of receivers appointed by United States courts in Pennsylvania and West Virginia. The Cleveland & Pittsburgh Coal Company is under receivership by order of the District Court below. Appellant is not under receivership. It has acted for many years past as sales agent for the two mining companies, which has been its principal business. The books of appellant and the Cleveland & Pittsburgh Company have always been kept separately, and their dealings have not been confined to the material furnished by the Jones interests, although this has constituted a large portion of their business and the principal portion of appellant's business. A large number of the receiver's bills against the Jones companies have from time to time been charged against one of these companies, and upon rendition the receiver has been advised that the charge should properly be made against another of the Jones companies, and all of said bills in the past have been corrected as requested by said Jones companies.

The District Court found that the receiver was entitled to the claimed set-off, rendered judgment against appellant for the amount thereof, and directed the receiver to pay appellant the balance only of its bill above such set-off. This appeal is from that order.

Appellee seeks to justify the action complained of on the ground that the facts stated are sufficient to support a conclusion that (a) the Cleveland & Pittsburgh Company was the sales agent of appellant; or (b) that the Cleveland & Pittsburgh Company was held out by appellant as having authority to bind it, and that the latter is so estopped to deny such authority; and (c) that in the circumstances stated to deny the set-off would work an actual or constructive fraud against the railroad's receiver.

We are unable to agree with this view. The consideration of stock ownership and corporate control apart, the agreed facts fall short, in our opinion, of supporting a conclusion either that the Cleveland

& Pittsburgh Company (the retail coal dealer) was in fact appellant's sales agent, or that it was so held out by appellant; the books of the two companies were always kept separate, and we think the natural inference from the facts stated is that the receiver's bills against the respective companies were paid only when made out to the company properly chargeable therewith.

[1, 2] As respects stock ownership and corporate control: The mere fact that the stockholders in two or more corporations are the same, or that one corporation exercises a control over the other through ownership of its stock, or through identity of its stockholders, does not make either the agent of the other, nor does it merge them into one, so as to make a contract of one corporation binding upon the other, where each corporation is separately organized under a distinct charter. Central Trust Co. v. Bridges (C. C. A. 6) 57 Fed. 753, 6 C. C. A. 539; Richmond & I. Constr. Co. v. Richmond, etc., R. R. Co. (C. C. A. 6) 68 Fed. 105, 108, 15 C. C. A. 289, 34 L. R. A. 625; In re Watertown Paper Co. (C. C. A. 2) 169 Fed. 252, 255, 94 C. C. A. 528. True, the legal fiction of distinct corporate existence will be disregarded when necessary to prevent fraud, or when a corporation is so organized and controlled and its affairs so conducted "as to make it only an adjunct or instrumentality of another corporation." In re Watertown Paper Co., supra; Gay v. Hudson River Elec. Power Co. (C. C. A. 2) 187 Fed. 12, 14, 109 C. C. A. 66; Foard Co. v. Maryland (C. C. A. 4) 219 Fed. 827, 829, 135 C. C. A. 497. But "it requires a strong case to induce a court of equity to consider two corporations as one, on account of one owning all the capital stock of the other." 1 Cook on Corporations (7th Ed.) § 317; and see Peterson v. C., R. I. & P. R. R. Co., 205 U. S. at page 393, 27 Sup. Ct. 513, 51 L. Ed. 841.

[3] In the instant case there is not even complete identity of ownership in fact over the three corporations involved; the stock is not all owned by the Jones interests, individual stockholdings (as well as that of the Johnetta Company) in the different companies are not identical in amount, and one of the Jones brothers has no personal holding in the Cleveland & Pittsburgh Company. Appellant holds no stock in either of the other two corporations.

Nor do we think the inter-relation of the various Jones companies, as shown by the agreed facts, can properly be held to amount to fraud, actual or constructive, such as to make the retail coal-selling company and the coal-mining company instrumentalities of appellant and thus warrant a disregard of the actual separate identity of the three corporations. We find nothing indicating that the receiver gave credit to either the Cleveland & Pittsburgh Coal Company (the retail coal dealer) for freight and demurrage, or to the Pittsburgh-Buffalo Company (the mining company) for repairs on cars, upon any rightful expectation induced by those managing appellant's affairs, that his bills therefor would be paid by appellant or that the latter was chargeable therewith. The fact that the Jones interests were in the habit of seeing to it that the receiver's bills were paid by the corporation properly chargeable therefor has, in our opinion, no substantial tendency to establish liability on the part of appellant for such bills. Nor

is appellant shown to have had the benefit of the services rendered the other two corporations, and for which it has been held liable. There are apparent no circumstances of fraud or inequity on appellant's part, requiring its payment of the debts of the two other corporations.

The order of the District Court is accordingly reversed, with costs.

SEARS, ROEBUCK & CO. v. ELLIOTT VARNISH CO.

(Circuit Court of Appeals, Seventh Circuit. Jan. 4, 1916.)

No. 2286.

1. TRADE-MARKS AND TRADE-NAMES ⟸59(5)—INFRINGEMENT—IMITATION OF NAMES.

The name "Roof Leak," used as a trade-mark for a roof paint, is not infringed by the name "Never Leak," used for a similar paint.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 71; Dec. Dig. ⟸59(5).]

2. TRADE-MARKS AND TRADE-NAMES ⟸75—UNFAIR COMPETITION—USE OF NAME.

Complainant made a roof paint, which it sold under the name "Roof Leak." It contracted to furnish such paint to defendant, a mail order house, for sale, but to prevent its other customers from knowing that it was the same paint. By agreement the labels bore the name "Never Leak" and a different name as the manufacturer. On expiration of the contract, defendant bought paint elsewhere, but continued to use thereon the name "Never Leak." *Held*, that such use did not constitute unfair competition, since it had no tendency to deceive the public into believing that the paint sold thereunder was that of complainant.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 86; Dec. Dig. ⟸75.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Arthur L. Sanborn, Judge.

Suit in equity by the Elliott Varnish Company against Sears, Roebuck & Co. Decree for complainant, and defendant appeals. Reversed.

For opinion below, see 221 Fed. 797.

Luther L. Miller and C. C. Linthicum, both of Chicago, Ill., for appellant.

Walter H. Chamberlin and H. S. Wegg, both of Chicago, Ill., for appellee.

Before KOHLSAAT and ALSCHULER, Circuit Judges, and ANDERSON, District Judge.

ANDERSON, District Judge. For several years prior to 1909 appellee was engaged in the manufacture of paints. As early as 1902 or 1903 it manufactured and sold a roof paint which was adapted to stop leaks in roofs. About that time the name "Roof Leak" was used on labels on the paint and it was extensively advertised by that name.

In 1905 appellee registered the words "Roof Leak" as its trade-mark and continued to sell to the trade its roof paint under that name.

The appellant is a mail order house. It sells goods by catalogue and delivers them by mail, express, or freight. It must sell at a lower price than the retail dealer in the trade, because its customers pay, in addition to the purchase price, the carriage charges.

The appellee desired to have the appellant sell its roof paint, but would not allow appellant to sell it under the name "Roof Leak," because its other customers would know that it was selling its paint to appellant for a less price than it was giving them; so in order to get the benefit of sales through appellant, and at the same time conceal the fact from its other customers, it was agreed that the appellant should sell appellee's paint under the name "Never Leak." It is averred in the bill:

"That on or about the month of March, 1909, your orator made a verbal contract with the defendant * * * to furnish to the defendant its 'Roof Leak' paint under the brand 'Never Leak,' a brand selected by your orator in simulation of your orator's brand 'Roof Leak,' but sufficiently different therefrom to indicate the goods of your orator that were sold through the defendant."

The evidence shows that, under the arrangement made between the parties, appellant sold appellee's goods under the name "Never Leak." In its catalogues it described the paint as "Never Leak Roof Cement Paint." The labels used by appellant are set out in the record. One of them bore the name of the Illinois Paint Company; the other bore appellant's name. The reason for this course of procedure appears in the evidence of James P. Elliott, the president and manager of the appellee. He testified:

"Complainant's purpose in refusing to permit Sears, Roebuck & Co. to handle 'Roof Leak' paint under complainant's mark was due to a desire to prevent complainant's customers from knowing that Sears, Roebuck & Co. were handling the same thing."

Pursuant to this arrangement, the appellant sold appellee's goods for about a year, when the appellant ceased to purchase paint from appellee, purchased it elsewhere, and continued to sell it under the name "Never Leak," and with the same advertisements and catalogue insertions that it used in selling appellee's paint. Appellee brought this suit to restrain the appellant from so doing upon two grounds: First. Infringement of appellee's trade-mark. Second. Unfair competition, by continuing, after it ceased to buy appellee's goods, to use and apply to goods not appellee's the words "Never Leak" and labels that simulated appellee's labels, thereby deceiving the public. The District Court found in favor of appellee on both these propositions, and from the decree of court entered accordingly, the appeal herein is prosecuted.

There is some contradiction in the testimony as to who suggested the name "Never Leak," but this is not important. Is "Roof Leak" a valid trade-mark? As applied to a paint, it of course means a paint which will stop leaks in a roof.

"It is the settled rule that no one can appropriate as a trade-mark a generic name, or one descriptive of an article of trade, its qualities, ingredients, or characteristics, or any sign, word, or symbol which, from the nature of

the fact it is used to signify, others may employ with equal truth." Trinidad Asphalt Manufacturing Company v. Standard Paint Company, 163 Fed. 977, 90 C. C. A. 195, affirmed by the Supreme Court in Standard Paint Company v. Trinidad Asphalt Manufacturing Company, 220 U. S. 446, 31 Sup. Ct. 456, 55 L. Ed. 536.

Under the authorities, it would appear that this name is descriptive of the paint. It signifies its qualities and characteristics, and from the nature of the fact it is used to signify, namely, paint that will stop leaks in a roof, others may employ it with equal truth. The term may be truthfully applied to any paint calculated to stop leaks in a roof.

[1] But, passing the question as to the validity of the trade-mark, it is quite obvious, under the decision of this court in the case of S. R. Feil Company v. John E. Robbins Company, 220 Fed. 650, 136 C. C. A. 258 (the Sal Vet-Sal Tone case) that the words "Never Leak" are not an infringement of "Roof Leak." The court there said:

"In the present case defendant has appropriated only the term 'Sal,' which he and every one else was at liberty to use. As between the arbitrary term 'Vet' and the word 'Tone,' there can be no reasonable claim to resemblance."

So here the appellant has appropriated only the term "Leak," which it and every one else was at liberty to use and no one can claim that there is a resemblance between the words "Roof" and "Never."

[2] Nor is the appellee in any better position as to the charge of unfair competition. The essence of unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another. The mere resemblance of the words used by the appellant to the trade-mark of the appellee is not sufficient to establish unfair competition, because this would be to give, as stated by the Supreme Court in the Standard Paint Company v. Trinidad Asphalt Company, supra, "the full effect of a trade-mark while denying its validity as such."

The appellee's case, then, stands upon the proposition that the appellant is selling its own goods as the goods of appellee. From the facts above stated it is apparent that, while the appellant was selling appellee's paint, it sold it, not as the paint of the appellee, not as "Roof Leak," manufactured by the Elliott Varnish Company, but as "Never Leak," manufactured by the Illinois Paint Works; and the evidence shows that it was thus sold by appellant under an arrangement with the appellee in order to conceal from the other customers of appellee the fact that such paint was the paint of the appellee. If the paint was to be sold and was sold by the appellant under a name that would conceal from the other customers of the appellee the fact that the paint was the paint of the appellee, it is difficult to see how the sale of other paint under this name would deceive the public into believing that it was buying the paint of the appellee.

Appellee now complains of a method of doing business by which appellee says appellant is selling its own goods as the goods of appellee, and yet this method is just such as was agreed upon between appellee and appellant to conceal from appellee's other customers the fact that the appellant was selling appellee's goods. A method of doing business agreed upon for the purpose of making the trade believe that appellant was not selling the goods of appellee (and which, so far as

this feature is concerned, seems to have been successful) can hardly be relied upon to establish that appellant is deceiving the public into believing that it is selling appellee's goods. Appellee's case lacks the very essence of unfair competition.

It is contended by the appellee that the appellant got the right to use the words "Never Leak" from the appellee and that this right to use was only to continue while the appellant sold the paint of the appellee. The evidence does not support this contention.

Much insistence is placed upon the resemblance of the labels and particularly of the language of the directions for the use of the paint. The labels are not so similar as to deceive the ordinary purchaser, and the directions for using the paint are necessarily similar. Appellant has the right to sell paint with the same ingredients as that of appellee; it is used for the same purpose; and no reason is perceived why it may not employ the same language in directions for its use.

The decree is reversed, and the cause remanded, with directions to dismiss the bill.

OCEANIC STEAM NAV. CO., Limited, v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. April 11, 1916.)

No. 217.

ALIENS ⊂=53—DEPORTATION—EXPENSE OF.

Immigration Act Feb. 20, 1907, c. 1134, § 3, 34 Stat. 899, provided that the importation of any alien female for immoral purposes is forbidden, and whoever shall directly or indirectly import or attempt to import into the United States any alien woman for immoral purposes, or who shall hold or attempt to hold any alien woman for any such purpose, and whoever shall maintain any immoral resort frequented by any alien woman within three years after she shall have entered the United States, shall be deemed guilty of a felony, while the alien woman shall be deported. In 1910 (Act March 26, 1910, c. 128, § 2, 36 Stat. 264 [Comp. St. 1913, § 4247]), the section was amended, so as to declare that any alien who shall be found an inmate or connected with the management of an immoral resort, or who shall share in, receive, or derive benefit from any of the earnings of any prostitute, shall be deemed to be unlawfully within the United States, and shall be deported. Section 20 (section 4269) declares that any alien who shall enter the United States in violation of law and become a public charge, from causes existing prior to landing, shall be deported to the country whence he came at any time within three years after the date of his entry, and that the expense of deporting the alien from the port of deportation shall be borne by the owner or owners of the vessel or transportation line by which the alien came. *Held* that, in view of the amendment to section 3, the three-year period fixed by section 20 must be disregarded, and a steamship company which brought an alien to the country is liable after the expiration of the three-year period for the expense of his deportation, where he was guilty of sharing the earnings of a prostitute.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. ⊂=53.]

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

Action by the United States of America against the Oceanic Steam

Navigation Company, Limited. There was a judgment for the United States, and defendant brings error. Affirmed.

Burlingham, Montgomery & Beecher, of New York City (R. R. Allen, of New York City, of counsel), for plaintiff in error.

H. Snowden Marshall, U. S. Atty., of New York City (H. A. Content, Asst. U. S. Atty., of New York City, of counsel), for the United States.

Before COXE and WARD, Circuit Judges, and LEARNED HAND, District Judge.

WARD, Circuit Judge. April 19, 1910, Nicola Compagna entered the United States on one of the defendant's vessels. December 19, 1914, he was arrested upon a warrant of the Secretary of Labor on the ground that he was sharing in the earnings of a prostitute; and March 16, 1915, after a hearing, was ordered to be deported at the expense of the defendant. The defendant having refused to accept him as a passenger unless his fare were paid, the government paid the same under protest and brought this action to recover the amount, with costs. The defendant demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, and, the demurrer having been overruled, judgment was entered for the United States and this writ of error taken.

It will be seen that a pure question of law is presented, involving the construction of section 3 of the Immigration Act of February 20, 1907, as amended March 26, 1910, in conection with sections 20 and 21 of the same act. Section 3 was as follows:

"Sec. 3. That the importation into the United States of any alien woman or girl for the purpose of prostitution, or for any other immoral purpose, is hereby forbidden; and whoever shall, directly or indirectly, import, or attempt to import, into the United States, any alien woman or girl for the purpose of prostitution, or for any other immoral purpose, or whoever shall hold or attempt to hold any alien woman or girl for any such purpose in pursuance of such illegal importation, or whoever shall keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl, within three years after she shall have entered the United States, shall, in every such case, be deemed guilty of a felony, and on conviction thereof be imprisoned not more than five years and pay a fine of not more than five thousand dollars; and any alien woman or girl who shall be found an inmate of a house of prostitution or practicing prostitution, at any time within three years after she shall have entered the United States, shall be deemed to be unlawfully within the United States and shall be deported as provided by sections 20 and 21 of this act."

March 26, 1910, it was amended to read:

"Sec. 3. That the importation into the United States of any alien for the purpose of prostitution or for any other immoral purpose is hereby forbidden; and whoever shall, directly or indirectly, import, or attempt to import, into the United States, any alien for the purpose of prostitution or for any other immoral purpose, or whoever shall hold or attempt to hold any alien for any such purpose in pursuance of such illegal importation, or whoever shall keep, maintain, control, support, employ, or harbor in any house or other place, for the purpose of prostitution or for any other immoral purpose, in pursuance of such illegal importation, any alien, shall, in every such case be deemed guilty of a felony, and on conviction thereof be imprisoned not more than ten years and pay a fine of not more than five thousand dollars. Jurisdiction for

the trial and punishment of the felonies hereinbefore set forth shall be in any district to or into which said alien is brought in pursuance of said importation by the person or persons accused, or in any district in which a violation of any of the foregoing provisions of this section occur. Any alien who shall be found an inmate of or connected with the management of a house of prostitution or practicing prostitution after such alien shall have entered the United States, or who shall receive, share in, or derive benefit from any part of the earnings of any prostitute; or who is employed by, in, or in connection with any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather, or who in any way assists, protects, or promises to protect from arrest any prostitute, shall be deemed to be unlawfully within the United States and shall be deported in the manner provided by sections twenty and twenty-one of this act. That any alien who shall, after he has been debarred or deported in pursuance of the provisions of this section, attempt thereafter to return to or to enter the United States shall be deemed guilty of a misdemeanor, and shall be imprisoned for not more than two years. Any alien who shall be convicted under any of the provisions of this section shall, at the expiration of his sentence, be taken into custody and returned to the country whence he came, or of which he is a subject or a citizen in the manner provided in sections 20 and 21 of this act. In all prosecutions under this section the testimony of a husband or wife shall be admissible and competent evidence against a wife or husband."

The amendment material in this case was the striking out of the three-year limitation.

Section 20 reads:

"That any alien who shall enter the United States in violation of law, and such as become public charges from causes existing prior to landing, shall, upon the warrant of the Secretary of * * * Labor, be taken into custody and deported to the country whence he came at any time within three years after the date of his entry into the United States. Such deportation, including one-half of the entire cost of removal to the port of deportation, shall be at the expense of the contractor, procurer, or other person by whom the alien was unlawfully induced to enter the United States, or, if that cannot be done, then the cost of removal to the port of deportation shall be at the expense of the 'immigrant fund' provided for in section 1 of this act, and the deportation from such port shall be at the expense of the owner or owners of such vessel or transportation line by which such aliens respectively came."

Section 21 (Comp. St. 1913, § 4270) adds nothing and need not be considered.

There were in the act of 1907 at the time of the amendment of March 26, 1910, only three sections in which any period for deportation was fixed, to wit, sections 3, 20, and 21; and the period fixed for all cases of deportation was the same, viz., three years from the date of entry. The "manner" in which the deportation should be effected was regulated by section 20, and was the same for all cases, viz., under a warrant of the Secretary of Labor, one-half the costs of removal to the port of deportation to be at the expense of the person by whom the alien was unlawfully induced to enter, and the whole cost of deportation from that port to be at the expense of the owners of the vessel by which the alien originally came. The intent of Congress evidently was that the vessel owners should return at their expense from the port of deportation all aliens unlawfully here whom they had brought to this country. When, therefore, the time limit for deportation of this particular class of aliens was removed, and they were ordered to be deported "in the manner provided in section 20," we

think the three-year period therein mentioned was to be disregarded for all purposes. There is no reason to suppose that Congress intended to make the extent of the vessel owner's liability different as to that class from their liability as to any other class of aliens to be deported. In other words, this particular class is to be deported at any time from the port of deportation at the expense of the owners of the vessel which brought them in.

The judgment is affirmed.

In re I. S. REMSON MFG. CO.

In re HEATER.

(Circuit Court of Appeals, Second Circuit. April 25, 1916.)

No. 112.

BANKRUPTCY ⊜184(2)—PROPERTY VESTING IN TRUSTEE—UNRECORDED CONDITIONAL SALE CONTRACTS.

Bankr. Act July 1, 1898, c. 541, § 47a(2), 30 Stat. 557, as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (Comp. St. 1913, § 9631), which vests a trustee, as to property coming into his possession, with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon, does not entitle him, as against the seller, to hold property delivered to the bankrupt under a conditional sale contract preserving title, which, although unrecorded, is good under the state statute (Personal Property Law N. Y. [Consol. Laws, c. 41] §§ 62, 63), except as against subsequent purchasers, pledgees, or mortgagees in good faith, for the trustee merely stands in the shoes of an attaching creditor, who would only have acquired the interest of the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 276; Dec. Dig. ⊜184(2).]

Petition to Revise Order of the District Court of the United States for the Eastern District of New York.

In the matter of the bankruptcy of the I. S. Remson Manufacturing Company. On petition of the Adder Machine Company, an adding machine in possession of bankrupt was ordered delivered to it (227 Fed. 207), and Guy C. Heater, as trustee, petitions to revise the order. Order affirmed.

Winslow, Keenan & Budd, of New York City, for petitioner.

Black, Varian & Simon, of New York City, for respondent.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. The bankrupt is a New York corporation, and on February 23, 1915, it purchased from the Adder Machine Company, a Pennsylvania corporation, a Wales visible adding machine. The sale was a conditional one, and the price agreed to be paid was $180. The terms of sale required $70 to be paid in cash with the order, and that thereafter 10 consecutive monthly payments of $11 each should be made commencing 30 days from date of invoice. Of this amount $92 has been paid, leaving a balance of $88 due and

unpaid with interest from February 23, 1915. The agreement contained the following provision:

"Nothing but acceptance in writing from vendor's home office, Wilkes-Barre, Pa., shall constitute an acceptance of this order by vendor. It is agreed that title to said property shall not pass to vendee, or any other person, firm, or corporation, until paid for in full, which shall include the payment of any judgment secured. If cash payment is not made as agreed, or if there be default at any time in any payment, or other condition of this agreement, or upon refusal or neglect of vendee to accept said property when tendered by vendor or its agent, or any transportation agency, the full amount unpaid hereon shall become due and payable forthwith, and vendee agrees to accept and pay draft for the amount. In default of any payment or other condition herein expressed, said property may be removed by the vendor or its agents without legal process, and all payments made shall be retained by vendor as liquidated damages for the use thereof and not as a penalty. When payment in full shall have been received the property shall belong to the vendee."

The machine was duly delivered to the bankrupt prior to the adjudication of bankruptcy, which occurred on May 27, 1915. The trustee in bankruptcy was about to sell certain of the assets of the bankrupt, and thereupon the Adder Machine Company applied to the court for an order directing him to return to it the machine in question. The court below has entered an order directing that the machine be surrendered.

The conditional bill of sale was not filed in accordance with the Personal Property Law of the state of New York (Consol. Laws, c. 41) until after the trustee in bankruptcy had been elected and had qualified. That law provides as follows:

"*Where Contract to be Filed.* Such contracts * * * shall be filed in the city or town where the conditional vendee resides, if he resides within the state at the time of the execution thereof, and if not, in the city or town where such property is at such time. Such contract shall be filed in the city of New York, as follows, namely: In the borough of Brooklyn in said city, such instrument shall be filed in the office of the register of the county of Kings. * * *" New York Laws 1909, c. 45, art. 4, § 63; 4 Consolidated Laws of New York (Birdseye's Cummings & Gilbert's Edition) 4220.

It also provides:

"*Conditions and Reservations in Contracts for the Sale of Goods and Chattels.* Except as otherwise provided in this article, all conditions and reservations in a contract for the conditional sale of goods and chattels, accompanied by delivery of the thing contracted to be sold, to the effect that the ownership of such goods and chattels is to remain in the conditional vendor or in a person other than the conditional vendee, until they are paid for, or until the occurrence of a future event or contingency, shall be void as against subsequent purchasers, pledgees or mortgagees, in good faith, and as to them such sale shall be deemed absolute, unless such contract of sale, containing such conditions and reservations, or a true copy thereof, be filed as directed in this article. * * *" New York Laws 1909, c. 45, art. 4, § 62; 4 Consolidated Laws of New York (Birdseye's Cummings & Gilbert's Edition) 4218.

The trustee objects to the order of the court below. He calls attention to the fact that under this statute a purchaser, pledgee, or mortgagee in good faith of the machine acquiring his interest therein prior to the filing of the conditional bill of sale would take free of the conditions of the bill of sale. The trustee seeks therefore to convince us that he stands in the shoes of a purchaser, pledgee or mortgagee

in good faith and that therefore he is entitled to retain the machine. And he relies upon the following provision of the Bankruptcy Act:

"Such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied." Bankruptcy Act 1898, c. 541, § 47, subd. "a" (2), as amended June 25, 1910.

The effect of the above provision is to invest the trustee with the rights of a creditor holding a lien by legal or equitable proceedings. In other words, the meaning of the act is that the trustee has such rights as a creditor of the bankrupt would have who held a judgment, or an attachment, or an execution, or an equitable lien similar thereto. It does not clothe the trustee with the rights of an innocent purchaser, mortgagee, or pledgee for value. A judgment creditor, an attaching creditor, an execution creditor, simply gets the precise interest which the judgment debtor has and could have transferred. At the time of the bankruptcy the bankrupt held the machine subject to the right of the vendor to reclaim it from the vendee, who had defaulted in making payment. As the vendor could assert its title as against a judgment or an attaching creditor, it can assert it as against the trustee.

The rule is stated correctly in Remington on Bankruptcy (2d Ed.) vol. 2, p. 939, § 1137, where that writer declares that the trustee stands in the shoes of the bankrupt and takes "the property, in cases unaffected by any fraud of the bankrupt toward the creditors, in the same plight and condition in which the bankrupt held it, and subject to all equities and rights imposed upon it in the hands of the bankrupt," subject to certain exceptions not now necessary to be considered not being herein involved.

Counsel for the trustee has directed our attention to In re White's Express Co., 215 Fed. 894, 132 C. C. A. 234. In that case it was not necessary to consider the meaning of the amendment to the act made in 1910. The conditional bill of sale in that case had been filed prior to the adjudication of bankruptcy, and this court was not called upon to decide, and of course did not decide, what the effect would have been if the bill of sale had not been filed until after the adjudication.

Order affirmed.

In re BOESSNECK et al.

In re HAYNES.

(Circuit Court of Appeals, Second Circuit. April 18, 1916.)

No. 177.

BANKRUPTCY ⊂=140(3)—OWNERSHIP OF PROPERTY—TRUST.

Petitioner, an importer, desiring to obtain assistance for the carrying on of his business, applied to the bankrupts, a copartnership, and they agreed that orders by petitioner for goods should be submitted to the bankrupts; that, on approval, the bankrupts should remit to the for-

eign manufacturers the net amount of the consular invoices and should pay the duties on the goods; that they should be delivered to petitioner, who might sell them with the approval of the bankrupts, but that the bills should show an assignment to the bankrupts; that the bankrupts should guarantee the solvency of the customers; that the moneys collected should be received by the bankrupts; and that they should account semiannually. Under this arrangement, the bankrupts were allowed to deposit money so received with their general funds. *Held*, that no trust in such funds was created, and therefore, on bankruptcy, petitioner was entitled to no lien on funds derived from such transaction for which an accounting had not been had.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 225; Dec. Dig. ⇐140(3).]

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

In the matter of the bankruptcy of Otto Boessneck, Hugo E. Boessneck, Kurt Loewel, and Herman Weedgartner, copartners trading as Boessneck, Broesel & Co. From an order denying the petition of Charles W. Haynes to establish a lien on moneys in the hands of the receiver of the bankrupt, petitioner appeals. Affirmed.

Hiram Thomas, of New York City, for petitioner.

Rosenberg, Levis & Ball, of New York City (James N. Rosenberg and Ernest A. Bigelow, both of New York City, of counsel), for trustee.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. The appellant filed a petition in the court below praying that he be adjudged to have a lien on the moneys in the hands of the receiver of the bankrupt in the sum of $16,810.12 and that the receiver be directed to pay over to him that amount. On the coming in of the answer the issues raised were referred to a special master to take the testimony and report. He reported that in his opinion the petitioner had failed to establish that any trust fund was held by the receiver, now the trustee, for the petitioner. The District Judge confirmed the master's report.

The question is whether the appellant is entitled to be paid in full out of the funds in the hands of the trustee in bankruptcy, on the ground that a fiduciary relation existed between the appellant and the bankrupt, so that the funds in the trustee's hands are impressed with a trust in appellant's favor, or whether no trust existed and appellant is to share with the general creditors pari passu in the final distribution of the bankrupt's estate.

The bankrupt was a copartnership engaged in the business of the importation and sale of woolens and laces. The appellant was a dealer in laces, who purchased practically all of his product in Europe. In 1911 he desired to obtain financial assistance for the carrying on of his business. In order that he might obtain the necessary credit from the European manufacturers of his grade of merchandise, he had several conversations with a representative of the bankrupt with a view to having that firm finance his business. The results of these conversations are set forth in two letters, one sent by the bankrupt to appellant, the second sent by appellant to the bankrupt.

The general arrangement made between the parties was as follows: The appellant was to maintain his own office and selling force, and as soon as orders were taken by his salesmen, the orders were to be submitted to the bankrupt for approval. If approved, the order was to be forwarded to the foreign manufacturers, and the bankrupt agreed to remit to the foreign manufacturers the net amount of the consular invoices upon receipt of the merchandise in New York, thus becoming liable for the amount owing on the imported goods. The foreign manufacturer was to invoice the goods to appellant, but the bills of lading were to be made out in the name of the bankrupt, and the consular invoices and duplicates thereof, together with the bills of lading, were to be sent to the latter. The bankrupt was to make the entry of the merchandise in its own name and pay the duty, charging the amount of the duty so paid and all expenses incident to the handling and forwarding of the goods to appellant's account. The goods were then delivered into appellant's possession and forwarded by him to his customers, the bills being sent in appellant's name and on his bill heads, but bearing a notation upon each bill that the customer's account was assigned to the bankrupt and that payment should be made to it.

The bankrupt guaranteed to appellant the solvency of the customer, of the accounts which it approved, and, in case of a failure of the customer, the account of appellant was to be credited with the amount owing by the customer. The money received by the bankrupt from the customer was deposited in its general bank account and used as its own, and an account was rendered to appellant monthly and semi-annually of the net balance standing to his credit. The right to deposit the proceeds received in the general bank account is not disputed by appellant; on the contrary, it is alleged in the petition as proper.

For their services in guaranteeing the accounts and importing the goods the bankrupt was to receive 2 per cent. on the net amount of the sales and was entitled to charge 6 per cent. interest on the amount advanced for the account of appellant. The appellant was to keep on deposit at all times with the bankrupt 7½ per cent. of the sales accounts outstanding; the bankrupt reserved the right to deduct from his deposit account all claims, allowances, returned merchandise, charges, or other discounts from any of the sales accounts that were assigned. In case the bankrupt declined to assume the credit risk of any customer, appellant was to have the right to ship to this customer, but the outstanding account so created, when assigned to the bankrupt, was to be held by it for collection only.

We are unable to see in all this that any trust relation existed between these parties. The relation was that of debtor and creditor. The bankrupt had the right to deposit the proceeds of accounts collected in its general bank account and could use the money as it saw fit. This is not consistent with the existence of a trust, as a trustee has no right to mingle trust funds with his own, and he has no right to make use of the money for his own purposes, and he is not chargeable with interest unless he allows trust money to lie too long uninvested, or makes some unauthorized use of it. The relation was not even that of principal and agent, for title to the money which the

agent collects is not in the agent, but is in the principal, and the agent has no right to mingle it with his own, or to make any use of it. He must hold it alone for his principal. The bankrupt took the title to the funds collected, not for the benefit of the appellant, but for its own benefit and protection.

Inasmuch as in our opinion no trust existed between appellant and the bankrupt, it is quite immaterial that the trustee in bankruptcy admits that $4,500 came into his hands from collections received from Haynes' sales which were deposited in the Pacific Bank, and an additional sum of $3,524.05 from collections from like sales deposited in the Importers' & Traders' Bank. To that extent appellant would be entitled to recover, if his theory of a trust relation could be established. As to the balance of the amount he claims, his proof fails to trace it into the hands of the trustee. But as there is no trust relationship shown, he has no lien which he can assert in preference to the general creditors, even as to the funds shown to have reached the trustee's hands.

Judgment is affirmed.

UNITED STATES ex rel. HEN LEE v. SISSON, Chinese Inspector.

(Circuit Court of Appeals, Second Circuit. April 11, 1916.)

No. 280.

1. ALIENS ⟸32(8)—CHINESE—EXCLUSION—EVIDENCE.
Where a Chinese person, who claimed that he was born in San Francisco and lived there till 16, demonstrated his ignorance of the city, such fact is sufficient to warrant a finding that he was born, not in San Francisco, but in China, and to justify his deportation.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 84; Dec. Dig. ⟸32(8).]

2. ALIENS ⟸32(10)—CHINESE PERSONS—DEPORTATION.
Under Act Feb. 20, 1907, c. 1134, § 35, 34 Stat. 908 (Comp. St. 1913, § 4284), declaring that deportation of aliens arrested within the United States after entry and found to be illegally therein, shall be to the trans-Atlantic or trans-Pacific ports from which said aliens embarked for the United States, or, if such embarkation was for foreign contiguous territory, to the foreign port at which such aliens embarked for such territory, a Chinese person, who resided for a number of years in Canada before seeking entry into the United States, should, though a native and subject of China, be deported to Canada, instead of being returned 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 Southern District of New York.

Application by the United States, on the relation of Hen Lee, alias Leong Hen Lee, for a writ of habeas corpus against Harry R. Sisson, as Chinese Inspector, etc. From an order denying the writ, relator appeals. Order of relator's deportation modified.

R. M. Moore, of New York City (B. W. Berry, of New York City, of counsel), for appellant.

H. Snowden Marshall, U. S. Atty., of New York City (H. A. Content, Asst. U. S. Atty., of New York City, of counsel), for appellee.

Before WARD and ROGERS, Circuit Judges, and MAYER, District Judge.

WARD, Circuit Judge. [1] September 7, 1915, Hen Lee was arrested while attempting surreptitiously to enter the United States from Canada at Detroit. He was given a fair hearing before the Chinese and immigration inspector, before whom he testified that he was 25 years of age, was born in San Francisco, from where he removed in 1906 to New York, where he remained until 1910, when he sailed for China from Vancouver, returning to Canada in 1911, where he lived until he was arrested, as above stated, in 1915. Although no witness contradicted his testimony that he was born in San Francisco, the inspector did not believe it because his ignorance about a place in which he had lived until he was 16 was quite sufficient to discredit the statement. This finding is final. Tang Tun v. Edsell, 223 U. S. 673, 32 Sup. Ct. 359, 56 L. Ed. 606.

The relator was given an opportunity to call witnesses as to his birth, and also to have counsel, which offers he declined. The Acting Secretary of Labor, upon these proofs and the report of the Inspector, directed the relator to be deported to China. A writ of habeas corpus was taken out and dismissed, from which order this appeal is taken.

[2] There is no doubt that the relator should be deported from the United States under section 21 of the Act of 1907 (Comp. St. 1913, § 4270), because he is subject to deportation under the provisions of section 3 of the Chinese Exclusion Act of May 5, 1892, c. 60, 27 Stat. 25 (Comp. St. 1913, § 4317). The question is to what country should he be deported under section 35 of the act of 1907. His counsel contends that, as he had lived three or four years in Canada, it was the country from which he came, and to which, and not to China, he should be returned. The United States, on the other hand, insists that as he has been found to have been born in China he should be returned there.

Section 35 of the act of 1907 reads:

"That the deportation of aliens arrested within the United States after entry and found to be illegally therein, provided for in this act, shall be to the trans-Atlantic or trans-Pacific ports from which said aliens embarked for the United States; or, if such embarkation was for foreign contiguous territory, to the foreign part at which said aliens embarked for such territory." Comp. St. 1913, § 4284.

This provision literally applies to aliens found in the United States after entry, whereas this alien was arrested upon entry. Still the reason of the provision is equally applicable to an arrest in either case, and the question is whether the section contemplates an embarkation for foreign contiguous territory with intention to enter the United States via that territory, or whether it applies to any alien who lands in contiguous foreign territory, even if he does so with the intention

of staying, and even if he has actually established his domicile there, provided he afterwards attempts to enter the United States.

We think the former construction right. The country in which the alien was born is important only if the statute requires or authorizes him to be returned there, as in the provision of section 3 of the act of 1907 (Comp. St. 1913, § 4247) that he shall be "returned to the country whence he came, or of which he is a subject or a citizen," or as in the provision of section 2 of the Chinese Exclusion Act of 1892 (Comp. St. 1913, § 4316), that he "shall be removed from the United States to China, unless he or they shall make it appear to the justice, judge, or commissioner before whom he or they are tried that he or they are subjects or citizens of some other country, in which case he or they shall be removed from the United States to such country." If the deportation proceedings had been instituted under the Chinese Exclusion Acts, a different question would have arisen.

It is often intimated that an alien must be returned to the country of his nativity, because that was ordered in Lewis v. Frick, 233 U. S. 291, 34 Sup. Ct. 488, 58 L. Ed. 967. In that case a Russian, who had lived in the United States for several years, visited Canada for one day and returned with a prostitute. He was deported to Russia, which was the country of his nativity. It was also the country from which he originally came via London, as an examination of the transcript of record will show. Mr. Justice Pitney says:

"But since his offense was not discovered in time to permit of his physical exclusion, so that he becomes subject to the provisions for deportation, his destination ought not to be controlled by the factitious circumstance that he went into Canada to procure the prostitute. And, upon the whole, it seems to us that the act reasonably admits of his being returned to the land of his nativity, that being in fact the 'country whence he came' when he first entered the United States."

We think that the residence of this relator for three or four years in Canada before his attempt to enter the United States cannot be regarded as what Mr. Justice Pitney called a factitious circumstance. The Supreme Court in Lewis v. Frick, supra, left open the question whether "that part of the deportation order which determines the destination of the alien is open to inquiry upon habeas corpus," and we will therefore follow our previous practice by modifying the order of deportation by directing the alien to be returned to Canada.

In re LOEB et al.

(Circuit Court of Appeals, Second Circuit. April 11, 1916.)

No. 224.

BANKRUPTCY ⇐408(3)—DISCHARGE—CONCEALMENT OF ASSETS.

In December, 1911, the bankrupt signed a statement certifying that his assets amounted to $12,000 and his liabilities to $2,000. Thereafter another entered into partnership with the bankrupt, investing $3,000 in cash in the business. In October, 1912, the petition in bankruptcy was filed.

Held that, where there was a deficit of over $4,000 at the time of bankruptcy, and the bankrupt made no showing to explain the loss, his discharge will be denied, on the ground of concealment of assets.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 735, 736; Dec. Dig. ⊂=408(3).]

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

In the matter of the bankruptcy of Max Loeb and Solomon Liban, doing business as M. Loeb & Co. From an order dismissing the petition of Max Loeb for a discharge, and refusing to grant a discharge to said bankrupt, he appeals. Affirmed.

Morrison & Schiff, of New York City (I. D. Morrison, of New York City, and Leo N. Haiblum, of Stapleton, N. Y., of counsel), for appellant.

M. C. Ansorge, of New York City, for objecting creditor Bryant Park Bank.

Before COXE and ROGERS, Circuit Judges, and HOUGH, District Judge.

COXE, Circuit Judge. A discharge was refused the bankrupt, Max Loeb, on the sole ground that he had concealed assets belonging to the firm and in its possession prior to the bankruptcy. The petition in bankruptcy was filed October 28, 1912. The proof that such assets existed was found in a statement signed by the bankrupt and ending with the following certificate:

"The above statement printed and written has been carefully read by the undersigned and is full and correct. Max Loeb.
"Date, Dec. 20, 1911."

This statement showed total assets amounting to $12,233.32 and total liabilities of $2,307, leaving a "net worth" in December, 1911, of $9,926.32. The statement also showed that there was no contingent liability "upon accommodation indorsements," "upon exchanged paper," "for guaranties," "for bonds" and no "assets or liabilities pledged as, or secured by, collateral." Here, then, was a statement by the bankrupt showing an excellent financial condition which, if true, would make any extension of credit to Loeb, within reasonable limits, absolutely safe.

About this time Solomon Liban entered the partnership, investing therein the sum of $3,000 in cash, so that if the statement had been true, the firm would have had a surplus over liabilities of about $13,000. The bankrupt Loeb does not pretend that this statement was false and as to him, at least, it must be taken as true. He cannot be heard to contradict his own guaranty that the statement "is full and correct." When the firm failed about ten months after the statement was made there was a deficit of over $4,000 so that the bankrupt Loeb must account for a total loss of $16,000 during this period. This he has entirely failed to do.

The decree of the District Court is affirmed.

APPLE v. AMERICAN SHOE MACHINERY & TOOL CO.

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

No. 4500.

1. PATENTS ⊂=328—INVENTION—SKIVING MACHINE.
The Medalie patent, No. 1,010,065, for a leather skiving machine, is void for lack of patentable invention and anticipation in the prior art.

2. PATENTS ⊂=12—INVENTION—IMPROVEMENT PATENTS.
A mere change in the manner of taking out the knife of a skiving machine for the purpose of sharpening does not produce a new result, within the meaning of the patent law.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 10; Dec. Dig. ⊂=12.]

3. PATENTS ⊂=35—EVIDENCE OF INVENTION—COMMERCIAL SUCCESS.
That a patented machine has gone into extensive use is an unsafe criterion by which to determine patentable invention.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 39; Dec. Dig. ⊂=35.]

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

Suit in equity by the American Shoe Machinery & Tool Company against Nathan Apple. Decree for complainant, and defendant appeals. Reversed.

Charles S. Cairns, of Minneapolis, Minn., for appellant.

T. Percy Carr, of St. Louis, Mo. (James A. Carr and Amasa M. Holcombe, both of St. Louis, Mo., on the brief), for appellee.

Before ADAMS and CARLAND, Circuit Judges, and TRIEBER, District Judge.

CARLAND, Circuit Judge. Appellee as the owner of United States patent No. 1,010,065, issued to it November 28, 1911, as the assignee of Benjamin Medalie for an improved leather skiving machine, brought this action to enjoin appellant from infringing claims 1, 2, and 3 of said patent. The appellant is a seller of a skiving machine known to the trade as the "Progressive skiver," which is manufactured by the Progressive Shoe Machinery Company of Minneapolis, Minn. After a hearing on the merits a decree was entered in the trial court in favor of appellee, and appellant appeals.

[1] There can be no question on the evidence, but that the structure of appellant infringes the patent, as it performs the same function by the same means and in the same way as the patented structure. The question for decision is whether the patent in suit was anticipated by the patents cited in appellant's answer, and more particularly by the British patent to Mudd and Pochin, No. 8,136, application filed April 29, 1892, sealed July 11, 1893. The Mudd and Pochin patent is physically illustrated by the "improved Tripp skiver," which is in evidence. Medalie in his specification said:

"This invention relates to skiving machines, and it has for its principal objects to produce a simple and efficient machine for splitting and skiving or beveling strips or pieces of leather and similar fibrous materials, to provide for initially adjusting the cutting knife for a certain thickness of material and the automatic compensation of the knife for variations in the thickness

of material passed through the machine, and to attain certain advantages hereinafter more fully appearing."

Claims 1, 2, and 3 of the patent in suit are as follows:

"1. A skiving machine comprising a horizontally journaled fixed feed roller, a horizontally journaled idler resiliently supported in co-operative relation to said feed roller vertically thereunder, a cutting knife, a knife holder extending transversely at the rear of said feed roller and idler in the plane of their meeting peripheral portions and pivoted on one side to a fixed support and pivoted at its opposite side to the resilient support for said idler, whereby the position of the knife is automatically varied to compensate for various thicknesses of work which is passed between said feed roller and said idler.

"2. A skiving machine comprising a horizontally journaled fixed feed roller, an idler resiliently supported in co-operative relation to said feed roller, a cutting knife approximately in the plane of the meeting peripheral portions of said feed roller and idler, a holder for said knife pivoted at one side to an adjustable normally stationary support which is movable in a direction transversely with respect to the axes of said feed roller and idler, said holder being pivoted at its opposite side to an adjustable member on the resilient support for said idler, whereby the knife may be adjusted at different angles initially for a certain thickness of work and whereby, also, said knife automatically accommodates itself for different thicknesses of work which is passed between the feed roller and idler.

"3. A skiving machine comprising a horizontally journaled feed roller, a co-operating feed roller beneath said first mentioned roller, said second mentioned roller being journaled on a vertically movable spring-pressed support, a knife arranged with its cutting edge in co-operative relation to said feed rollers so as to receive the work end-wise, a knife-holder pivoted at one side to a vertically adjustable normally stationary support and pivotally and adjustably secured at its opposite side to the spring-pressed support for the lower feed roller, so that said knife holder may be set initially at different angles for a given thickness of work and automatically compensates for a variation in the thickness of the work, and means for adjusting the knife on its holder with respect to the feed rollers."

In view of the evidence, counsel for appellee very properly make the following statement in their brief:

"There is no use in burdening the court with a detailed consideration of elements which are not claimed to be new or to in any wise distinguish Medalie's machine from others which preceded it. We therefore freely concede that, for substantially 35 years prior to Medalie's invention, the broad principles were well known of feeding leather to a skiving knife between feed rollers; also of having one roller fixed and the other spring-pressed, so as to permit the rollers to automatically accommodate themselves to the various thicknesses of leather to be skived; and, finally, of having the angle or tilt of the knife automatically adjusted for different thicknesses of leather. These principles were not merely disclosed by paper patents, but were incorporated into skiving machines in actual use in the shoe factories of the country and, are fully exemplified, for instance, in the 'improved Tripp skiver' in evidence in this case. The complainant has no quarrel with the defendant here on the score of utilizing any of these principles. Medalie has, however, produced an absolutely new and ingenious method of mounting the knife, which distinguishes his machine from all prior machines and which produces a different and better result, *and it is in this that his invention consists.*"

[2] The invention, if any, in the Medalie patent, is in the method of mounting the knife upon a knife-holder, which permits the knife to be taken out without removing the holder. In the Tripp machine, if you desire to remove the knife, it is necessary to remove the holder. The question is thus reduced to a narrow compass, namely: Was it invention to simply change the manner of removing the knife, or was this change one which a person skilled in the art would ordinarily

make. The only reason for removing the knife is to sharpen it, it being contended that the knife in the Medalie machine may be removed for that purpose quicker and easier than in the patented machine. It is also claimed that the removal of the knife without removing the knife-holder is a new result, accomplished by entirely new means; but the Medalie machine skives leather just the same as the Tripp machine, which physically illustrates the Mudd and Pochin patent. The mere change in the manner of taking out the knife for the purpose of sharpening is not a new result within the meaning of the patent law, and in our opinion is not invention. Moreover, the fact that the knife-holder in the Medalie machine is pivotally connected to the other parts of the machine, and the knife is independently adjustable on the knife-holder, is not new.

In the Helms patent, dated March 15, 1870, the knife is independently adjusted on the knife-holder; and the same is true in the Wickersham patent, dated June 1, 1886; also the Vrooman patent, dated February 27, 1872. We are of the opinion that it would occur to any mechanic who was skilled in the art of skiving machines, in view of the Tripp skiver, to connect the knife-holder to the vertically adjustable plates by screws, instead of connecting the knife-holder by notches which engage the knife.

[3] It appears from the evidence that, after the patent in suit was issued, many sales of the patented machine were made by the appellee, and it is argued from this fact that a new use was supplied, or a new want satisfied. It also appears from the evidence that the older machines were used by shoe manufacturers; that they were larger and more expensive, and were operated by power rather than by hand. The Medalie machine was made small, and the price thereof was about one-half of the older machines, so that it could be used in small repair shops. This we think would fully account for the increase in sales. Moreover, the making of many sales is an unsafe criterion of patentable invention.

"That which was commonplace, whether as a result directly sought or incident to a usual mode of construction, cannot be novel. It is, in effect, an effort to incorporate upon the old art a function of the mechanism used in producing the fabric [fence] of the old art. That this fabric has gone into extensive use is an unsafe criterion by which to judge its novelty." Lane v. Welds, 99 Fed. 286–292, 39 C. C. A. 528, 534.

"That which is common and well known is as if it were written out in the patent and delineated in the drawings." Loom Co. v. Higgins, 105 U. S. 580, 26 L. Ed. 1177.

"Every inventor or constructor is presumed by the law to have borrowed from another whatever he produces that was actually first invented and constructed or used by that other in the United States, or was previously patented or described in a printed publication in any country, after having been invented by another." Walker on Patents (4th Ed.) § 43.

In Aron v. Manhattan Railroad Company, 132 U. S. 84, 10 Sup. Ct. 24, 33 L. Ed. 272, the Supreme Court approved the following language used by Judge Wallace in the court below:

"The patentee is entitled to the merit of being the first to conceive of the convenience and utility of a gate opening and closing mechanism which could be operated efficiently by an attendant in the new situation. His right to a patent, however, must rest upon the novelty of the means he contrives to carry his idea into practical application. It rarely happens that old instru-

mentalities are so perfectly adapted for a use for which they were not originally intended as not to require any alteration or modification. If these changes involve only the exercise of ordinary mechanical skill, they do not sanction the patent; and in most of the adjudged cases, where it has been held that the application of old devices to a new use was not patentable, there were changes of form, proportion, or organization of this character which were necessary to accommodate them to the new occasion. The present case falls within this category."

In Specialty Manufacturing Company v. Fenton Manufacturing Company, 174 U. S. 492, 19 Sup. Ct. 641, 43 L. Ed. 1058, the Supreme Court said:

"Putting the Hoffman patent in its most favorable light, it is very little, if anything, more than an aggregation of prior well-known devices, each constituent of which aggregation performs its own appropriate function in the old way. Where a combination of old devices produces a new result such combination is doubtless patentable; but where the combination is not only of old elements, but of old results, and no new function is evolved from such combination, it falls within the rulings of this court in Hailes v. Van Wormer, 20 Wall. 353, 368 [22 L. Ed. 241]; Reckendorfer v. Faber, 92 U. S. 347, 356 [23 L. Ed. 719]; Phillips v. Detroit, 111 U. S. 604 [4 Sup. Ct. 580, 28 L. Ed. 532]; Brinkerhoff v. Aloe, 146 U. S. 515, 517 [13 Sup. Ct. 221, 36 L. Ed. 1068]; Palmer v. Corning, 156 U. S. 342, 345 [15 Sup. Ct. 381, 39 L. Ed. 445]; Richards v. Chase Elevator Co., 158 U. S. 299 [15 Sup. Ct. 831, 39 L. Ed. 991]. Hoffman may have succeeded in producing a shelf more convenient and more salable than any which preceded it, but he has done it principally, if not wholly, by the exercise of mechanical skill."

Using the word "Medalie" in the place of "Hoffman" in the above excerpt, the language is quite pertinent to the present case. We are of the opinion, therefore, that the patent in suit is void for want of patentable invention, for the reason that the same had been anticipated by the patents cited by appellant, particularly the British Mudd and Pochin patent.

The decree below will be reversed, with directions to dismiss the bill; and it is so ordered.

MARSHALL v. WIRT.

(Circuit Court of Appeals, First Circuit. April 21, 1916.)

No. 1137.

1. PATENTS ⟸328—INVENTION.

The Marshall patent, No. 784,695, for insulating lining, claim 6, which covers an insulating lining for the outer shell, consisting of a paper tube having a portion of its diameter greater than that of the shell within which it is to fit, and which by its elasticity will maintain an effective holding pressure and prevent it from falling out when the shell is removed for repairs, while for an ingenious and useful device, involves only a change in form of the paper tubes previously in use, and is void for lack of patentable invention.

2. PATENTS ⟸16—INVENTION.

Every ingenious and beneficial mechanical device cannot be accepted as involving invention or discovery within the meaning of the patent law.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 14, 15; Dec. Dig. ⟸16.]

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

Suit in equity by Norman Marshall against Herbert C. Wirt. Decree for defendant, and complainant appeals. Affirmed.

Benjamin Phillips, of Boston, Mass., for appellant.

Reuben L. Roberts, of Boston, Mass., for appellee.

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

ALDRICH, District Judge. This case has reference to a patent granted to Norman Marshall, which is numbered 784,695, and dated March 14, 1905. The supposed invention relates to insulating sleeves used in incandescent lamp sockets to separate the metallic outer shell from the current-carrying parts of the socket.

[1] This patent has been before the courts in another case. It was before Judge Brown, sitting in the Circuit Court for the District of Massachusetts in 1907, and he wrote an opinion which was reported in Marshall v. Pettingell-Andrews Co., 153 Fed. 579. There was an appeal from his decision, and there was an opinion in the Court of Appeals by Judge Colt, which was reported in 164 Fed. 864, 91 C. C. A. 8. In that case, claims 5 and 9 were in issue, and there was a certain disclaimer. Claim 6 was not in issue. There was considerable discussion before us as to the effect of the disclaimer, and as to the bearing of these opinions upon claim 6, which is in issue here.

As we reach the conclusion that claim 6 does not involve invention, we have no occasion to discuss the effect of the disclaimer, nor the opinions in the former case, further than to say that, if they bear at all upon the question before us, they in effect at least bear a little against the idea of sustaining the patentability of the claim.

Claim 6 is as follows:

"An insulating lining consisting of a paper tube having its diameter reduced for a portion of its length, and having a portion of greater diameter than the part within which it is to fit, substantially as described."

It is quite true that the device described by Marshall has gone into general use. That, of course, shows that it involves a considerable measure of merit. In his specification Marshall points out that it is desirable that sleeves used as linings for the outer shell should be retained there, and that they should not fall out, as they frequently did, when the shells were removed for purposes of repair, and that by being held there certain dangers were minimized; that with the former insulating linings or insulating fiber tubings it had been found impracticable to make the linings invariably fit the shells with just the requisite closeness to prevent the linings from falling out, and at the same time permit the ready insertion and removal of parts when repairs were necessary; that the close-fitting linings were affected by moisture and temperature, and that under the earlier conditions there was danger that linings would drop out when shells were removed, and if, by chance, proper readjustments were not made, hazards would result.

Marshall points out that he has discovered means for curing these difficulties through an incandescent lamp socket which, when used as

a lining for the outer shell, will be retained there at all times and under all conditions, without danger of dropping out, and without offering undue resistance to its removal. His lining was made of paper, while in the former art, like that of Painter, the material was hard fiber; but nothing results from the paper characteristics, though it is evidently a preferable material, because, as said in the Circuit Court of Appeals (164 Fed. 862, 91 C. C. A. 8), the idea of using paper for such purposes was not new.

Marshall claims he accomplished his beneficial result by forming an elastic insulating sleeve or lining having a portion of its periphery of larger diameter than the part of the shell within which it is to fit, so that, as the lining is inserted in the shell, this portion will be compressed, and by its elasticity will maintain an effective holding pressure on the shell under all conditions; and, while he says that his lining may be made of any suitable insulating material having the requisite elasticity, he has discovered that such lining may be formed from paper tubing consisting of closely-wound layers of paper.

It is obvious that, if Marshall's device could be sustained at all, it must be through the idea of ingeniously shaping and forming a well-known material and adapting it to a particular use. It is plain enough that Marshall did furnish a lining of practical utility, and one which very likely is generally used; but the question remains whether it amounted to invention.

[2] Though we accept the full meaning of the constitutional provision in respect to inventions as one intended to promote the progress of the sciences and the useful arts, by giving to inventors and authors exclusive rights for a limited time, we cannot disregard the rules of public policy which enter into all cases of this kind. Reasonable consideration of such rules rejects the idea of accepting every ingenious and beneficial mechanical device as involving invention or discovery within the meaning of the Constitution and the statutes.

It must be admitted that Marshall's device comes very near invention, because its shape and adaption were meritoriously ingenious. Still our conclusion is that it does not involve such a discovery, or such a description of an original device, as should give it a patentable status carrying the exclusive right to make, use, and sell throughout the United States and territories. Such monopolies embarrass mechanical enterprises and the freedom of trade, and they should only be created and maintained in situations where the party claiming them describes an original discovery, or a device with mechanical means, having a pretty full measure of merit. To decide what that measure is is always difficult. It is largely a question of fact, and from the very nature of things there are no two cases alike.

It is with some hesitation that we do it, but on the whole we are inclined to adopt the theory expressed by this court, in Independent Die Co. v. Savels, 228 Fed. 45, 142 C. C. A. 501, in respect to the Gimson patent. Here, as there, the suggestion was a valuable one, but it must be accepted as a suggestion of a new use of something old, involving a mechanical change in shape and form, rather than as one involving an original discovery, or a line of ingenious mechanical adaptations amounting to patentable invention.

The decree of the District Court is affirmed, with costs of this court.

HARPER BROS. et al. v. KLAW et al.

(District Court, S. D. New York. January 6, 1916.)

1. COURTS ⟸291—JURISDICTION—COPYRIGHTS—SUIT FOR INFRINGEMENT—CONTROVERSY WITH LICENSEE.

A suit by the owner of the copyright of a play to enjoin licensees from producing it as a photo-play, which right they claim under their license contract, is one for infringement of copyright, of which a federal court has jurisdiction, regardless of the citizenship of the parties.

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

2. COPYRIGHTS ⟸82—INFRINGEMENT—PLEADING—COUNTERCLAIM.

Complainant, as owner of the copyright of a play, and defendants, as sole licensees for the production of the play, both claimed the right to produce the play as a photo-play, and complainant brought suit to enjoin such production by defendants as an infringement of the copyright. *Held*, that under new equity rule 30 (198 Fed. xxvi, 115 C. C. A. xxvi), which provides that a defendant "may without cross-bill set out any counterclaim against the plaintiff which might be made the subject of an independent suit in equity against him," the defendants might in their answer by way of counterclaim set up their contract, and ask an injunction to restrain complainant from producing the photo-play as in violation of the contract.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 72, 73; Dec. Dig. ⟸82.]

3. COPYRIGHTS ⟸48—DRAMATIC COMPOSITION—RIGHTS OF LICENSOR AND LICENSEE—PRODUCTION OF PHOTO-PLAY.

In 1899 complainant, which was the publisher of the novel "Ben Hur," with the consent of the author, who owned the copyright, entered into a contract with defendants by which they were authorized to have written a dramatic version of the novel, to be approved by complainant and the author and copyrighted in the name of complainant, and were given the "exclusive right of producing such dramatic version on the stage," on certain conditions as to the size of the cities where produced, the payment of royalties, and the manner of computing the same; the contract further providing that there should be no change in the text or manner of performance. *Held*, that the contract did not give defendants moving picture rights in the play, and that its production by them in such form would be an infringement of the copyright. *Held*, further, that while such rights were not granted, there was an implied negative covenant by complainant not to use the ungranted portion of the copyright estate to the detriment of the licensees' estate, which covenant would be violated by the granting to another of the moving picture rights in the copyrighted play, and that defendants were entitled to an injunction to restrain the same.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 46; Dec. Dig. ⟸48.]

In Equity. Suit by Harper Bros. and Henry L. Wallace against Marc Klaw and Abraham L. Erlanger, to restrain threatened infringement of copyright, with counterclaim for an injunction to restrain violation of contract. On final hearing. Injunction granted on both bill and counterclaim.

John Larkin, of New York City, for plaintiffs.
David Gerber, of New York City, for defendants.

HOUGH, District Judge. Plaintiff Wallace owns the copyright of the well-known novel "Ben Hur," and Harper Bros. (a New York corporation) that of an authorized dramatization of the romance made in 1899 by one Young, who was employed for that purpose by the defendant partners, Klaw & Erlanger (both New Yorkers), pursuant to a contract the true meaning of which is the ultimate problem presented by this case.

In 1899 Gen. Wallace's novel had long enjoyed popularity, and was known to be in many ways suitable for stage representation, with those spectacular accessories which the improved electrical and mechanical appliances of recent years have rendered possible. With the author's permission, therefore, Harper Bros. (the publishers of Ben Hur) agreed in writing with Klaw & Erlanger that (1) the latter should employ writers to produce "a dramatic version" of the novel; (2) such version should be approved by author and publishers of the novel, and copyrighted in the publishers' name; (3) after such approval the producers of the play should have no right to change the text or manner of performance in any material way; but (4) Klaw & Erlanger were granted the sole right (during the life of the copyright, if all conditions were duly complied with) of "producing on the stage," or "performing," the "dramatic version" provided for or created as above described.

In the preamble of the contract it is recited as the purpose thereof that the defendants are to obtain "the exclusive right of producing *such dramatic version* on the stage"; i. e., the dramatic version made by Young and paid for by Klaw & Erlanger. In pursuance of this written agreement the play was prepared, approved, and copyrighted. It follows the novel very closely, and it would (I think) be quite impossible to make another play that really told the story of Ben Hur without presenting substantially the same sequence of ideas as is presented by the copyrighted version of Young. That version in turn uses, far more frequently than is often the case, the exact words of the novel of which it is the derivative. When this contract was made the moving picture art was (in the trite phrase) in its infancy. There were moving pictures, but it was then completely beyond the known possibilities of the art to produce a series of pictures representing such and so spectacular and elaborate a play or performance as is the Ben Hur of Klaw & Erlanger.

For about 14 years Ben Hur has been produced in obedience to the contract of 1899, and apparently to the great pecuniary satisfaction both of the copyright owners and their licensees, Klaw & Erlanger. Lately, however, it is shown to have occurred to both parties to the contract that the public might be growing tired of the play as shown with actors speaking on the stage, and that (considering the enormous advances in recent years in the moving picture art) a photo-play of Ben Hur might reach, if not a new audience, at all events one that probably would not much longer pay ordinary theater prices to see so old a production. Thereupon both Harper Bros., as owners of the copyright, and Klaw & Erlanger, as licensees thereunder, assert that they and they alone possess the photo-play rights. The defendants have gone so far in the assertion of their position as to write a letter in which it is definitely said that they will produce Ben Hur as a photo-

play when and as they choose. This bill is brought to restrain the defendants from carrying out that threat, on the ground that such a production would be an infringement of copyright.

[1] Defendants have answered, questioning the jurisdiction of the court, but also denying that such production of Ben Hur as a photo-play would be an infringement, and alleging the contract of 1899 as full justification of their position. They then pleaded further, and under equity rule 30 (198 Fed. xxvi, 115 C. C. A. xxvi) set forth the same matter as a counterclaim, and in their turn ask the court to enjoin the plaintiffs from violating their contract of 1899 by doing, or seeking to do, exactly what Klaw & Erlanger claim for themselves; i. e., produce Ben Hur as a photo-play. I am quite unable to doubt jurisdiction as to the original bill of complaint. It shows a copyright case of a simple kind. The sole question is whether Mr. Klaw's letter hereinabove referred to is or is not a threat of violating copyright; and it is such a threat unless it becomes, by reason of the contract of 1899, the mere assertion of a lawful right.

Plaintiffs do not rest upon the contract, nor bring their action to enforce the contract; they seek to restrain the commission of a tort, and leave the defendants to come in and prove, if they can, that the action complained of is not a tort, because it is justified by a contract. To be sure, plaintiffs do in their bill anticipate this defense; but that is a matter of no moment. There is really no difference in the technical structure of the bill herein and that of the cases cited by plaintiffs. Healy v. Sea Gull Specialty Co., 237 U. S. 479, 35 Sup. Ct. 658, 59 L. Ed. 1056; Henry v. Dick Co., 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880.

[2] Whether there is jurisdiction of the defendants' counterclaim is a far more curious question, and one upon which there is great paucity of authority. Prior to the present rules in equity defendants would have been obliged to file a cross-bill, if they had sought to obtain the relief here demanded. Whether such a cross-bill as this could be sustained under Lautz v. Gordon (C. C.) 28 Fed. 264, and Hogg v. Hoag (C. C.) 107 Fed. 807, and 154 Fed. 1003, 83 C. C. A. 677, is a point on which much learning (probably useless) might be expended. It is my opinion that rule 30 in equity has deliberately and wisely enlarged the function of a cross-bill, now called a counterclaim. The language of that rule is that:

> The answer "may without cross-bill set out any counterclaim against the plaintiff *which might be made the subject of an independent suit in equity against him*, and such counterclaim so set up shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross-claims."

It is in my opinion now proper to do what these defendants have done; i. e., deny the equity of plaintiffs' bill, ground such denial on the language of a written document, and serve a counterclaim to prevent plaintiffs from violating said contract as understood by defendants. It is proper to do this, even though it cannot be said that the matter of the counterclaim, cross-suit, or cross-bill is merely auxiliary to the original suit. It is enough that in the language of the present rule the

counterclaim shows something "which might be the subject of an independent suit in equity against" the plaintiffs.

It follows that the next query is whether such an action as is here shown by defendants' counterclaim is a suit properly cognizable in equity. I think it is, on two grounds:

First. It is within the reasoning of some modern cases, of which Miller v. Uhlman (D. C.) 198 Fed. 233, is a good example. These cases display an inclination to greatly and justly expand the function of a cross-bill, even before the present equity rules.

Second. Remembering that this is an action for infringement of copyright, the real theory of the counterclaim or cross-suit is that plaintiffs threaten to infringe the rights of defendants, and in a very true sense should be considered as infringers themselves. This is exactly what may be and has been done in respect of patents. A patentee may be an infringer of his own patent, if after assignment thereof he does something that amounts to a violation of his contract with assignee. An ordinary action in equity for the infringement of patent rights may then be brought against the patentee himself. Piaget Novelty Co. v. Headley (C. C.) 107 Fed. 134; Id., 108 Fed. 870, 48 C. C. A. 116. The same remedy seems to me open to a similarly injured licensee.

[3] Being, therefore, of opinion that both the original action and the counterclaim are well brought, the merits of the case may be considered. It must be admitted (especially in this litigation) that the "exhibition of a series of photographs of persons and things arranged on films as moving pictures, and so depicting the principal scenes of an author's work as to tell the story, is a dramatization of such work," because all the parties to this litigation united in procuring such determination from the Supreme Court in Kalem Co. v. Harper Bros., 222 U. S. 55, 32 Sup. Ct. 20, 56 L. Ed. 92, Ann. Cas. 1913A, 1285. If by the agreement of 1899 the defendants had been granted the exclusive right of dramatizing Ben Hur, or producing any play or plays that might be made out of Ben Hur, there would be no doubt at all as to their right to make a "movie play," as well as the kind of play that has heretofore been produced.[1]

But the grant made by that agreement was far more limited. The right conferred was to produce one version only, and that in a particular manner, and in places limited to cities of a certain size. The contract prohibits any change in the manner of performance or text, and contains provisions as to royalties and their computation, confessedly incapable of application to any method of producing photoplays in commercial use or known to witnesses or counsel. It is unnecessary to expand this thought. The whole arrangement made between the parties in 1899 is not only inconsistent with, but repugnant to, the thought of making "movies" out of Ben Hur.

1 *Note.*—The Kalem Case was (as this is) an action for infringement of copyright. Klaw & Erlanger were joined as defendants, because they were the exclusive licensees of the copyright owners. It might well be said that there was a contradiction in terms in making them plaintiffs in that case, if they had no rights to be infringed upon by the production of moving pictures or photo-plays of Ben Hur. This point, however, has not been here argued, and certainly was not raised in the Kalem Company Case.

This differentiates the case at bar from Frohman v. Fitch, 164 App. Div. 231, 149 N. Y. Supp. 633, with which I fully concur; but these defendants never got so ample a grant as did Mr. Frohman. It follows, since the copyright covers a photo-play, and Klaw & Erlanger got no license to make or produce one, they would infringe if their threat were carried out; therefore they must be enjoined.

Plaintiffs assert, and almost assume, that since defendants cannot make a "movie" out of Ben Hur, and such right must exist somewhere, it is in them, as being an unconveyed portion of the copyright estate wherefrom was carved defendants' limited license. In strictness of law I think this true; but it does not always follow that, because one owns a certain thing, he may use it to the detriment of another, especially if the owner is under contractual obligations to such other. The "movie" rights to Ben Hur undoubtedly existed in 1899, but in nubibus, or (what is frequently the same thing) in contemplation of law only. As matter of fact they are an accretion or unearned increment conferred of late years upon the copyright owners by the ingenuity of many inventors and mechanicians.

In my opinion there is implied a negative covenant on the part of the plaintiffs (the grantors of defendants' restricted license) not to use the ungranted portion of the copyright estate to the detriment, if not destruction, of the licensees' estate. Admittedly, if Harper Bros. (or Klaw & Erlanger, for the matter of that) permitted photo-plays of Ben Hur to infest the country, the market for the spoken play would be greatly impaired, if not destroyed. This being the fact, the law is analogous to that which implies, from a covenant to make a certain use of property, a covenant negative against doing anything else with it. High on Injunctions (4th Ed.) § 1151A, and cases cited.

The result is that plaintiffs may take the injunction prayed for against defendants, and the defendants may have the same relief against plaintiffs. The meaning of such double injunction is that, as long as the contract of 1899 exists, neither party thereto can produce a photo-play of Ben Hur except by bargain with the other.

There will be no costs.

WALL et al. v. UNITED STATES MINING CO.

(Circuit Court, D. Utah. September 4, 1905.)

No. (541) 1105.

1. MINES AND MINERALS ⊂⊃30—"VEIN"—WHAT CONSTITUTES.
   A limestone belt, through which a mineral streak containing ore bodies can be traced, is a "vein," within the apex rule.
   [Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 73, 74; Dec. Dig. ⊂⊃30.
   For other definitions, see Words and Phrases, First and Second Series, Vein.]

2. MINES AND MINERALS ⊂⊃30—APEX RULE—VEINS.
   Where a fissure changing the formation of the land crosses a mineral vein, the owner of a claim in which the vein apexes cannot pursue it beyond the fissure.
   [Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 73, 74; Dec. Dig. ⊂⊃30.]

3. TRIAL ⊜375—VIEW—EVIDENCE.
In an action tried to the court, facts ascertained by view of the locus in quo may be considered as evidence; but, where the matter is one for experts, the court will not consider impressions obtained on view, as against their opinions.
[Ed. Note.—For other cases, see Trial, Dec. Dig. ⊜375.]

4. MINES AND MINERALS ⊜38(18)—APEX RULE—EVIDENCE—CLAIMS.
In an action to recover for a trespass on an ore body lying beneath the surface of plaintiff's mining claim, evidence *held* to warrant a finding that defendant was entitled to the mineral under the apex rule; the apex of the vein being on its property.
[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 104; Dec. Dig. ⊜38(18).]

5. MINES AND MINERALS ⊜30—MINING CLAIMS—TRESPASS.
Where defendant, either as owner of one claim or as owner of another, was entitled to the entire vein, the apex of which was within its properties, it is immaterial in what way it traces its title to the ore on which other mine owners claimed it trespassed.
[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 73, 74; Dec. Dig. ⊜30.]

At Law. Action by Enos A. Wall and another against the United States Mining Company. Judgment for defendant.

MARSHALL, District Judge. The plaintiff Wall, as lessee, and the plaintiff Fox, as the owner of the fee, of the Red Rover mining claim, instituted this action against the defendant to recover for a trespass on the ore body lying beneath the surface of said mining claim. The defendant justified its entry on the ground that the ore body in dispute is in a vein apexing in the Roman Empire, the Montana, and the Columbia Mining claims, owned by it, and that this vein, on its dip, passes beneath the surface of the plaintiff's claim and between parallel planes drawn through the end lines of the defendant's claims continued in their own direction. The case was tried by the court without a jury. The surface relations of these claims to each other is shown by a map, Exhibit 8, introduced in evidence by the plaintiffs. There is no controversy over the title to the surface. The plaintiffs own the Red Rover mining claim, and the vein in question does not apex in that claim. The defendant owns the Roman Empire, Montana, and Columbia Mining claims. These claims conflict with each other, and with respect to the conflicting areas the title is held under the senior claim. In order of seniority the Roman Empire is first and the Montana second. There is admittedly in the Roman Empire claim a zone or belt of limestone striking approximately east and west and dipping to the north. The apex of this limestone belt crosses the east end line of that claim and proceeds to the west approximately parallel to the side lines. This lime zone is of considerable width, and on its strike can be traced for a great distance. It lies between a hanging and a foot wall of quartzite, and the ore bodies in dispute are in it.

[1] It is not necessary to consider in detail the evidence which proves that this zone of limestone constitutes a vein, because in the case of United States Mining Co. v. Lawson, 134 Fed. 769, 67 C. C. A. 587, the Circuit Court of Appeals had occasion to consider the

same stratum of limestone in the light of evidence which, while it related to a portion of the zone at some distance from the claims here in question, was substantially the same as the evidence in this case. That court held that this limestone zone constituted a broad vein or lode, and that the overlying and underlying beds of quartzite were the limits of the lode. Here this vein can be followed on its dip through a network of openings from its apex in the Roman Empire to the ore bodies beneath the surface of the Red Rover, showing a demonstrated continuity of vein.

[2-4] But the real contention of the plaintiffs is that about 150 feet east of the west end line of the Roman Empire that claim is crossed by the Giant Chief fissure. This fissure is narrow, but of considerable length. It strikes approximately north and south and dips to the west. It is claimed by the plaintiffs that this fissure has faulted the formation, and that the country to the west of it has been thrown to the south. So that, while the mineralized lime belt apexes in the Roman Empire to the east of the fissure, yet the westerly continuation of the vein is found entirely to the south of all of the defendant's claims. If this be true, the western limit of the defendant's extralateral rights must be a plane drawn through the western point of the apex, as found in the Roman Empire, and parallel to the end lines of that claim. This would exclude the ore bodies in dispute, and the plaintiffs would then be entitled to recover.

The defendant admits the existence of the fissure and that at certain levels it faults the vein, the portion to the west being thrown to the south, but contends that, as the surface is approached, this throw decreases until at the surface within the Roman Empire it is either nonexistent or so small as to leave the western continuation of the vein within the limits of the defendant's claims. Whatever the fact may be as to the throw, the dip of the fissure to the west causes it to pass to the west of the ore bodies in dispute; so that these bodies lie in the same segment of the vein which undeniably apexes in the Roman Empire, but they extend west of the defendant's extralateral rights on the vein, if the apex ends in the claims of the defendant where the fissure is encountered on the surface.

The issue narrows itself to the question of the existence of the lime zone to the west of the fissure and within the defendant's claims. The problem is not easy of solution. The formation is covered with wash in which some trenches and cuts have been made. The deeper workings consist of the Corner tunnel and the R–18 tunnel. The witnesses of the respective parties do not agree as to the formation exposed. The plaintiffs' experts contend that the Corner tunnel is entirely in quartzite and that the first 135 feet of the R–18 tunnel is also in quartzite. The defendant's experts testify that both are in altered lime. The same confusion exists as to most of the cuts. The former see wash where the latter see the vein lime, and the latter find quartzite boulders in wash where the former allege that the solid quartzite formation has been reached. The appearances are ambiguous. The lime belt has been much altered, in many places to such an extent as to show an entire replacement of the lime with silica. This replacement was due to the very processes that transformed the barren lime into

a mineral vein. Where this replacement is atom by atom, the structure of the lime is apt to be reproduced in the replacing material, so that the silica, instead of being crystalline, is amorphous. No chemical test will discriminate between quartzite and lime entirely replaced with silica; but admittedly, if a thin slide is made of the rock, and it be examined under the microscope with polarized light, the question is easy of solution. The crystals of quartzite diffracting the light reveal the colors of the solar spectrum, while the amorphous quartz displays no such colors.

This was the test applied by the defendant's experts, and the result enabled them to pronounce the formation disclosed in the Corner and R–18 tunnels to be altered lime. They admitted that samples taken from both tunnels so resembled quartzite as to be difficult or impossible to classify without a microscopic test. If this evidence for the defendant is truthful, it demonstrates the existence of the lime belt to the west of the Giant Chief fissure and within the defendant's claims. If it be false the samples of rock from which the slides were made were selected with a fraudulent purpose to deceive, and either not obtained from the tunnels in question, or, if from them, taken from some small crack or fissure in the quartzite, in which there had been a secondary infiltration of lime. An honest mistake seems impossible. The slides were prepared by Dr. Talmage from samples taken by him, and were prepared, as he testified, for his own information, and not for use in court.

I am aware that some experts color their opinions to suit their interests, too readily assuming that they are justified in advancing specious arguments to support their employer's side of the case; but it has not been my experience that they deliberately misstate facts, as distinguished from opinions, with greater frequency than other witnesses.

At the request of the parties, I personally examined the ground, and I am asked by the plaintiffs to accept my own impressions of the nature of the rock as against this evidence. Two opposing theories are held as to such views of premises by court or jury. According to the first theory, such a view is not for the purpose of obtaining evidence, but only for the better understanding of the evidence given. The facts ascertained by the view are not regarded as a part of the proof. Close v. Samm, 27 Iowa, 503; Jeffersonville, etc., R. Co. v. Bowen, 40 Ind. 545; Heady v. Turnpike Co., 52 Ind. 117; L. & N., etc., R. Co. v. Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; Sasse v. State, 68 Wis. 530, 32 N. W. 849. But by the weight of authority the facts ascertained by a view are to be considered as in evidence and given due weight in reaching a conclusion. Indeed, any other rule is incapable of practical application. Washburn v. Railroad Co., 59 Wis. 364, 368, 18 N. W. 328; Denver T. & F. Co. v. Ditch Co., 11 Colo. App. 41, 52 Pac. 224; Tully v. Railroad Co., 134 Mass. 499; People v. Milner, 122 Cal. 171, 54 Pac. 833; McGar v. Bristol, 71 Conn. 652, 42 Atl. 1000; Maywood Co. v. Maywood, 140 Ill. 216, 29 N. E. 704; Chicago, etc., R. Co. v. Parsons, 51 Kan. 408, 32 Pac. 1083; Shepherd v. Camden, 82 Me. 535, 20 Atl. 91; Seattle, etc., R. Co. v. Roeder, 30 Wash. 244, 70 Pac. 498, 94 Am. St. Rep. 864; Fox v.

B. & O. R. Co., 34 W. Va. 466, 12 S. E. 757; U. S. v. Seufert Bros. Co. (C. C.) 87 Fed. 35.

But, while I agree that I am to consider my own impressions obtained from a view of the premises, the question still remains as to the weight to be attached to such impressions. The appearances on the ground were confessedly ambiguous. The question was one on which experts had differed. It was admitted by both sides that a microscopic examination of the rock was the only absolutely reliable test. Defendant's witnesses had in advance conceded that even an experienced miner might be deceived on an ordinary inspection. Under these circumstances, and concerning a matter involving special knowledge and experience, it would be a great presumption on my part to attach material weight to impressions gained by my own inspection. It is unnecessary, therefore, to state the result of that inspection. The weight of the evidence is, I think, with the defendant on this issue.

[5] It is not necessary to consider whether the defendant takes the entire vein in dispute by virtue of its ownership of the Roman Empire and Montana claims, in accordance with the decisions of the Circuit Court of Appeals of the Ninth Circuit in Empire State-Idaho Mining & Development Co. v. Bunker Hill & Sullivan Mining & Concentrating Co., 121 Fed. 973, 58 C. C. A. 311, and Empire State v. Bunker Hill, etc., 131 Fed. 591, 66 C. C. A. 99, or whether as to a part it must rely on the apex in the Columbia, under the Viola-San Carlos Case, Empire State, etc., v. Bunker Hill & Sullivan, etc., Co., 114 Fed. 417, 52 C. C. A. 219. There is no reason to doubt the correctness of this latter decision.

In either event the judgment must be for the defendant.

F. SPEIDEL CO. v. N. BARSTOW CO.

(District Court, D. Rhode Island. April 18, 1916.)

No. 60.

1. PATENTS ⊂=292 — INFRINGEMENT — INTERROGATORIES — FACTS SUPPORTING CASE.

Equity rule 58 (198 Fed. xxxiv, 115 C. C. A. xxxiv) is not intended to change the substantive rules of equity as to discovery, but merely to alter procedure, and the interrogatories authorized thereunder are such only as tend to establish complainant's case.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 446; Dec. Dig. ⊂=292.]

2. PATENTS ⊂=292—INFRINGEMENT—INTERROGATORIES—"PENALTY."

A suit for infringement, in which treble damages are asked, is essentially one for a "penalty," and complainant is not entitled to propound interrogatories which relate to the defense.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 446; Dec. Dig. ⊂=292.

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

In Equity. Suit by the F. Speidel Company against the N. Barstow Company. On motion by defendant to strike out interrogatories. Sustained.

Arthur P. Sumner, of Providence, R. I., for plaintiff.

Browne & Woodworth and Alex. P. Browne, both of Boston, Mass., for defendant.

BROWN, District Judge. The bill in equity charged infringement of letters patent No. 890,896, June 16, 1908, to Max Fessler, for process of soldering chain links. It prays for an injunction and accounting, and also prays specifically that the court may increase the damages to a sum not exceeding three times the amount thereof.

[1] The plaintiff has filed interrogatories, the substance of the principal interrogatories being: First, an inquiry whether the defendant has practiced the process of the patent in suit; and, second, an inquiry what were the steps of the process practiced by A. H. Bliss & Co., alleged in the answer to be a prior user, and when and where such process was practiced, and by what persons, together with their names and present addresses.

In support of the application the plaintiff cites P. M. Co. v. Ajax Rail Anchor Co. (D. C.) 216 Fed. 634; Luten v. Camp (D. C.) 221 Fed. 424; Blast Furnace Appliance Co. v. Worth Bros. Co. (D. C.) 221 Fed. 430.

In cases cited it is said that equity rule 58 (198 Fed. xxxiv, 115 C. C. A. xxxiv) adopts the English practice of order XXXI, "Discovery and Inspection," of the Rules of the Supreme Court of 1883. Referring to the Yearly Practice for 1912, by Mackenzie and Chitty, vol. 1, p. 370, it appears that the provision for interrogatories was not intended to give any right to discovery that did not exist before, or take away any previously existing right to protection on any ground of privilege, and that the principles previously existing in the Court of Chancery are now binding in the English courts. It also seems that the purpose was to enable a party to establish his case rather than to seek information as to the evidence or witnesses of the other party.

[2] The question of the right to propose interrogatories in an action to subject a party to a forfeiture or to penalties is considered on pages 379, 380, 393, of the Yearly Practice above cited.

In Jones v. Jones, 22 Q. B. D. 425 (1889), a claim for treble damages under a statute was held a penal action. Lord Coleridge observing:

> "'Treble damages' cannot possibly be compensation to the person grieved, and are plainly inflicted on the offender as a punishment. In other words, they are a penalty."

It was held that the plaintiff was not entitled to an affidavit of documents, and the principle was applied that the liability of a defendant to file such affidavit depends upon whether the action in which the application is made is or is not a penal action.

In Hobbs & Co. v. Hudson et al., 25 Q. B. D. 232 (1890), an appeal case before Lord Esher, M. R., and Lindley and Lopes, L. JJ., it was held that an action brought under a statute for double the value of

goods fraudulently removed by a tenant is a penal action, and that the plaintiff is not entitled to administer interrogatories to the defendant. The case of Jones v. Jones, supra, was expressly approved.

As was said in Boyd v. United States, 116 U. S. 631, 6 Sup. Ct. 533, 29 L. Ed. 746:

"Now it is elementary knowledge that one cardinal rule of the Court of Chancery is never to decree a discovery which might tend to convict the party of a crime, or to forfeit his property."

The imposition of threefold damages is, in substance, punitive, and I am of the opinion that, at least without an express waiver of any claim for such damages, a plaintiff cannot compel a defendant to give information which might amount to a confession of infringement, and thus expose him to a liability not to make compensation alone, but to pay exemplary damages, provided by statute as a punishment for willful infringement. This is, in substance, a penalty. See, also, In re Ashland Emery & Corundum Co. (D. C.) 229 Fed. 829.

The interrogatory as to the prior use does not relate to, nor tend to establish, the plaintiff's case, but relates to the defense, and to the defendant's evidence and witnesses. This also is not permissible under the English practice, under order XXXI. See Yearly Practice, above cited, pp. 373, 374; Carpenter v. Winn, 221 U. S. 533, 540, 31 Sup. Ct. 683, 55 L. Ed. 842; J. H. Day, Co. v. Mountain City Mill Co. (D. C.) 225 Fed. 622.

I am of the opinion that rule 58, like order XXXI, was not intended to change the substantive rules of equity as to discovery, but merely to alter procedure, and that, as the interrogatories seek for discovery to which the plaintiff is not entitled under the established principles of equity, the motion to strike out should be granted.

UNITED STATES v. MIDWAY NORTHERN OIL CO. et al.
(and five other cases).

(District Court, S. D. California. May 1, 1916.)

Nos. 47, A-2, A-3, A-13, A-31, and A-30.

1. EQUITY ⇐392—REHEARING—TIME FOR FILING PETITION.
While a court is without power to entertain a petition for rehearing after the term at which final decree was entered, where a petition is filed during the term by leave of court, the decree does not become final until the petition is disposed of.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 834–851; Dec. Dig. ⇐392.]

2. JUDGMENT ⇐388—VACATION—NOTICE TO PARTIES.
Entry of an order vacating a decree of dismissal without notice to the defendant, even if an error, does not affect the jurisdiction of the court to make the order.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 747–749; Dec. Dig. ⇐388.]

8. MINES AND MINERALS ⟸17(1)—MINING CLAIMS—VALIDITY OF LOCATION.
Under Rev. St. §§ 2320, 2329 (Comp. St. 1913, §§ 4615, 4628), no location of a mining claim, either lode or placer, valid as against the government, can be made until the discovery of mineral within the limits of the claim.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 24, 27, 28; Dec. Dig. ⟸17(1).]

4. MINES AND MINERALS ⟸36—OIL AND GAS CLAIMS—EFFECT OF WITHDRAWAL ORDER—"DILIGENT PROSECUTION OF WORK OF DISCOVERY."
The saving clause in Act June 25, 1910, c. 421, § 2, 36 Stat. 847 (Comp. St. 1913, § 4524), providing that, on the withdrawal of public lands from sale or entry by presidential order, the rights of any person who at the date of any such order "is a bona fide occupant or claimant of oil or gas bearing lands, and who at such date is in the diligent prosecution of work leading to the discovery of oil or gas, shall not be affected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution of said work," does not protect or confer any rights upon persons who had merely made a filing prior to such order, but who were not on its date, for whatever reason, actually engaged in the diligent prosecution of work leading to discovery.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 87; Dec. Dig. ⟸36.]

5. MINES AND MINERALS ⟸2—MINING CLAIMS—EFFECT OF WITHDRAWAL ORDER.
The presidential order of September 27, 1909, temporarily withdrawing public lands within a designated area in California from entry or disposal under the mineral laws, did not cease to be operative on the passage of Act June 25, 1910, but continued in force until confirmed by order of July 2, 1910, made under such act, and its effect was to withdraw the lands from explorations for minerals as well as entry during such time.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 2; Dec. Dig. ⟸2.]

6. MINES AND MINERALS ⟸7—SUIT TO ENJOIN—TRESPASS AND WASTE—EQUITY—JURISDICTION.
The United States may maintain a suit in equity to enjoin trespass upon public lands to which it has clear title, where the defendants are extracting and removing oil therefrom which constitutes their sole value, and on determining that the possession of defendants is without right, the court will retain jurisdiction to give full relief by a decree granting a permanent injunction and an accounting.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 7; Dec. Dig. ⟸7.]

7. MINES AND MINERALS ⟸7—SUIT TO ENJOIN TRESPASS AND WASTE—EQUITY—JURISDICTION.
As to defendants joined in suit, however, who claim no right in the lands and are not charged with trespass, but who merely bought the oil from the operating defendants in the usual course of business, the complainant has a plain, adequate, and complete remedy at law by an action for conversion, and a court of equity is without jurisdiction.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 7; Dec. Dig. ⟸7.]

8. UNITED STATES ⟸126—RIGHTS AS SUITOR IN EQUITY.
Where the sovereign comes into a court of equity, asserting a pecuniary demand against a citizen, or to protect its proprietary interests, its claims appeal, generally speaking, to the conscience of the chancellor

with the same, but not greater or less, force than those of a private individual under like circumstances.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 115; Dec. Dig. ⊂⊃126.]

9. MINES AND MINERALS ⊂⊃7—TRESPASS AND WASTE—RULE OF DAMAGES IN EQUITY.

On an accounting in a suit in equity by the United States against trespassers, who have built derricks, drilled wells, and extracted and marketed oil from public lands, but who entered upon the lands in good faith through a mistake of law, in the belief, under advice of reputable counsel, that they could acquire rights under the mineral laws, defendants will not be subjected to punitive damages by enforcing against them the rule of the common law in cases of willful trespass, and requiring them to account for the entire proceeds of all oil sold and to forfeit all improvements, but will be given credit for the cost of production, and allowed to set off the value of permanent and useful improvements made, and to remove their machinery and tools.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 7; Dec. Dig. ⊂⊃7.]

10. MINES AND MINERALS ⊂⊃7—TRESPASS AND WASTE—RULE OF DAMAGES IN EQUITY.

On the other hand, such defendants will not be given the benefit of the rule in favor of occupying claimants in good faith under color of title, by requiring the government to pay for their improvements before regaining possession.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 7; Dec. Dig. ⊂⊃7.]

In Equity. Suits by the United States against the Midway Northern Oil Company and others, against the Consolidated Midway Oil Company and others, against the American Oilfields Company and others, against David Kinsey and others, against the Midlands Oilfields Company, Limited, and others, and against the Associated Oil Company and others. On final hearing. Dismissed as to certain defendants, and decrees for the United States against all other defendants.

See, also, 216 Fed. 802.

Case No. 47:

A. E. Campbell and Frank Hall, Sp. Asst. Attys. Gen., for the United States.

Pillsbury, Madison & Sutro, of San Francisco, Cal., for defendant Standard Oil Co.

A. L. Weil, of San Francisco, Cal., for defendants Waite and others.

George E. Whitaker, of Bakersfield, Cal., and Frank H. Short, of Fresno, Cal., for defendants Lowell and others.

Walter F. Haas, of Los Angeles, Cal., for defendant Maricopa Northern Oil Co.

W. A. Sutherland, of Fresno, Cal., for defendant Miocene Oil Co.

Matthew S. Platz, of Bakersfield, Cal., for defendant Francis.

Case No. A–2:

A. E. Campbell and Frank Hall, Sp. Asst. Attys. Gen., for the United States.

James P. Sweeney, of San Francisco, Cal., for defendant Maricopa Oil Co.

A. L. Weil, of San Francisco, Cal., for defendants Maricopa Consol. Oil Co. and others.

George E. Whitaker, of Bakersfield, Cal., for defendants Midnight Oil Co. and others.

Pillsbury, Madison & Sutro, of San Francisco, Cal., for defendant Standard Oil Co.

Case No. A–3:

A. E. Campbell and Frank Hall, Sp. Asst. Attys. Gen., for the United States.

Andrews, Toland & Andrews, of Los Angeles, Cal., for defendant Union Oil Co.

James P. Sweeney, of San Francisco, Cal., for defendants Miocene Oil Co. and others.

A. L. Weil, of San Francisco, Cal., for defendants American Oilfields Co. and others.

George E. Whitaker, of Bakersfield, Cal., for intervener Coons.

Pillsbury, Madison & Sutro, of San Francisco, Cal., for defendant Standard Oil Co.

Case No. A–13:

A. E. Campbell and Frank Hall, Sp. Asst. Attys. Gen., for the United States.

A. L. Weil, of San Francisco, Cal., for defendants Midlands Oilfields Co. and others.

Andrews, Toland & Andrews, of Los Angeles, Cal., for defendant Union Oil Co.

Case No. A–31:

A. E. Campbell and Frank Hall, Sp. Asst. Attys. Gen., for the United States.

Edmund Tauszky, of San Francisco, Cal., for defendant Associated Oil Co.

C. Del Bondio, of Taft, Cal., for defendants Beers and others.

Case No. A–30:

A. E. Campbell and Frank Hall, Sp. Asst. Attys. Gen., for the United States.

A. L. Weil, of San Francisco, Cal., for defendants Midlands Oilfields Co. and others.

Andrews, Toland & Andrews, of Los Angeles, Cal., for defendant Union Oil Co.

BEAN, District Judge (sitting by special assignment). These cases involve closely related questions, were heard together, and it will be convenient to likewise dispose of them, noticing in the course of the opinion wherein they differ, if at all. They are suits in equity brought by the government for decrees that the several tracts of land particularly described in the bills, together with the mineral contents thereof, are the property of the United States, free from all claims of the defendants, or any of them, and for an injunction restraining the

defendants from trespassing thereon or extracting the oil therefrom, and an accounting for oil heretofore extracted and disposed of.

The lands in controversy are mineral (petroleum) lands of the United States situate in the Maricopa oil fields in California. They are included in presidential order of September 27, 1909, temporarily withdrawing all public lands, without particular designation, within an area of about 3,000,000 acres, the larger part of which was privately owned, "from all forms of location, settlement, selection, filing, entry, or disposal," under the mineral laws of the United States, "in aid of proposed legislation affecting the use and disposition of the petroleum deposits in the public domain." This order, which was subsequently ratified and confirmed on July 2, 1910, subject to the provisions, limitations, exceptions, and conditions contained in the act of Congress approved June 25, 1910 (36 Stat. 847), was held in all respects valid by the Supreme Court in February, 1915, in U. S. v. Midwest Co., 236 U. S. 459, 35 Sup. Ct. 309, 59 L. Ed. 673. No discovery of oil had been made on any of the lands at the date of the first withdrawal order, nor was any one in possession thereof at that time actually engaged in work looking to a discovery. In suits 47, A–2, A–3, and A–30 sundry parties had, prior thereto, posted on the land involved in each of the suits and caused to be recorded a notice claiming a location of the land as a petroleum placer mining claim under the mining laws of the United States, but no discovery of oil had been made or any work done thereon, except some so-called assessment work, which consisted in excavating sump holes, building small cabins, and the erection of a couple of derricks on one of the tracts, which derricks were never used or equipped for drilling, but were subsequently taken down and removed to other parts of the premises. After the first withdrawal order, parties claiming as lessees of the so-called locators in the four cases referred to, and in the other two without any previous notice of location, commenced drilling operations in each of the tracts involved in the fall of 1909 or early in 1910, and continued thereafter until the discovery of oil, which they were extracting and disposing of when these suits were commenced against the parties in possession, the so-called locators, the purchasers of the oil, and others.

The bills set out the title of the government, the character of the land, the withdrawal orders, the entry of the defendants in violation thereof, and allege that they are in possession of the property, and extracting the oil therefrom, and disposing of it, to the irreparable damage of the plaintiff. The bills pray for injunctions, decrees, and accounting, as stated. The defendants admit government's title, but assert the right of the locators and the operating companies to the possession of the properties, and to extract and dispose of the oil, under the mining laws of the United States and the act of Congress of June 25, 1910.

[1] In case No. 47 a preliminary question as to the right of the court to consider it on the merits requires attention. On June 1, 1914, a decree was entered dismissing the suit; the court (Judge Dooling) holding that the withdrawal order of September 27, 1909, was invalid

for want of authority in the President to make it. On July 1st following, and within the term, an ex parte order was made by him permitting a petition to rehear to be filed by the government; "the hearing thereon and the decision of the questions therein to be presented to be had upon 10 days' notice, to be issued by the parties or their counsel of record, at a time and place to be fixed by the court." The petition was not served on the defendants, nor any show cause order made. Subsequently, and after the decision in the Midwest Case and after the expiration of the term in which the decree was rendered, the court allowed the petition to rehear, vacated its former decree of dismissal, and reinstated the case, without, as far as the record shows, notice to the defendants or their counsel. The decree of dismissal is pleaded in bar, and it is urged that the order granting the rehearing is void for want of jurisdiction, because made after the expiration of the term at which the decree was rendered and without notice. After a term has ended, all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them. Bronson v. Schulten, 104 U. S. 410, 26 L. Ed. 797; Wetmore v. Karrick, 205 U. S. 141, 27 Sup. Ct. 434, 51 L. Ed. 745; In re Metropolitan Trust, 218 U. S. 312, 31 Sup. Ct. 18, 54 L. Ed. 1051. But the petition to rehear was filed by permission of the court within the term, and it is settled that, if a petition or motion for rehearing is made in season and entertained by the court, the decree, although entered in form, does not become final or discharge the parties from attendance in the case, and they are bound to follow the petition thus pending to a subsequent term. Equity rule 69 (198 Fed. xxxviii, 115 C. C. A. xxxviii), "that no rehearing shall be granted after the term at which the final decree of the court shall have been entered and rendered," etc., does not apply where a petition to rehear is presented during the term, because the decree of the court does not become final until such petition is disposed of. Giant Pwd. Co. v. Cal. V. Powder Co. (C. C.) 5 Fed. 197; Aspen M. & S. v. Billings, 150 U. S. 31, 14 Sup. Ct. 4, 37 L. Ed. 986.

[2] There is no statute or rule of court of which I am advised requiring a petition to rehear in an equity case to be served on the adverse party unless by order of the court. It is no doubt the better practice, but the failure to do so is not a jurisdictional defect, and does not destroy the efficacy of a petition filed by the consent and in pursuance of an order of the court. Whether it was error to vacate the former decree without formal notice to the defendants does not go to the sufficiency of the decree as a bar. At most it was an error or irregularity in the course of the proceedings in a matter over which the court had jurisdiction, and which I do not feel called upon to consider at this time. The plea in bar will therefore be overruled and denied.

[3] No location of a mining claim, valid as against the government, can be made until the discovery of mineral within the limits of the claim. R. S. §§ 2320, 2329 (Comp. St. 1913, §§ 4615, 4628). Discovery and appropriation are the sources of title. Posting a notice on public land claiming the same as a mining claim, recording such

notice, and doing so-called assessment work, without first making a discovery, is a mere speculative proceeding, conferring no rights as against the government, although as long as the so-called locator remains in possession and with due diligence prosecutes work towards discovery he may be entitled to protection against "all forms of forcible, surreptitious, or clandestine entry and intrusion upon his possession" by another. Erhardt v. Boaro, 113 U. S. 527, 5 Sup. Ct. 560, 28 L. Ed. 1113; McLemore v. Express Oil Co., 158 Cal. 559, 112 Pac. 59; Borgwardt v. McKittrick, 164 Cal. 650, 130 Pac. 417; Tuolumne Con. M. v. Maier, 134 Cal. 583, 66 Pac. 863; and opinion of Judge Bledsoe on application for appointment of receivers in cases A–13 and A–30. It follows, therefore, that the defendants had no right or claim to the properties in controversy, or the mineral contents thereof, valid as against the United States, at the date of the first withdrawal order, since there had been no discovery of oil at that time; nor could any such right be initiated by an entry after the date of such order. Midwest Case, supra.

[4] It is contended, however, that although no discovery had been made at the time of the first withdrawal order, the operating companies or those under whom they claim had, in all of the cases except two, made paper locations and done work on the premises prior to that date, and were bona fide occupants at the time of the first withdrawal order, and in diligent prosecution of work leading to discovery, within the meaning of the saving clause in the act of June 25, 1910. This act declares:

"That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands, and who, at such date, is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order, as long as such * * * claimant shall continue in diligent prosecution of said work."

To come within this provision it is essential that the party claiming the benefit thereof was a bona fide occupant or claimant at the date of the withdrawal, and at that time in diligent prosecution of work leading to a discovery. Now, the evidence shows, and it is undisputed, that the defendants in none of the cases were engaged in the prosecution of work leading to discovery of oil or gas at the date of the first withdrawal order, or in fact doing any work at all. Indeed, no work had been done on any of the tracts for months prior to the order, and then only so-called assessment work, which was of no effect as against the government, since assessment work must follow, and not precede, discovery.

It is urged, however, that they had in good faith signified an intention, by filing and recording notices and doing so-called assessment work, to enter the lands under the mineral laws, and that they would have proceeded with work looking to discovery, but for their inability to obtain water for use in their boilers and for drilling purposes. The lands in controversy are situate in an arid section of the state, and until late in 1909 or early in 1910 it was difficult, if not impracticable, to obtain water in sufficient quantities for successful drilling; but I do not think that fact brings the cases within the terms of the law.

There is no intention manifest in the statute, as far as I can see, to protect or confer any rights on those who had merely made a filing prior to the withdrawal order, but who were unable to engage in work looking to discovery, but only those who were at the date of the order bona fide occupants or claimants of the lands withdrawn and *actually engaged in the diligent prosecution of such work.* None of the defendants comes within this category.

"Diligent prosecution of the work of discovery does not mean the doing of assessment work. It does not mean the pursuit of capital to prosecute the work. It does not mean any attempted holding, by cabin, lumber pile, or unused derrick. It means the diligent, continuous prosecution of the work, with the expenditure of whatever money may be necessary to the end in view." McLemore v. Express Oil Co., supra.

The Supreme Court of Nevada, in Ophir Silver Mining Company v. Carpenter, 4 Nev. 538, 97 Am. Dec. 550, after saying, "Diligence is defined to be the 'steady application to business of any kind, constant effort to accomplish any undertaking,'" adds:

It "is that constancy or steadiness of purpose or labor which is usual with men engaged in like enterprises, and who desire a speedy accomplishment of their designs; such assiduity in the prosecution of the enterprise as will manifest to the world a bona fide intention to complete it within a reasonable time. It is the doing of an act, or series of acts, with all practical expedition, with no delay, except such as may be incident to the work itself."

Now, the mere effort, however diligent, to obtain water for drilling purposes, or the inability to do so, which is all the evidence for the defendants tends to show, cannot be held to constitute diligent prosecution of work looking to discovery any more than the pursuit of capital to prosecute such work, or a lumber pile or unused derrick, can be held to constitute such diligence. The question is not whether the defendants were able to prosecute the work of discovery at the date of the withdrawal order, but whether they were actually engaged in such work at that time.

[5] It is argued that as the withdrawal order of September 27, 1909, was temporary, and "in aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain," its purpose was accomplished, and the implied power of the President to make it exhausted, when Congress acted by passing the act of June 25, 1910, entitled "An act to authorize the President of the United States to make withdrawals of public lands in certain cases," and it became ineffective and ceased to be operative immediately on the passage of such act, and from that time until July 2d, the date of the second withdrawal order, the public lands included in the first order were open to entry under the mineral laws, and as it is admitted that the operating defendants in each of the cases were in possession of the property at the date of the second withdrawal order and engaged in the work of development, their right to the possession was confirmed by the provisions of the act referred to.

There is some force in this argument, but I think it is answered by the language of the act and the decision in the Midwest Case. It was held in the Midwest Case that the President had authority by long

acquiescence of Congress to make the withdrawal order. Consequently such order must be valid and effective until revoked, repudiated, or modified by lawful authority, and that has not been done, at least so far as it affects oil or gas bearing lands. The language of the act as a whole evidences an intention on the part of Congress to leave parties in possession of such withdrawn lands in statu quo; the courts to determine their rights, if any. It provides that it shall not be "construed as a repudiation, abridgment or enlargement of any asserted rights or claims initiated upon any oil or gas bearing land after any withdrawal of such made prior to the passage of this act." There is nothing in its language, nor can anything be read into it by implication, which indicates an intention to nullify or affect the validity of previous orders withdrawing oil or gas bearing lands. It shows an intention on the part of Congress to regulate withdrawals after its passage and to grant relief to those who were in diligent prosecution of work leading to discovery of oil or gas at the date of previous withdrawal, but nothing therein to indicate the slightest intention to nullify, cancel, or repudiate withdrawals of oil or gas bearing lands already made. In the Midwest Case the locators entered upon the land in March, 1910, bored a well, and discovered oil, and in May following filed a location notice. They were in possession of the property between the passage of the act of June 25, 1910, and the 2d of July, the date of the second withdrawal order, and had actually discovered oil, and yet the court held that they had no right or claim to the property, valid as against the government. The defendants in the cases at bar are in no better position.

It is also insisted that the withdrawal order of September, 1909, did not affect the right to explore for oil in the withdrawn lands, and, after discovery, to extract and dispose of the same, but only the right to enter, locate, or purchase such lands. The language of the order, as well as its history and purpose, clearly negatives such contention. Its manifest object, as its language plainly shows, was to preserve the petroleum in the lands, in order to subserve the public interest as the President then saw it. The lands were valuable only for their mineral contents, and the express purpose of the withdrawal order was to preserve such contents until Congress should provide for their disposition. When the lands were withdrawn, they ceased to be public lands of the United States within the meaning of the mining laws, and hence not open to exploration or discovery under such laws. I conclude, therefore, that in view of the withdrawal order of September 27, 1909, and the Midwest Case, the defendants have no right, title, or interest in or to the property in controversy, or possession thereof, or its mineral contents, which they can successfully assert as against the government, and this brings me to the question of jurisdiction and the relief to which the plaintiff is entitled in these suits.

[6] The defendants stoutly contend that, since the complaints allege and the answers admit that the plaintiff was not, and the operating defendants were, in possession at the time the suits were commenced, the question of title or right to possession cannot be determined by a court of equity, and the only relief to which the plaintiff is entitled in

any event is decrees enjoining the defendants from committing further waste until the title and right of possession can be determined at law, while the position of the government is that, since the defendants were engaged in extracting and removing the oil, and thereby destroying the very substance of the estate, a court of equity has jurisdiction to restrain such operation, and, having acquired jurisdiction for that purpose, will retain it for all purposes.

There is much apparent confusion in the adjudged cases as to when and under what circumstances a court of equity will assume jurisdiction at the suit of a party out of possession to determine title and right to possession of mining property. These questions were considered by Mr. Justice Wolverton in Bishop v. Baisley, 28 Or. 119, 41 Pac. 936, and the doctrine deduced by him from an examination of the authorities may be summarized as follows: Where the title is legal, and not equitable, and is seriously in dispute, a court of equity will not assume jurisdiction by one out of possession, except for a temporary purpose, to abide the adjudication of title by an action at law, and a perpetual injunction will not be granted in such a case, as that would be to try title in a court of equity, when the remedy is purely legal. But where the legal title and right to possession is clear, a perpetual injunction will issue to restrain trespass and waste, and a court of equity will grant such other relief as may be consistent with equity and right. He says:

"The injunctive jurisdiction of courts of equity will be freely exercised to prevent trespass upon mines, as the digging and removing ores therefrom and extracting and disposing of their products reaches to the very substance and value of the estate, and goes to the destruction of the very essence thereof. A continued trespass of such a character would almost inevitably lead to a multiplicity of actions for damages. 2 Beach on Injunction, § 1155. The general rule requiring the plaintiff to come with an uncontroverted legal title extends also to trespass against mines, but is relaxed somewhat in the case of irreparable injury going to the substance of the estate."

And this I take to be the true rule. Where there is a serious controversy as to the title, and the party in possession is holding adversely, the plaintiff's remedy is at law, and not in equity. Johnston v. Corson Gold Mining Co., 157 Fed. 145, 84 C. C. A. 593, 15 L. R. A. (N. S.) 1078. For "suits in equity shall not be sustained in the courts of the United States in any case where a plain, adequate and complete remedy may be had at law." R. S. § 723. But where the title and right to possession is clear, and the defendant is wrongfully in possession, extracting and removing the mineral contents, thus destroying the very substance of the estate, a court of equity will assume jurisdiction to prevent such waste, and, having done so, will determine the rights of the parties before it. It is true the plaintiff in such case has a remedy at law to recover possession and damages for the trespass, but "it is not enough that there is a remedy at law. It must be plain and adequate, or, in other words, as practical and efficient to the ends of justice, and its prompt administration, as a remedy at equity." Payne v. Hook, 7 Wall. 430, 19 L. Ed. 260; Toledo Traction, Light & Power Co. v. Smith (D. C.) 205 Fed. 643; Magruder v. Belle Fourche Valley Water Users' Ass'n, 219 Fed. 72, 133 C. C. A. 524.

Now, in these cases there is no issue tendered as to title. It is admitted that the properties in controversy belong to the government, and that it has the clear legal title thereto. The defendants were either lawfully in possession, with the right to take and remove the mineral contents, or they were trespassers, committing waste by destroying the very substance of the estate. If my conclusion is sound that the defendants have no right of possession or to the oil as against the government, it seems to follow necessarily that the remedy at law would be wholly inadequate to prevent irreparable injury to the estate and practical destruction thereof by the removal of the oil. The lands are admittedly valuable only for their oil contents. The trespasses of the defendants complained of were not ordinarily cases of trespasses of temporary duration. They were continuous, and defendants were destroying, and threatened to continue to destroy, the substance of the estate, and ultimately, if they had been permitted to continue, would have rendered the plaintiff's ownership thereof valueless. As stated by Judge Riner in Big Six Development Company v. Mitchell, 138 Fed. 279, 70 C. C. A. 569, 1 L. R. A. (N. S.) 332:

"Threatened and continuous injuries to mines, quarries, timber growing upon lands, buildings located thereon, or other improvements of a permanent character, are enjoined, because, as has been said, such acts 'alter the character of the property, and also tend to destroy it, and occasion irreparable loss and damage.' * * * In such cases the threatened injuries are to the res, and diminish the value of the property itself, and an injunction will be granted to prevent the continuing waste or continuing trespass, although the plaintiff is not in possession, and although the legal title has not been settled or questioned by an action at law. * * * And having obtained jurisdiction for that purpose, the court may, for the purpose of preventing a multiplicity of suits, retain it for further relief, and may remove a cloud upon the title, quiet the title, and determine the right of possession."

A court of equity, therefore, has jurisdiction to restrain the defendants from destroying the value of the properties in controversy, by extracting and removing the oil therefrom, and will retain the suits for an accounting and satisfaction for the injuries already done. El Dora Oil Co. v. U. S., 229 Fed. 946, — C. C. A. —; Graves v. Ashburn, 215 U. S. 331, 30 Sup. Ct. 108, 54 L. Ed. 217; Coosaw Min. Co. v. South Carolina, 144 U. S. 550, 12 Sup. Ct. 689, 36 L. Ed. 537; U. S. v. Flint, 4 Sawy. 78, Fed. Cas. No. 15,121; U. S. v. Guglard et al. (C. C.) 79 Fed. 21; Light v. U. S., 220 U. S. 523, 31 Sup. Ct. 485, 55 L. Ed. 570; Big Six Dev. Co. v. Mitchell, 138 Fed. 279, 70 C. C. A. 569, 1 L. R. A. (N. S.) 332, and authorities there cited; U. S. v. Bernard, 202 Fed. 728, 121 C. C. A. 190; U. S. v. Mackey (D. C.) 214 Fed. 137; Wood v. Braxton et al. (C. C.) 54 Fed. 1005; Peck v. Ayers & Lord Tie Co. et al., 116 Fed. 273, 53 C. C. A. 551; U. S. v. Brighton Ranche Co. (C. C.) 26 Fed. 218.

In most of the cases there are substantially three classes of defendants: (1) The parties who drilled wells in the properties in controversy, and extracted and marketed the oil therefrom, and were threatening to continue to do so, known as the operating companies; (2) the alleged locators, under whom the operating companies claim; and

(3) the parties who purchased the oil after it had been extracted, who may be designated as the marketing defendants.

[7] As to the latter, the suits are nothing in effect but actions for conversion of property alleged to have been wrongfully taken from the lands by the operating companies. The marketing companies make no claim to the properties, have never trespassed, nor committed waste therein, nor advised or encouraged others to do so. Their only offending consisted in purchasing the oil in the usual course of business, as they did from many other operators in the same field. They are no doubt amply able to respond to any judgment the government may recover against them, and for the wrong, if any, done by them, the plaintiff has a plain, adequate, and complete remedy at law, and they cannot be denied their constitutional right to trial by jury by joining them with defendants in a suit to prevent waste brought against the operating companies. There is no question here of following the proceeds of property converted into other property, but simply an action to recover of the marketing companies the value of the oil purchased by them from the actual trespassers. Nor is there an accounting necessary between them and the government in any such sense as to give a court of equity jurisdiction on that ground. The suits, therefore, will be dismissed as to the marketing companies, without prejudice, however, to the rights of the government to sue at law, if it should so elect. U. S. v. Bitter Root Co., 200 U. S. 451, 26 Sup. Ct. 318, 50 L. Ed. 550.

The cases against the operating defendants must go to a master to ascertain and report the amounts, if any, the plaintiff is entitled to recover against them. It is proper, therefore, that the court should indicate the rule by which, in its judgment, the master should be governed in his consideration of the matter. For the government it is contended that the operating companies must be treated as willful trespassers, and required to account to it for all oil extracted at its market value, with no deductions whatever for money expended for sinking wells, or otherwise developing and improving the properties, or for the cost and expenses of extracting and marketing the oil, and that in addition it is entitled to take and appropriate all wells, casings, derricks, machinery, tools, and appliances and other property put on the lands by the defendants. This view does not favorably address itself to a court of equity. Equity seeks compensation for the wrong done, and not to punish the wrongdoer. Turner v. Seep (C. C.) 167 Fed. 652. As said by Judge Gilbert in United States v. Bernard, 202 Fed. 732, 121 C. C. A. 190, which was a suit to enjoin trespass on government land and for damages:

"In actions of trespass, where the injury is wanton or malicious, or gross and outrageous, or is done against the protest of the plaintiff, or in known violation of the law, the court may permit the jury to add to the measured compensation of the plaintiff further damages by way of punishment or example, the amount thereof to be left to the jury's discretion, in view of the special, peculiar circumstances of the case. But the function of a court of equity goes no farther than to award, as incidental to other relief, or in lieu thereof, compensatory damages. It has no authority to assess exemplary damages. By applying to a court of equity for relief, the complainant waives all claims to vindictive damages."

[8] The government could have proceeded against the defendants in ejectment, or in trespass, or for a conversion, in which event the rules applicable at law would have been available; but it has seen fit to invoke the aid of a court of equity, and, having done so, its rights must be determined on equitable principles, the same as that of any other litigant. Where the sovereign comes into a court of equity, asserting a pecuniary demand against a citizen, or to protect its proprietary interest, its claims appeal, generally speaking, to the conscience of the chancellor with the same, but no greater or less, force than that of a private individual under like circumstances, and it is the duty of the court to withhold relief, except upon the terms which do justice to the citizen or subject, as determined by the jurisprudence of the forum. Sweet v. U. S., 228 Fed. 421, — C. C. A. —, and authorities cited; Walker v. U. S. (C. C.) 139 Fed. 409; U. S. v. Detroit Lumber Co., 200 U. S. 321, 26 Sup. Ct. 282, 50 L. Ed. 499; Hemmer v. U. S., 204 Fed. 898, 123 C. C. A. 194; Iowa v. Carr, 191 Fed. 257, 112 C. C. A. 477. For, as said by Mr. Justice Severens, speaking for the court in United States v. Chandler Dunbar Water Power Co., 152 Fed. 41, 81 C. C. A. 221:

> When it (the sovereign) "sues in equity as a private suitor on a cause of action relating to its proprietary interests, it is held to be affected by those equities which are recognized as fundamental in controversies between private parties. And why should this not be so? It derogates from the dignity and character of the government to suppose that, formed as it is to secure impartial justice between individuals, it may nevertheless, in the conduct of its own affairs, without regard to the principles it represents, perpetrate upon its citizens wrongs which it would promptly condemn if practiced by one of them upon another."

It is therefore unnecessary to examine the numerous cases cited discussing when a trespass upon land will be regarded as innocent or willful, or the measure of damages in an action at law therefor, or to attempt to reconcile the apparent conflict in the opinions, or to deduce any general rule therefrom, because these suits are to be decided upon principles of justice, right, and fair dealing, under all the facts, and not according to the strict rules applicable to actions at law.

[9] Now, in four of the cases the parties under whom the operating companies entered claimed a right to the possession of the property involved and to extract the oil therefrom because of attempted locations made prior to the withdrawal order, or under contracts with such locators. In Case No. A–30 the land in controversy was, at the date of the first withdrawal order, covered by a homestead entry; but, as the adjoining lands were rapidly being developed as mineral, the entryman concluded that he could not sustain his title, and therefore permitted the operating defendants to enter into possession and prospect for oil. At the time of the withdrawal order, or soon thereafter, the area in the immediate vicinity of the properties in controversy was being rapidly developed as oil-producing property. It was therefore necessary for the claimants, if they were to protect their rights, if they had any, to take immediate steps to develop the property claimed by them, in order to prevent its occupation by others, or the oil under it from being drawn off and exhausted by wells on adjoining land. They

thereupon, acting as prudent and careful men, consulted counsel learned in the law, and were advised that, since Congress is vested by the Constitution with power to dispose of the public land (article 4, § 3), and since it had declared by statute that valuable mineral deposits, including petroleum, in land belonging to the United States, are free and open to exploration and purchase, and the land in which they are situate to occupation and purchase (R. S. §§ 2319–2329; Act Feb. 11, 1897, c. 216, 29 Stat. 526 [Comp. St. 1913, § 4635]), the Executive was without authority to suspend the acts of Congress, or withdraw the lands from the operative effect thereof, and therefore the withdrawal order was invalid, and if they proceeded to a discovery of oil, they would acquire a right to the property and its contents.

Acting on this advice, honestly and in good faith, without any intention of wronging the government, they developed the properties, expending large sums of money in so doing, the aggregate in the six cases in question amounting to more than $1,000,000. By their labor and expenditures they have demonstrated the mineral character of the lands, and increased their market value from $2 or $3 an acre to $2,000 or $2,500 an acre. What was before a barren, arid waste is now demonstrated valuable mining properties, with numerous oil-producing wells thereon, and that through the efforts and expenditures of the defendants. The government agents and officers charged with the disposition of the public lands knew of the possession and development of the properties, and made no objection thereto, and while this does not estop the government from now asserting title or right to the possession (Pine River Logging Co. v. U. S., 186 U. S. 279, 22 Sup. Ct. 920, 46 L. Ed. 1164), it should not be overlooked by a court of equity in considering the character of the defendants' possession, or the damages which they should be required to pay.

It is true the defendants, as laymen, are presumed to have known the law, and that the withdrawal order was valid, although many of the leading members of the California bar, and five of the ten federal judges called upon to consider the question judicially, apparently did not, and even the Executive himself was in doubt as to his authority to make the order. The maxim that every man knows the law applies to defendants, but there is a marked difference between those who recklessly, or with actual intent to rob others, trespass upon their property, and those who, acting on the advice of counsel, trespass by mistake, with no evil purpose, but with an honest belief that they have a right to do so. "One who acts in good faith, upon the erroneous advice of reputable counsel upon questions of legal right concerning which a layman could hardly have actual knowledge, is not chargeable with bad faith, or with a willful intent to commit a wrongful act because his counsel was mistaken in his view of the law." U. S. v. Homestake Min. Co., 117 Fed. 481, 54 C. C. A. 303; U. S. v. St. Anthony R. R. Co., 192 U. S. 524, 24 Sup. Ct. 333, 48 L. Ed. 548; U. S. v. Mullan Fuel Co. (D. C.) 118 Fed. 663. The defendants were not willful looters of the public domain, nor reckless trespassers thereon. They acted on the advice of reputable counsel, expended their money and labor in good faith, relying upon a law of the United

States and in the honest belief that they were within their rights. They were of course trespassers, because they were mistaken, but they should not be mulcted in damages beyond the actual loss to the government, and in my opinion this should be measured by the value of the oil taken and the damages, if any, which they have caused or permitted to the properties or their oil contents by the infiltration of water or otherwise.

The value of the oil taken is to be ascertained by its market value at the time it was used or disposed of by the defendants, less the cost of extracting and marketing the same, excluding from such costs the work of sinking wells, development or improvement, or in discovering or reaching the oil. Hall v. Abraham, 44 Or. 481, 75 Pac. 882. In Turner v. Seep (C. C.) 167 Fed. 650, and other cases (see Dartmouth College v. Paper Co. [C. C.] 132 Fed. 92), the courts have held that the damages to be recovered from an innocent trespasser on mineral land is the value of the mineral in the ground at the time it was taken, determined by the usual and customary royalty its production would have afforded the owner. This result depends to some extent on the form of the action, and so far as I have been able to ascertain in most of the cases in which this rule has been applied the defendants were either in possession claiming under the owner or through inadvertence or mistake. Here the possession was intentional and without the consent and against the will of the government, and therefore the defendants should not be permitted to reap a profit from their transaction. U. S. v. Hammond (D. C.) 226 Fed. 849. They should be allowed, however, to set off against the damages properly chargeable to them the value of any permanent and useful improvements to the property made by them, such as producing wells, permanent buildings, and the like, and should be permitted to remove from the premises all tools, boilers, engines, and other movable machinery or equipment which they placed thereon during their occupation thereof.

The properties have been for some time and are now being operated by a receiver, and the oil extracted by him should be awarded to the complainant; but if he has used or is now using any tools, appliances, or equipment belonging to the defendants, he should be required to account to the owner for the fair value of such use, and for the value of such parts thereof, if any, which have been consumed, destroyed, or worn out by him, and the defendants should not be charged with any part of the compensation or expenses of the receiver, or the costs of these suits. Midland Oil Co. et al. v. Turner, 179 Fed. 74, 102 C. C. A. 368.

[10] It is claimed on behalf of the defendants that the doctrine announced by Justice Story in Bright v. Boyd, 1 Story, 478, Fed. Cas No. 1,875, and followed in many subsequent cases, that where an occupant of land in good faith under color of title has by his improvements added to the permanent value of the estate, he is entitled to be reimbursed therefor before a court of equity will restore the absolute owner to the possession thereof, and hence the government should be required to reimburse the defendants for the value of the producing wells drilled on the properties by them, or other permanent improve-

ments put thereon, before it is awarded possession. But this position is, I think, untenable. The defendants did not enter or hold under color of title or in good faith within the meaning of the rule referred to, for as said by Mr. Justice Field in Deffeback v. Hawke, 115 U. S. 407, 6 Sup. Ct. 95, 29 L. Ed. 423:

"There can be no color of title in an occupant who does not hold under any instrument, proceeding, or law purporting to transfer to him the title or to give to him the right of possession. And there can be no such a thing as good faith in an adverse holding, where the party knows that he has no title, and that, under the law, which he is presumed to know, he can acquire none by his occupation."

The defendants drilled the wells in question, and made the other improvements with full knowledge of the withdrawal order and of all the facts in the case, and while they acted under an honest belief they had the right to extract the oil, they were nevertheless trespassers, and are not entitled to be recompensed by the government for the money expended in developing the properties in excess of the amount of its claim against them. The lands were included in the withdrawn area to preserve them intact and undeveloped, pursuant to a governmental policy to conserve their mineral contents for such future use and disposition as to it might seem proper. This purpose has been interfered with by the opening up of the oil reservoirs by the defendants, so that in many, if not all, instances it is now necessary to continue to operate the wells and extract the oil, or lose it entirely. The government should not be required to pay for improvements so made without its consent and against its expressed will. The proposition that the defendants cannot be required to surrender possession until they have been reimbursed for permanent improvements is not within the reason of the rule that one who seeks equity must do equity. U. S. v. Trinidad Coal & Coking Co., 137 U. S. 160, 11 Sup. Ct. 57, 34 L. Ed. 640.

In order, however, that all questions of accounting may, if possible, be settled in one hearing, the master will be directed to ascertain and report, in addition to the matters necessary for an accounting in accordance with the views heretofore expressed, the reasonable cost and expense of drilling the several wells producing, or capable of producing, at the time the receiver took charge, and of all wells, if any, partly drilled at that time and subsequently completed by the receiver, and any other permanent and valuable improvements put upon the property, and the usual and customary royalty value of oil in place, if any such value existed at the time of the trespass.

It is insisted that suit No. A–31 is barred by section 2332, Revised Statutes (Comp. St. 1913, § 4631), which provides that where a person or association of persons, or "their grantors, have held and worked their claim [mining] for a period equal to the time prescribed by the statute of limitations for mining claims of the state or territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim." This is not a statute of limitations. It is a part of the chapter on Mineral and Mining Resources, and prescribes the evidence sufficient to

establish the right of one who has possessed and worked a mining claim to a patent. It necessarily assumes that the lands were open to entry and patent under the mining laws. And while, as said by the Supreme Court in Reavis v. Fianza, 215 U. S. 25, 30 Sup. Ct. 1, 54 L. Ed. 72, construing a similar provision, the "right to an instrument that would confer title in a thing is the right to have the thing," it manifestly can have no application to a trespasser on land the title to which cannot be acquired under the law of the United States. The defendants' entry and possession was after the withdrawal order, and initiated no rights as against the government which could ripen into a title or a right to a patent.

Decree may be prepared accordingly.

HOUGH v. SOCIÉTÉ ELECTRIQUE WESTINGHOUSE DE RUSSIE et al.

(District Court, S. D. New York. April 26, 1916.)

1. REMOVAL OF CAUSES ⟸61—SEPARABLE CONTROVERSIES—HOW DETERMINED.
Whether an action against two defendants is separable, so as to entitle one defendant, who is a nonresident, to remove the cause against him, must be determined from the allegations of the plaintiff's pleading; but the legal effect of the facts alleged is to be determined by the court, and not by the plaintiff.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 115; Dec. Dig. ⟸61.]

2. REMOVAL OF CAUSES ⟸49(2)—SEPARABLE CONTROVERSIES.
The liability of a corporation for breach of a contract, and of a liquidator subsequently appointed for the corporation, if the latter liability exists by reason of his acceptance of the appointment and assets, are several, and not joint, and although, under the statutes of the state, a single action may be maintained against both, the controversies with the two defendants may be fully determined separately, and the cause is removable by the corporation, not being a citizen of the same state as plaintiff, under Judicial Code (Act March 3, 1911, c. 231) § 28, 36 Stat. 1094 (Comp. St. 1913, § 1010).

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 96; Dec. Dig. ⟸49(2).]

At Law. Action by David L. Hough against the Société Electrique Westinghouse de Russie and Robert D. McCarter, as liquidator of said Société Electrique Westinghouse de Russie. On motion to remand to state court, and on motion to dismiss as to the corporation. Motion to remand granted as to the liquidator, and denied as to the corporation. Motion to dismiss granted.

See, also, 231 Fed. 341.

Daly, Hoyt & Mason, of New York City, for plaintiff.

Cravath & Henderson, of New York City, for defendant.

LEARNED HAND, District Judge. When this case was originally argued, the question was whether the plaintiff could have any cause of action against the liquidator. The defendants said that the liquidator was so clearly not liable that no one could have sued him, except

in a fraudulent effort to prevent removal to this court. The point was not presented, or at least not argued, that, granting the plaintiff had a possible cause of action against the liquidator, he must have known that he could not, under the New York Code, § 484, join him in the same action with the cause of action against the corporation.

[1] It is the purpose of this reargument to present the last question, but before I come to it I think it essential to consider a point not raised by the defendants at all. The point is whether the controversies are not in their nature separable under the authorities, and whether, therefore, the corporation may not remove the cause alone, even though the New York Code might allow the causes of action to be joined in one complaint and tried together. The question whether the controversies are separable depends altogether upon the way the plaintiff has laid his action. Louisville & Nashville Ry. v. Ide, 114 U. S. 52, 5 Sup. Ct. 735, 29 L. Ed. 63; Powers v. Ches. & O. Ry. Co., 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673; Louisville & Nashville Ry. v. Wangelin, 132 U. S. 599, 10 Sup. Ct. 203, 33 L. Ed. 474. Indeed, so much is the joinder within the power of the plaintiff that it was said in Alabama So. Ry. v. Thompson, 200 U. S. 206, 215, 26 Sup. Ct. 161, 50 L. Ed. 441, 4 Ann. Cas. 1147, that the fact of an apparent misjoinder upon the face of the complaint was not decisive of the right of the nonresident defendant to remove. In the case at bar the question must therefore be determined altogether by the allegations of the complaint, unless the good faith of the plaintiff come in question.

The matter arises in two aspects: First, whether the obligations alleged are joint; second, whether, if several, they may be "fully determined" separately, as required in section 28 of the Judicial Code. The language in Alabama So. Ry. v. Thompson, supra, cannot, I think, mean that, where the plaintiff has alleged facts which under the state law would clearly create several obligations which could be separably tried, he may prevent removal by saying that he believes them to create joint obligations. Such a doctrine would make the removal depend upon what theory of law the plaintiff might honestly assert, and would leave the court nothing to do but ascertain how far his legal aberrations might actually carry him. The allegations of the complaint must be the test, but the court must decide whether they create controversies which are separable or inseparable, regardless of the plaintiff's belief. Geer v. Mathieson Alkali Works, 190 U. S. 428, 23 Sup. Ct. 807, 47 L. Ed. 1122.

[2] Judged by any such objective standard, the obligations asserted are several, and the controversies separable. That the obligations are not joint, but several, appears from inspection. The obligation of the corporation arose first, and by the breach of a contract; the obligation of the liquidator arose later, and by his acceptance of his appointment and of the assets. Only two possible theories occur to me: Either the liquidator succeeded to the obligations of the corporation, like an executor to those of his decedent, or winding-up trustees to those of dissolved corporations; or the liquidator assumed the corporate obligations, to the extent of the assets, the corporation still remaining

liable as before. In neither case can we suppose the obligations were joint, since they arose at separate times, and by separate acts of the defendants. In cases like Sloane v. Anderson, 117 U. S. 275, 6 Sup. Ct. 730, 29 L. Ed. 899; Pirie v. Tiedt, 115 U. S. 41, 5 Sup. Ct. 1034, 1161, 29 L. Ed. 331; and C. B. & Q. Ry. v. Willard, 220 U. S. 413, 31 Sup. Ct. 460, 55 L. Ed. 521, where the question arises whether a joint tort creates a joint liability, the courts have found a good deal of difficulty between the conflicting theories, and have in the end agreed to say that the liability is joint, including cases of the master's and servant's liabilities for the servant's negligent act. In cases of contract, even so unusual as this, I think there is no such difficulty, unless the test be what legal construction the plaintiff may honestly put upon the facts.

Assuming, as I must, therefore, that these purely legal obligations are several, and not joint, there is nothing which prevents their being "fully determined" separately, because each would terminate with a money judgment and execution. Certainly they could have been sued upon separately, had the plaintiff chosen; indeed, in New York it would seem that they must have been. Leszynsky v. Levinsohn, 170 App. Div. 514, 156 N. Y. Supp. 494. Unless the plaintiff had a joint obligation on which to sue, he could not, therefore, insist upon a joint disposition of the two controversies.

Therefore the removal by the corporation was good, and that by the liquidator was bad. Hence the action against the liquidator will be remanded as before, and the motion will be denied as to the corporation. The motion to dismiss as against the corporation is granted; that against the liquidator dismissed for lack of jurisdiction.

THE JOHN G. McCULLOUGH.

THE BEGONIA.

(District Court, E. D. Virginia. March 20, 1916.)

1. COLLISION ⊂=71(3)—MOVING AND ANCHORED VESSELS—ANCHORAGE IN CHANNEL.

Act March 3, 1899, c. 425, § 15, 30 Stat. 1152 (Comp. St. 1913, § 9920), providing that it shall not be lawful to tie up or anchor vessels in navigable channels in such manner as to prevent or obstruct the passage of other vessels, does not absolutely forbid anchoring in channels, and a vessel anchoring at a point in a channel where, notwithstanding such anchorage, other vessels navigating with the care the situation requires can safely pass, neither violates the statute nor is chargeable with fault which renders her liable for a collision, even though in some degree she obstructs the channel.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig. ⊂=71(3).]

2. COLLISION ⊂=71(2)—MOVING AND ANCHORED VESSELS—FAULT.

A collision at night between the steamship Begonia, anchored in Chesapeake Bay a mile from Thimble Light, and the steamship McCullough bound for Newport News, *held* due solely to the fault of the McCullough

for negligent navigation; the evidence showing that the Begonia carried proper lights and that there was ample room to pass on either side of her.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig. ⊂=71(2).]

3. COLLISION ⊂=71(2)—MOVING AND ANCHORED VESSELS—NEGLIGENT LOOKOUT.

That the lookout on a moving vessel confounded the light of an anchored vessel with others on shore five miles distant does not relieve her from the charge of negligence, nor from liability for a collision with the anchored vessel.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig. ⊂=71(2).]

In Admiralty. Suit for collision by Joseph Robinson, master of the British steamship Begonia, against the American Steamship John G. McCullough, Lars P. Nelson, master, with cross-libel against the Begonia. Decree against the John G. McCullough.

Hughes, Little & Seawell, of Norfolk, Va., for the Begonia.

Harrington, Bigham & Englar and T. Catesby Jones, all of New York City, and J. Westmore Willcox, of Norfolk, Va., for the John G. McCullough.

WADDILL, District Judge. On the night of the 2d of December, 1915, about 12 o'clock, the Begonia, a British steamship, 345 feet long, and 46 feet beam, bound for Newport News, came to anchor about a mile to the southward and eastward of Thimble Light, near Black Buoy No. 13, in 8½ fathoms of water. On the morning of the 3d of December, 1915, about 3:30 o'clock, the American steamship John G. McCullough, 253 feet 4 inches long, 40 feet 2 inches beam, also bound for Newport News, collided with the Begonia thus lying at anchor, causing serious injury, and to recover which this libel was filed.

The case turns upon the propriety of the place of anchorage of the Begonia, whether her anchor lights were properly set and burning, whether the McCullough had a proper and vigilant lookout, and whether she could have seen and observed the presence of the Begonia in time to avoid the collision. The conclusion of the court on these questions is:

[1] First. That the Begonia cannot be held to be at fault in anchoring where she did under the law (30 Stat. 1152, § 15), particularly as settled in this circuit. The Job H. Jackson (D. C.) 144 Fed. 900, 901; The Hilton (D. C.) 213 Fed. 997, 1000; The Caldy, 153 Fed. 837, 840, 83 C. C. A. 19; The Margaret J. Sanford (D. C.) 203 Fed. 331; Id., 213 Fed. 975, 130 C. C. A. 381. The last citation is the decision of the Circuit Court of Appeals of this circuit, and to that case, and the cases therein cited, reference is made, as giving the law applicable to the anchorage of vessels, which is briefly to the effect that it was not the purpose of the act of Congress in question to absolutely forbid anchoring in navigable streams, other than at such places as would necessarily prevent the passage of vessels, or obstruct them in passing, to such an ex-

tent as to make the effort to do so a dangerous maneuver, and that if a vessel anchored at a point in the channel where, notwithstanding such anchorage, other vessels navigating with the care the situation required, could safely pass, then she neither violated the statute, nor rendered herself liable under the general rules applicable to navigation, even though in some degree she obstructed the channel.

Clearly the Begonia, in the absence of any action on the part of the government designating anchorage grounds, should not be held liable for damages because of her then location, with deep water on each side of her for a mile or more. The designation of anchorage grounds in the waters of Chesapeake Bay and tributaries, by the proper authorities of the government, would greatly relieve the hazards of navigation, and until the same is done each case must be determined upon its own peculiar facts and circumstances under the decisions of this judicial circuit mentioned above.

[2, 3] Second. The lights of the Begonia were at the time of the collision, sufficient to have warned and admonished the navigator of the McCullough and her lookout of the presence of the anchored vessel in time to avoid the collision, had her officers exercised proper diligence on their part. They admit having seen the lights—the lookout as far as a mile away—and the vessel will not be excused for her failure to take proper warning therefrom, although her lookout may have confounded the Begonia's lights with lights on shore five miles or more away. The Emily A. Foote (D. C.) 73 Fed. 508; The Richmond (D. C.) 114 Fed. 208; Foster v. Merchants' & Miners' Transportation Co. (D. C.) 134 Fed. 965, 968, 969; The Europe, 190 Fed. 475, 478, 479, 111 C. C. A. 307.

Third. The Begonia, at anchor, had the right under the circumstances of this case to assume that she would not be run into, and she should therefore be held free from fault for the collision, and a decree will be entered so determining, and that the McCullough was solely responsible for the accident.

FREY & SON, Inc., v. CUDAHY PACKING CO.

(District Court, D. Maryland. April 27, 1916.)

MONOPOLIES ⟸28—PRICE DISCRIMINATION—ACTION FOR DAMAGES—JURISDICTION.

An action may sometimes be maintained in a federal District Court to recover damages for alleged price discriminations by defendant against plaintiff in violation of Clayton Act Oct. 15, 1914, c. 323, 38 Stat. 730, although the Federal Trade Commission has taken no action in the premises.

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

At Law. Action by Frey & Son, Incorporated, against the Cudahy Packing Company. On demurrer to declaration. Overruled.

See, also, 228 Fed. 209.

Daniel W. Baker, of Washington, D. C., and Horace T. Smith, of Baltimore, Md., for plaintiff.

Washington Bowie, Jr., of Baltimore, Md., and Gilbert H. Montague, of New York City, for defendant.

ROSE, District Judge. The plaintiff and the defendant are both corporations, one of Maryland, the other of Illinois. The plaintiff's declaration contains four counts. It charges that the defendant has violated the Sherman and the Clayton Acts to its injury, and asks damages therefor.

The third and fourth counts allege in substance that the defendant is a manufacturer of an article known as "Old Dutch Cleanser." The plaintiff, a wholesale grocer, had a trade in it of $15,000 a year in Maryland. The defendant, because plaintiff would not allow defendant to control its resale prices, refused to sell plaintiff at the same price at which it sold all other persons similarly situated, but asked it an exorbitant and prohibitive price. Defendant entered a demurrer to these counts of the declaration. It says that under the Clayton Act the courts have no jurisdiction of suits brought to recover for price discriminations, until after the Federal Trade Commission has determined that there was such discrimination. By analogy it relies upon the case of Texas & Pacific Railway Company v. Abilene Cotton Oil Company, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075, and the cases which have followed it.

It is unnecessary here to determine whether the law laid down in those decisions is or is not ever applicable to price discrimination forbidden by the Clayton Act. The facts alleged make a case analogous to that of Pennsylvania Railroad Company v. International Coal Comany, 230 U. S. 184, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315, in which it was held that the courts had jurisdiction to award damages for the discrimination therein set up, although the Interstate Commerce Commission had not acted or been asked to act.

The demurrer will be overruled.

EMPIRE TRUST CO. et al. v. BROOKS.

(Circuit Court of Appeals, Fifth Circuit. April 20, 1916. Rehearing Denied May 20, 1916.)

No. 2761.

1. APPEAL AND ERROR ⊜80(1)—APPEALABLE DECREE—FINALITY.
A decree of a federal court, directing its receiver in a foreclosure suit against a corporation to turn over the mortgaged property to a receiver of a state court, made on application of the latter, is final and appealable.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 494–500, 503, 505–509; Dec. Dig. ⊜80(1).]

2. COURTS ⊜493(3)—FEDERAL AND STATE COURTS—PRIORITY OF JURISDICTION.
Where a state court, in which a suit was pending for the dissolution of a corporation and a distribution of its assets under a state statute, had made no order appointing a receiver, and had taken neither actual nor constructive possession of the defendant's property at the time a suit against it to foreclose a mortgage was commenced in a federal court and a receiver appointed, who took possession of the mortgaged property, the federal court acquired priority of jurisdiction with respect to such property, and an order directing its receiver to surrender it to a receiver subsequently appointed by the state court was erroneous.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1349–1352; Dec. Dig. ⊜493(3).]

3. COURTS ⊜500—FEDERAL AND STATE COURTS—PRIORITY OF JURISDICTION.
The actual possession of property by a receiver appointed by one court, or his constructive possession by having been appointed and qualified, although he has not reduced the property to actual possession, cannot be disturbed by another court of concurrent jurisdiction; but such rule does not apply in its strictness where the first court, although having acquired jurisdiction of a cause which may require possession of the property for its disposition, has not obtained such possession either actually or constructively. In such case the rule is one of comity, which requires a surrender of both possession and jurisdiction to the court first acquiring jurisdiction, if the issues and subject-matter of the two suits are essentially the same, but not where they are different, and where there is therefore no conflict of jurisdiction.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1407, 1408; Dec. Dig. ⊜500.]

Walker, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Western District of Texas; Thomas S. Maxey, Judge.

Suit in equity by the Empire Trust Company, trustee, against the San Antonio Land & Irrigation Company, Limited; Sidney J. Brooks, receiver, intervener. From a decree in favor of intervener, complainant, defendant, and Floyd McGown, its receiver, appeal. Reversed.

The original bill in this cause was filed July 31, 1914, in the District Court of the United States for the Western District of Texas, by the appellant, the Empire Trust Company, as trustee under a mortgage, executed May 1, 1911, by the San Antonio Land & Irrigation Company, Limited, to it, against that and others of its subsidiary companies, praying for a foreclosure of the mortgage and the appointment of a receiver of the mortgaged property, pending final decree. One Preston, a bondholder and stockholder of the San Antonio Land & Irrigation Company, had previously, but on the same day, filed a bill in the district court of Bexar county, Tex., the purpose of which was the appointment of a receiver of the corporation, as an insolvent cor-

poration, under the statute of Texas, and, by an amendment, the marshaling of its asserts and its liquidation under the Texas laws. The suit in the state court was filed and brought to the attention of the judge of that court some hours before the filing of the bill in the federal court, and the state court judge had, prior thereto, made an order requiring the defendant corporation to show cause on August 24, 1914, why a receiver should not be appointed of the assets of the corporation. On August 12, 1914, the judge of the District Court of the United States for the Western District of Texas appointed Floyd McGown receiver of the defendant corporation in the foreclosure suit, and he took possession of the assets of the corporation and continued in possession of them up to and after the time of the filing of the intervention of the appellee herein. On August 31, 1914, the district court of Baxar county, Tex., appointed the appellee, Sidney J. Brooks, as receiver of the defendant corporation in that suit, under the petition filed in that court by Preston. On September 23, 1914, the state receiver, Brooks, applied to the judge of the District Court of the United States for the Western District of Texas for leave to intervene in the suit filed by the Empire Trust Company, as trustee, in that court, which leave was granted; and appellee thereupon filed his intervention, asking that the receiver theretofore appointed in the foreclosure suit be directed to turn over the assets in his possession to the intervener, as receiver under the appointment of the state court. This intervention came on for hearing in the District Court of the United States for the Western District of Texas on the 10th day of November, 1914, and the District Court, on that day, entered a decree in the intervention, directing its receiver, McGown, to turn over the property of the defendant corporation, in his possession as receiver, to the appellee, as receiver in the suit pending in the state court, and setting aside the previous order appointing McGown receiver in the foreclosure suit. It is from this decree that the present appeal is taken by the complainant and the receiver, McGown. The appellee has submitted a motion to dismiss the appeal, upon the ground that the decree appealed from is not a final decree.

West & McMillan and Thomas H. Franklin, all of San Antonio, Tex., for appellant Empire Trust Co.

William Aubrey, of San Antonio, Tex., for appellant McGown.

Williams & Hartman, of San Antonio, Tex., for appellant San Antonio Land & Irrigation Co., Limited.

Terrell, Walthall & Terrell, of San Antonio, Tex. (James D. Walthall and Frank C. Davis, both of San Antonio, Tex., and Alex S. Coke, of Dallas, Tex., on the brief), for appellee.

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

GRUBB, District Judge (after stating the facts as above). [1] The decree was certainly not determinative of the issues presented by the original bill. It did, however, finally determine the issues presented by the intervention of appellee. If the court below had ruled upon the intervention adversely to appellee, the finality of the decree against him would be obvious. In view of the impossibility of the appellant proceeding with the foreclosure suit, and having a lien declared in it upon the mortgaged property, with the mortgaged property in the possession of another court of concurrent jurisdiction, we think the decree appealed from, directing the receiver in the foreclosure suit to turn the property over to the receiver appointed by the state court, was final. It was fatal to the relief prayed for in the foreclosure suit. The motion to dismiss is overruled, upon the authority of Wabash Railroad Co. v. Adelbert College, 208 U. S. 609, 28 Sup. Ct. 425, 52

L. Ed. 642; Central Trust Co. v. Grant Locomotive Works, 135 U. S. 207–225, 10 Sup. Ct. 736, 34 L. Ed. 97; Grant v. E. & W. R. R. Co., 50 Fed. 795, 1 C. C. A. 681.

[2] The question presented on the merits is whether the court below properly directed its receiver to surrender the mortgaged property, of which he had taken possession, to the receiver appointed by the district court of Bexar county, in the insolvency proceedings pending in that court. The record fails to show that the property had been delivered to the trustee under the mortgage by the defendant corporation prior to the institution of the suit in the state court by Preston. While the naked legal title to the real property was then in trustees for the defendant corporation, the record does not satisfactorily show that the mortgaged property was adversely held or possessed by such trustees or any one against the defendant corporation. Nor are we prepared to hold that the district court of Bexar county, Tex., was without jurisdiction to entertain the suit instituted by Preston therein and to appoint a receiver of the assets of the defendant corporation on his application. It is conceded that the suit in the state court was filed, and that an order, notice of which was afterwards served, was made by the judge of the state court, requiring the defendant to show cause why a receiver should not be appointed, before the filing of the foreclosure suit. It may also be conceded that possession of the assets of the defendant corporation would have become necessary to the exercise of the jurisdiction of the state court, at least, as it was invoked under the amended petition, which prayed for the marshaling of assets and liens and a distribution of assets among all creditors, according to their priorities. It is also true that mere irregularities in the process or procedure in the state court, which do not avail to show a want of jurisdiction, cannot be considered in the United States court, upon an application to it to surrender its possession to the receiver of the state court.

At the time the District Court of the United States for the Western District of Texas appointed its receiver, and at the time the receiver qualified and took possession of the mortgage property, the district court of Bexar county had made no order appointing a receiver in the cause there pending. The Texas state court had neither actual nor constructive possession of the mortgaged property at that time. The seizure by the receiver in the foreclosure suit, subsequently filed in the federal court, was therefore no interference with the possession of the state court or its receiver, since it then had none. The prior jurisdiction of the state court had, however, been invoked in a way that might thereafter require the possession by the state court of the mortgaged property for the accomplishment of the relief prayed for in the suit there pending. The question for determination is whether the federal court must surrender its first acquired possession to the state court, because the jurisdiction of the latter was first invoked in a matter which required possession of the res for its proper disposition.

[3] The rule is stated by the Supreme Court in the case of Wabash Railroad v. Adelbert College, 208 U. S. 38–54, 28 Sup. Ct. 182, 187 [52 L. Ed. 379], as follows:

"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, as incident thereto and as ancillary to the suit in which the possession was acquired, has jurisdiction to hear and determine all questions respecting the title, the possession, or the control of the property. In the courts of the United States this incidental and ancillary jurisdiction exists, although in the subordinate suit there is no jurisdiction arising out of diversity of citizenship or the nature of the controversy. Those principles are of general application, and not peculiar to the relations of the courts of the United States to the courts of the states. They are, however, of especial importance with respect to the relations of those courts, which exercise independent jurisdiction in the same territory, often over the same property, persons, and controversies. They are not based upon any supposed superiority of one court over the others, but serve to prevent a conflict over the possession of property, which would be unseemly and subversive of justice, and have been applied by this court in many cases, some of which are cited, sometimes in favor of the jurisdiction of the courts of the states, and sometimes in favor of the jurisdiction of the courts of the United States, but always, it is believed, impartially and with a spirit of respect for the just authority of the states of the Union."

In the case of Palmer v. Texas, 212 U. S. 118–129, 29 Sup. Ct. 230, 233 [53 L. Ed. 435], the rule is stated more broadly, as follows:

"We think the law of this court is well established to be that jurisdiction over the property was acquired by the state courts when the receiver was appointed, the judicial process served, and the receiver duly qualified, although the * * * receiver had not taken actual possession of the property. This principle was recognized in Farmers' Loan & Trust Co. v. Lake Street Electric Ry. Co., 177 U. S. 51, 61 [20 Sup. Ct. 564, 44 L. Ed. 667], in which this court said: 'The possession of the res vests the court which has first acquired jurisdiction, with the power to hear and determine all controversies relating thereto, and, for the time being, disables other courts of coordinate jurisdiction from exercising like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdictions embrace the same subjects and persons. Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, to administer trust or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of especial importance in its application to federal and state courts.' "

From these cases it appears that the rule may be invoked in two classes of cases: First, in cases where there has been a disturbance of the actual or constructive possession of the res in one court by the officers of another court of concurrent jurisdiction. Property in the actual possession of a receiver, appointed by one court, can in no event be disturbed by the action of a court of concurrent jurisdiction. It is equally true that property in the constructive possession of a receiver of one court, who has been appointed and qualified, but has not reduced the property to his actual possession, cannot be taken from his custody or that of the court appointing him by the action of any other court of concurrent jurisdiction. The rule is without exception

that the actual or constructive possession of one court through its receiver cannot be disturbed by another of concurrent jurisdiction. The second class of cases to be considered is that in which there is no interference with the possession, either actual or constructive, of one court by another court of concurrent jurisdiction, but only an interference with the jurisdiction of one court by another of concurrent jurisdiction by the taking possession by the latter of property, not in the possession actual or constructive of the former, but which may become necessary to the exercise of its jurisdiction in the progress of the cause pending before it. Of these two classes, the Supreme Court said, in Palmer v. Texas, supra:

"Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, *but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, to administer trusts or liquidate insolvent estates, and in suits of a similar nature, where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected.*"

It seems clear that where the basis of the rule is an infringement of the jurisdiction of the court, and not an interference with its possession of property, the rule depends upon the existence of such a conflict and is not absolute. The quoted language of the Supreme Court indicates that the rule, where there is no disturbance of possession, is one of limited and not of universal application. It is a rule of comity, to be applied by the court asked to surrender its possession, only when it is shown that that court has interfered with the jurisdiction of the court asking the surrender. It was held to be merely a rule of comity by this court in the case of Adams v. Mercantile Trust Co., 66 Fed. 617, 15 C. C. A. 1; a case in which there was a clear conflict of jurisdiction. Where the issues in the two suits are the same, and their subject-matter substantially identical, comity and the orderly administration of justice, and the desire to avoid a conflict of jurisdiction, require of the court that last acquires jurisdiction, though it be the first to acquire possession of the property involved in the litigation, that it surrender such possession, on application, to the court of concurrent jurisdiction which first acquired jurisdiction of the controversy. This was the holding in Palmer v. Texas, 212 U. S. 118, 29 Sup. Ct. 230, 53 L. Ed. 435; Farmers' Loan Co. v. Lake Street Ry. Co., 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667; Adams v. Mercantile Trust Co., 66 Fed. 617, 15 C. C. A. 1. In such cases, the court making the surrender abdicates its jurisdiction over the cause, as well as surrenders possession of the res.

However, where the issues in the subsequent suit are different from those involved in the first suit, and the subject-matter is not identical, there can be no infringement of the jurisdiction of the court in which the first suit is pending, by reason of the institution of the second suit in a court of concurrent jurisdiction. The only identity between the two suits in that event is that they relate to the same property, and, this being true, there is no apparent reason why the court which first acquires possession of the property should surrender its possession and thereby defeat its own jurisdiction, a jurisdiction which does not infringe upon the prior jurisdiction of the court in which the first suit was brought.

Where the purpose of both suits is the same, and the relief prayed for substantially identical, the prior jurisdiction of the first court should be respected. In the case of Palmer v. Texas, supra, the suit in the state court was an action by the state to forfeit the charter of the corporation and wind up its affairs. The suit in the United States court was an action by a stockholder to liquidate the corporation. Both were substantially alike in purpose. So, in the case of Farmers' Loan Co. v. Lake Street Ry. Co., supra, the suit in the federal court was an action to foreclose a mortgage, and that in the state court sought to enjoin the foreclosure. In the case of Adams v. Mercantile Trust Co., supra, the trustee under the mortgage was made a party defendant in the suit in the state court, so that the same issues were there presented as were involved in the subsequent suit in the federal court. An examination of each of the authorities, in which the principle of surrender has been applied to cases in which there was no interference with possession, but only a claimed conflict of jurisdiction, we believe will show an identity of issues and subject-matter between the two suits. The case of McKinney v. Kansas Natural Gas Co. (D. C.) 209 Fed. 772, is an exception.

The principle is thus stated in Gluck & Becker on Receivers, pp. 67, 68 (2d Ed. pp. 89–91):

"The decisive test, as expressed by the weight of authority, is that, when the controversy in both actions is the same, the court first acquiring jurisdiction of the controversy will retain it, and it is not necessary that it should take actual possession through its receiver of the property to obtain exclusive jurisdiction. If, however, the controversy is not the same, there is no conflict of jurisdiction as to the question or cause, and the court which first acquires jurisdiction over the property by actual seizure through its receiver will enforce that jurisdiction, and assume the actual possession, to which it gives the right, and until the property is seized, no matter when the suit was commenced, the court does not have jurisdiction over the property, and another court of concurrent jurisdiction may appoint a receiver, and through him take possession of the property."

In the case of De La Vergne Refrigerating Mach. Co. v. Palmetto Brewing Co. (C. C.) 72 Fed. 579, 584, 585, applying this principle, Circuit Judge Simonton said:

"The counsel who argued this case with equal ability and earnestness have treated it as threatening a conflict of jurisdiction. But, as has been said, it is a question of comity. The jurisdiction of the court over the controversy made here is unquestionable. The jurisdiction of the state court over the controversy made there cannot be disputed. The receiver of this court is in actual, peaceable possession. The receiver of the state court was appointed, subsequent to his appointment, in proceedings antedating those in this court. * * * In view, therefore, of the fact that the controversy in the suit in this court is entirely distinct from that in the state court, and that the scope and purpose of the proceedings in the state court are not those of the proceedings in this court, connected with the fact that the receiver heretofore appointed in the main cause is in actual, peaceable possession of the property, and that the complainant holds a legal lien on the property, entitling it to its possession through a receiver, the mortgagor being insolvent, and that this court has been asked by it not to exercise an act of discretion, but to give effect to a right secured to it by the Constitution and laws of the United States, the prayer of the petition cannot be granted, and it is so ordered."

This was said of an application by a receiver, appointed by a state court in an action, first brought by a stockholder for the appointment of a receiver of the corporation, to have surrendered to him the property of the corporation, which was in the possession of a receiver in a suit for the foreclosure of a mortgage, subsequently brought.

In the case of Moran v. Sturges, 154 U. S. 256–283, 14 Sup. Ct. 1019, 1028 (38 L. Ed. 981), the Supreme Court said:

"The contention is not only that the title to these vessels vested in the receiver as of July 31st, and that, in such a case as this, constructive is the equivalent of actual possession, but that, although the receiver did not qualify until after the seizure by the marshal, he thereupon became constructively possessed of the vessels as of July 31st, and the jurisdiction of the District Court was thereby ousted. But, if jurisdiction had attached, it would not be defeated, even by the withdrawal of the property for the purposes of the state court, and, moreover, the doctrine of relation has no application. As between two courts of concurrent and co-ordinate jurisdiction, having like jurisdiction over the subject-matter in controversy, the court which first obtains jurisdiction is entitled to retain it without interference, and cannot be deprived of its right to do so because it may not have first obtained physical possession of the property in dispute. But where the jurisdiction is not concurrent, and the subject-matter in litigation in the one is not within the cognizance of the other, while actual or even constructive possession may, for the time being, and in order to avoid unseemly collision, prevent the one from disturbing such possession, yet where there is neither actual nor constructive possession there is no obstacle to proceeding, and action thus taken cannot be invalidated by relation. That doctrine is resorted to only for the advancement of justice, and, under these state statutes, is adopted to defeat fraudulent, unwarranted, and unjust dispositions of the debtor's property, and to accomplish just and equitable ends. Herring v. N. Y., Lake Erie, etc., Railroad, 105 N. Y. 340, 377 [12 N. E. 763]. At the time these libels were filed and the marshal seized the property, it had not been developed whether or when the receiver would or might give the security required and enter upon the discharge of his duties, and he had neither actual nor constructive possession. The jurisdiction of the state court over the subject-matter of the winding up of the corporation and the distribution of its assets did not embrace the disposition of the claims of the libelants upon these vessels, nor were they as holders of maritime liens represented by the attorney general when he assented to the order of July 31st, as mere creditors of the Schuyler Company were. The adjudication by that order may have so operated on the title in respect of the parties to that suit as to place the property constructively in the custody of the law as of that date, but not as to all persons and for all purposes. Under the circumstances we are unable to accept the conclusion that simply by the institution of the winding up proceeding, property, subject to liens over which that court could not exercise jurisdiction in invitum, was placed in such a situation in respect of liability to being ultimately brought within the custody of the court that the District Court could not obtain jurisdiction for the purpose of ascertaining and enforcing those liens in respect of which its jurisdiction was exclusive. It appears to us that the District Court violated no rule of comity nor any other rule in entertaining the libels."

It is true the case of Moran v. Sturges is to be distinguished from this case, in that in it the state court did not have the capacity to take jurisdiction of the enforcement of maritime liens which were the subject-matter involved in the suit in the federal court, whose jurisdiction thereof was paramount and exclusive, while in this case the Texas state court had the capacity to take jurisdiction of the action to foreclose a mortgage. The Supreme Court, however, did not limit the rule of nonsurrender to cases in which the court, asking the surrender, was

shown to have no capacity to take jurisdiction of the controversy, and in which the jurisdiction of the court in possession was exclusive and paramount. On the contrary, it was held to apply as well to cases in which both courts had capacity to take jurisdiction, in favor of the court which first actually obtained it. On pages 283, 284 of 154 U. S., page 283 of 14 Sup. Ct. (38 L. Ed. 981), the court said:

"As between courts of concurrent and co-ordinate jurisdiction, having like jurisdiction over the subject-matter in controversy, *the court which first obtains jurisdiction is entitled to retain it without interference.*"

The court again recognized that the rule of nonsurrender applied in cases in which the court asking the surrender had not actually taken jurisdiction first, though clothed with the power to do so, as well as those in which it had no potential jurisdiction, by declaring the rule applicable, both in cases "where the jurisdiction is not concurrent" and in cases where *"the subject-matter in litigation in the one is not within the cognizance of the other."* Cognizance and the want of it may be actual as well as potential. Again the Supreme Court said:

"The jurisdiction of the state court over the subject-matter of the winding up of the corporation and the distribution of its assets did not embrace the disposition of the claims of the libelants upon these vessels, nor were they as holders of maritime liens represented by the Attorney General, when he assented to the order of July 31st, as mere creditors of the Schuyler Company were."

This language is more appropriate when applied to an absence of jurisdiction in fact than to an absence of jurisdiction in law. The Supreme Court held that a court having possession of the res is entitled to retain it (1) as against any court which has no jurisdiction of the controversy pending about it, though such court first assumed to exercise jurisdiction; and (2) as against any court clothed with jurisdiction of the controversy, provided jurisdiction was first obtained by the court in possession of the res and asked to surrender it.

In this case the federal court was first in possession of the res, and is asked to surrender its possession to the state court, a court whose general competency is conceded. The propriety of the surrender must therefore depend upon which court in fact first obtained jurisdiction of the subject-matter in controversy. Conflict of jurisdiction as to the subject-matter of the litigation does not mean merely that the two suits relate to the same physical property. Moran v. Sturges holds directly to the contrary. It means that the issues involved, relief prayed for, and parties to the two suits are so substantially alike that the lis pendens of the last brought is included in the first. Unless it can be said that the issues involved, the relief sought, and the parties to the suit in the federal court were included substantially in the lis pendens of the prior suit in the state court, the jurisdiction of the former did not conflict with that of the latter. The subject-matter of the suit in the federal court exclusively related to the foreclosure of the appellant's mortgage. In the suit as originally brought in the state court the foreclosure of appellant's mortgage was not sought. The appellant, as trustee, and the bondholders, as such, were not made parties to it. There had then been no default that would authorize a

foreclosure. The attitude of the suit in the state court in these respects remained unchanged until after the foreclosure suit was filed in the federal court, and its receiver had been appointed and taken possession. In the absence of the mortgagee, the state court could only have dealt with the property covered by the mortgage subject to the lien of the mortgage. It could not have sold the mortgaged property free of liens, nor could it have foreclosed the lien of appellant's mortgage in that suit as it then stood. Whatever may have been its power to acquire future jurisdiction of the foreclosure of the mortgage by amendment or intervention, it had not in fact done so, when the suit in the federal court was filed. It follows that the state court did not obtain jurisdiction of the subject-matter of the suit in the federal court; i. e., the foreclosure of the appellant's mortgage, by the filing of the suit in the state court, nor had it obtained it up to the time of the filing of the suit in the federal court. The federal court, consequently, first obtained jurisdiction of the subject-matter of the foreclosure of the mortgage. In doing so it did not come into conflict with any prior jurisdiction of the state court, for it had obtained none. The federal court also first acquired possession of the mortgaged property, and this possession was necessary to enable it to exercise its first-acquired jurisdiction to foreclose the mortgage.

We think the principle decided in the case of Moran v. Sturges properly applies to the facts of this case, though it be conceded that the district court of Bexar county, Tex., was clothed with general jurisdiction of actions to foreclose mortgages. We also cite in support of the right of the court first acquiring possession of the res to maintain it, as against a court in which was pending a suit, first brought, but relating to different issues, and the objects of which would require it to take possession of the property during the progress of the suit, the cases of Mercantile Trust Company v. M., K. & T. R. R. Co. (C. C.) 48 Fed. 351; Compton v. Jesup, 68 Fed. 263, 15 C. C. A. 397; State Trust Company v. National Land Imp. & Mfg. Co. (C. C.) 72 Fed. 575. The case of McKinney v. Kansas Natural Gas. Co. (D. C.) 209 Fed. 772, is opposed to this view.

It is with this second class of cases that we are concerned in this case, since there was no actual or constructive possession of the res in the state court, when the receiver of the federal court assumed possession of the mortgaged property. No receiver had at that time been appointed by the state court. Moran v. Sturges, 154 U. S. 255–284, 14 Sup. Ct. 1019, 38 L. Ed. 981. The suit in the district court was instituted by a creditor and stockholder for the purpose of winding up the corporation and distributing its assets among its creditors as an insolvent corporation under the Texas statutes. No lien was sought to be enforced in it; the creditor, who was a bondholder, did not rely on his security, or seek to have enforced the lien of the mortgage. The trustee under the mortgage was not made a party to the proceeding in the state court. After the suit was brought, other holders of bonds and of stock intervened, as well as certain riparian claimants; but the nature and the purposes of the suit were in no wise changed. The foreclosure of the mortgage lien was never within the lis pendens of

the state court suit. It was always and exclusively a liquidation proceeding by general creditors under the Texas statutes.

The suit in the District Court of the United States for the Western District of Texas sought exclusively the foreclosure of a mortgage which was a first lien on the property of the corporation. The plaintiff was the trustee under the mortgage, the defendants were the mortgagor and certain subsidiary corporations. The record shows quite conclusively that there was no probable equity over and above the mortgage indebtedness, and that the bondholders were primarily, if not exclusively, interested in the administration of the property. They had a prior claim over the unsecured creditors represented in the state insolvency proceedings, a claim which was not within the issues or subject-matter of that proceeding. Though some of the creditors in the state suit happened to be bondholders, they were not there insisting on their security or seeking to enforce it, and so were in the attitude of unsecured creditors.

Under the circumstances, we conclude that the issues, the subject-matter, and the relief prayed for in the two suits are so different that it cannot be said there is a conflict of jurisdiction between them. If both suits had sought the winding up of the corporation because of its insolvency, or both had sought to enforce a mortgage lien on the property of the corporation, such a conflict of jurisdiction would have existed, and possession would have been rightly surrendered to the court in which the first suit was instituted.

Neither the rule that, in case of conflict of jurisdiction, possession should be surrendered to the court first acquiring jurisdiction of the controversy, where it is or may be required for the purposes of the litigation during its progress, nor the rule against the disturbance of the court's possession has, therefore, any application in this case.

In addition, in this case, the persons having the prior right and probably the exclusive interest in the property, which is the subject-matter of the litigation, are the bondholders, who are represented by the plaintiff in the suit in the federal court. Ordinarily the parties chiefly interested in the administration of the property should be permitted to select the forum. It is asked, however, that the court, in which the prior lien is sought to be enforced, which has full jurisdiction to enforce it, and whose receiver is in peaceable possession of the mortgaged property, acquired by him when the state court had neither actual nor constructive possession of it, surrender the possession to a receiver, appointed by the state court, in a suit instituted by creditors, whose claims are entitled to payment only after those of the bondholders are fully satisfied, when to do so would defeat the jurisdiction of the federal court to foreclose the mortgage, which the plaintiff has rightfully invoked, and remit the plaintiff, along with the res, to the state court, to apply for leave to intervene in the insolvency proceedings to assert the lien of its mortgage in a proceeding, which had not taken cognizance thereof.

It appears to us that no rule of comity required the District Court to surrender its possession under the circumstances indicated, if it be conceded that a case, in which there is no conflict of jurisdiction between the state and federal courts, and no interference by the federal

court with the possession, actual or constructive, of the state court, is one to which the rule of comity applies at all.

The decree appealed from is reversed, and the cause is remanded, with instructions to set aside the order of November 10, 1914, reinstating the order of August 1, 1914, and thereafter proceed in the case as equity and good conscience may require.

WALKER, Circuit Judge (dissenting). I do not concur in the conclusion last stated in the foregoing opinion. It seems to me that the withholding from the state court of the possession of the property in question has the affect of interfering with that court's first acquired jurisdiction, as its possession of that property was necessary to enable it to exercise that jurisdiction. The conclusion that this is permissible is not reconcilable with the proposition that "as between two courts of concurrent and co-ordinate jurisdiction, having like jurisdiction over the subject-matter in controversy, the court which first obtains jurisdiction is entitled to retain it without interference, and cannot be deprived of its right to do so because it may not have first obtained physical possession of the property in dispute." Moran v. Sturges, 154 U. S. 256, 283–284, 14 Sup. Ct. 1019, 1028 [38 L. Ed. 981]. The effect of the decision in the case cited was that the proposition just stated by quoting from the opinion rendered in that case was not applicable therein, because that was the case of the exercise of a jurisdiction which was exclusive, not being possessed by the court whose jurisdiction was first invoked, that court not being vested with the admiralty jurisdiction, which was exercised by the court which first took possession of the property in question. In the instant case it is not denied that the state court had jurisdiction, which was exercisable in the suit first brought in it, to marshal the assets which that court was asked to take possession of by its receiver, to ascertain all claims to or against those assets, including liens or charges thereon, and to make distribution to all parties in interest according to their priorities. Such a jurisdiction includes the power to require a mortgagee of the whole or a part of those assets to intervene in that suit and assert his claim therein. The suit subsequently brought in the federal court invoked the exercise by that court, not of a paramount or exclusive jurisdiction, but of a jurisdiction which it had concurrently with the state court. I have not been convinced that the latter court properly can be deprived of its right to retain its first-acquired jurisdiction because another court, the concurrent and co-ordinate jurisdiction of which subsequently was invoked, first obtained physical possession of the property in dispute. I do not understand that the rule above stated is subject to an exception which renders it inapplicable when the suitor in the subsequently brought suit, in which possession is acquired, asserts a claim to or against the property in question which the court to which he resorts regards as being entitled to priority over the claim previously asserted by another in another court; the subsequently asserted claim being one which is cognizable by the court whose jurisdiction first attached, and in the suit which was the first one that invoked a jurisdiction the exercise of which required possession of the property in question.

McGOWN et al. v. BROOKS.

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

No. 2753.

Petition for Temporary Restraining Order and Injunction to the District Court of the United States for the Western District of Texas; Thomas S. Maxey, Judge.

Suit by Floyd McGown, receiver of the San Antonio Land & Irrigation Company, against S. J. Brooks, receiver. On petition for temporary restraining order and injunction. Denied.

William Aubrey and Thomas H. Franklin, both of San Antonio, Tex., for petitioners.

Jas. D. Walthall, of San Antonio, Tex., for respondent.

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

PER CURIAM. This case was cumulated and heard with No. 2761, 232 Fed. 641, — C. C. A. —, just decided. The petition is denied, with costs.

ACZEL et al. v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. February 3, 1916.)

No. 2269.

1. CONSPIRACY ⊂=28—PREVENTING VOTING AT CONGRESSIONAL ELECTION—SCOPE OF CIVIL RIGHTS—STATUTE.

The right of a qualified elector to vote at an election for Members of Congress or United States Senators is a right secured to him by the Constitution and laws of the United States, and a conspiracy to deprive an elector of such right constitutes an offense, under Criminal Code (Act March 4, 1909, c. 321) § 19, 35 Stat. 1092 (Comp. St. 1913, § 10183).

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

2. CONSPIRACY ⊂=43(6)—CONSPIRACY TO INJURE PERSONS IN EXERCISE OF CIVIL RIGHTS—INDICTMENT.

A count of an indictment which aptly charges a conspiracy by defendants to injure and oppress electors named in the free exercise of their right to vote at an election for United States Senator and Representative in Congress is not bad because it also charges that a further object of the conspiracy was to injure and oppress certain of the citizens in the exercise of their right to act as election officers and to be free from arrest without due process of law, whether or not the latter charges alone state an offense under Criminal Code, § 19.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 86; Dec. Dig. ⊂=43(6).]

3. CONSPIRACY ⊂=43(6)—CONSPIRACY TO INJURE PERSONS IN THE EXERCISE OF CIVIL RIGHTS—INDICTMENT.

An indictment under Criminal Code, § 19, charging defendants with conspiracy to injure, oppress, and intimidate persons named and other persons unknown, alleged to be "qualified voters and entitled to vote at said election," in the exercise of their right to vote at an election for Senator and Representative in Congress, is not insufficient because it does

not contain an averment that such persons were registered, which under the law of the state was required to entitle them to vote.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 86; Dec. Dig. ⊂⊃43(6).]

4. CONSPIRACY ⊂⊃43(6)—INDICTMENT—DESCRIPTION OF OFFENSE.
In an indictment for conspiracy to do an unlawful act, the unlawful act which is the object of the conspiracy is not required to be set forth with such particularity as in case of a prosecution for the commission of the substantive offense.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 86; Dec. Dig. ⊂⊃43(6).]

5. CRIMINAL LAW ⊂⊃1134(3)—APPEAL AND ERROR—REVIEW.
Where one count of an indictment under which defendants were convicted is good, and the sentence is no greater than could lawfully be imposed upon such count, the question of the sufficiency of other counts becomes immaterial in a reviewing court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2989, 2990, 3056; Dec. Dig. ⊂⊃1134(3).]

In Error to the District Court of the United States for the District of Indiana; Albert B. Anderson, Judge.

Criminal prosecution by the United States against Alexander Aczel, Donn M. Roberts, William Crockett, George Ehrenhardt, John E. Green, Charles Houghton, Harry Montgomery, Hilton Redman, Eli H. Redman, Elmer Talbot, Lewis Nunley, and others. Judgment of conviction, and defendants named bring error. Affirmed.

Indictment was returned in the District Court for the District of Indiana against 126 persons for an offense in respect to the general election held in Vigo county, Ind., November 3, 1914. Under the indictment 115 of those indicted were arrested, and on arraignment 83 of these pleaded guilty, 5 not guilty, and 27 (including plaintiffs in error) filed demurrers to the indictment. The court overruled the demurrers, and the demurrants thereupon pleaded not guilty. After a trial lasting about a month, a verdict of guilty was found against 27 of the defendants. Motion for new trial and in arrest of judgment being overruled, judgment was rendered. The eleven who prosecuted the writ of error herein were each sentenced to imprisonment in the penitentiary on each of the four counts of the indictment; the longest period of sentence being in each case under the first count, where as to any defendant the terms fixed under the several counts differ. Fine was imposed on each defendant under the first count only. As to each defendant the sentence of imprisonment under the several counts was made concurrent, and not cumulative. There is no bill of exceptions, and the only question raised by the assignment of errors or presented by counsel is as to the sufficiency of the indictment.

The indictment is voluminous, occupying as it does 60 pages of the printed transcript. It is stated in condensed form in the opinion by Judge Anderson in passing on the demurrers, as reported in United States v. Aczel et al. (D. C.) 219 Fed. 917, pages 918 to 927. In view of the errors assigned and the propositions presented and urged here, still briefer statement of the indictment will suffice. There are four counts.

The first charges a violation of section 19 of the Criminal Code (Rev. Stat. U. S. § 5508, Comp. St. 1913, § 10183), which, so far as here material, is as follows: "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, * * * they shall be fined not more than five thousand dollars and imprisoned not more than ten years. * * *" It

alleges that on September 1, 1914, the defendants conspired together to injure, oppress, threaten and intimidate citizens named, and others whose names were unknown, in the free exercise and enjoyment of the rights and privileges secured to them by the Constitution and laws of the United States, viz. the right to vote for a candidate for United States Senator and Representative in Congress at the general election to be held November 3, 1914, and that as part of such conspiracy they further conspired to injure and oppress certain of said citizens in their right to act as judges, clerks and inspectors on election boards at said election, and in the right of said citizens and voters to be secure in their personal liberty, and freedom from arrest without due process of law.

It is charged that the persons alleged to have been conspired against were qualified voters, entitled to vote at such election and to serve as election officers thereat; their age, residence and citizenship as required by law for voting and serving as such election officers being stated. But it is not stated that they were registered, as is required of voters in Indiana before they may vote, nor that those to be deprived of the right to act as election officers had no wager or money bet on the result of the election, and were not related to any candidate for office at such election—the Indiana election laws providing that those having any wager or money bet on the result of the election, or who are related in specified degree to any such candidates, may not act in certain capacities as election officers. In considerable detail the plan of the alleged conspiracy is set out, including the intended use by the alleged conspirators of firearms, threats, intimidation of the voters, causing others to vote upon their names and in their stead, fraudulent manipulation of voting machines, and the like, in order to prevent the citizens from voting, and the use of force, threats, intimidation and firearms to prevent their acting as election officers, and the arrest of said citizens without process of law, for no offense and confine them in detention cells and jails, certain of said defendants pretending to so act in their official capacities as officers of the state of Indiana, which they then respectively were, viz. sheriff of said Vigo county, and mayor, chief of police, assistant chief of police and policemen of the city of Terre Haute. The count charges that in pursuance of the conspiracy the persons named were prevented from voting at the election, and that certain of them were preventd from acting as such election officers, and certain of them arrested and placed in jail and detention cell, without due process of law.

The second count charges a conspiracy under section 37 to defraud the United States by committing a willful fraud upon certain enumerated laws of the United States, through obstructing the administration of such laws, and bringing about their maladministration, by fraudulently procuring a certificate of election as congressman for one not so elected, and foisting upon Congress as a member thereof such person to be so fraudulently declared elected, and defrauding the United States out of a congressman's annual salary.

The third count charges conspiracy under section 37 "to commit an offense against the United States," the offense so to be committed being a violation of section 215 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1096, 1130 [Comp. St. 1913, §§ 10201, 10385]), relating to "use of the mails to defraud"; the scheme charged being one to fraudulently collect money from saloon keepers and keepers of disorderly houses through various fraudulent promises and pretenses, and thereby raising a fund to corrupt the electorate, and thus influence and control the election, and to use the mails to carry out the scheme. Many overt acts are charged in this and the preceding count.

Count 4 charges a direct violation of section 215, alleging a scheme or artifice to defraud very much as in count 3, and charging that in the execution of the scheme one of defendants deposited a certain letter in the United States post office at Terre Haute.

Under the views expressed in the opinion, it is not essential that the last three counts be more fully set out.

Elias D. Salsbury, of Indianapolis, Ind., for plaintiffs in error.

Frank C. Dailey, of Bluffton, Ind., for the United States.

Before KOHLSAAT, MACK, and ALSCHULER, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above). The sufficiency of the indictment is the only question brought here for determination.

[1] The first of the four counts being predicated on section 19 of the Criminal Code, which makes it a criminal act to "conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution and laws of the United States," the validity of the count will depend primarily on whether the infraction therein charged is in respect to any right or privilege which is secured to the citizen by the Constitution and laws of the United States. What are rights of citizens, secured to them by the Constitution and laws of the United States, has been a subject of frequent consideration by the federal courts. Article 1, § 2, of the federal Constitution, provides that:

"The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state Legislature."

It has been repeatedly held by the federal courts, and particularly in cases where conspiracies under section 19 were charged, that the right of voters to vote at elections for Member of Congress is a right secured by the Constitution and laws of the United States. Ex parte Yarbrough, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274; In re Coy, 127 U. S. 731, 8 Sup. Ct. 1263, 32 L. Ed. 274; Wiley v. Sinkler, 179 U. S. 58, 21 Sup. Ct. 17, 45 L. Ed. 84; Swafford v. Templeton, 185 U. S. 487, 22 Sup. Ct. 783, 46 L. Ed. 1005; James v. Bowman, 190 U S. 127, 23 Sup. Ct. 678, 47 L. Ed. 979; United States v. Mosley et al., 238 U. S. 383, 35 Sup. Ct. 904, 59 L. Ed. 1355; Felix v. United States, 186 Fed. 685, 108 C. C. A. 503; United States v. Stone (D. C.) 188 Fed. 836.

From the opinion in the very recent Mosley Case, which involved an indictment under section 19 for conspiracy to injure and oppress citizens of Oklahoma in their right to vote for a Member of Congress, we quote the following:

"It is not open to question that this statute is constitutional, and constitutionally extends some protection, at least, to the right to vote for Members of Congress. Ex parte Yarbrough, 110 U. S. 651 [4 Sup. Ct. 152, 28 L. Ed. 274]; Logan v. United States, 144 U. S. 263, 293 [12 Sup. Ct. 617, 36 L. Ed. 429]. We regard it as equally unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box."

Since the adoption of the Seventeenth Amendment to the Constitution, providing for the popular election of United States Senators, and the act of Congress of June 4, 1914, providing a temporary method of electing United States Senators, the right to vote at any such election for United States Senator must be likewise considered a right secured by the Constitution and laws of the United States. Indeed, the applicability of section 19 to conspiracies to injure citizens in their right to vote for Senators and Congressmen at elections where they are to be chosen does not seem here to be controverted, although it appears from the opinion of the District Court rendered in passing on

the demurrers, that the main contention there made in support of the demurrers was that the right to vote for Senators and Members of Congress was not one which was secured by the Constitution and laws of the United States. Possibly the present attitude on this proposition has been influenced by the Mosley Case, supra, the opinion in which has been handed down since the judgment of conviction herein.

[2] But with respect to the right of serving as election officers, and of freedom from arrest without due process of law, it is earnestly insisted on behalf of plaintiffs in error that these are not rights which are secured by the Constitution and laws of the United States, and that as to these section 19 has no application. If the count were grounded wholly on an alleged conspiracy to injure citizens in respect to their rights generally to serve as officers of election, and to be free from arrest without due process of law, as rights secured by the Constitution and laws of the United States rather than by the laws of the states, serious doubt of the validity of such a count might, under the decisions, be well entertained. United States v. Cruikshank et al., 92 U. S. 542, 23 L. Ed. 588; United States v. Harris, 106 U. S. 629, 1 Sup. Ct. 601, 27 L. Ed. 290; Civil Rights Cases, 109 U. S. 3, 3 Sup. Ct. 18, 27 L. Ed. 835; James v. Bowman, 190 U. S. 127, 23 Sup. Ct. 678, 47 L. Ed. 979; Hodges v. United States, 203 U. S. 1, 27 Sup. Ct. 6, 51 L. Ed. 65.

But if it be assumed that, abstractly and generally considered, the right to act as judge, clerk, or inspector of elections, and the right of liberty, and freedom from arrest without due process of law, are not rights which are secured by the Constitution or laws of the United States, but are dependent upon the laws of the state, it must be remembered that the charges in this count with respect to the right to serve as election officers and the right of immunity from arrest without due process of law, are not separate counts of the indictment, but are a part of the first count, and are therein set forth as part of the conspiracy to injure the persons named in their right to vote for a Senator and a Member of Congress. In this relation they cannot be considered in the same light as if, in separate counts, the rights alleged to have been violated were the right to serve as such election officers and the right to immunity from arrest, independent of and disconnected with any purpose thereby to influence the election of a United States Senator or Representative in Congress.

But if they were alleged in the same count as separate purposes of the same conspiracy, without allegation of connection with the conspiracy to injure the voters in their right to vote as set forth in the count, this would not invalidate the count in so far as it may properly charge a conspiracy to injuriously affect citizens in their right to vote for United States Senator and Member of Congress, as a right secured by the Constitution and laws of the United States. If the count aptly charges the defendants with conspiracy in respect to the last-named right, the count would be good, regardless of those other parts of the count which might charge that the conspiracy had also for its object the injury of citizens in respect to other rights.

[3] We are thus brought to the consideration of the specific objection urged against the sufficiency of the count in its statement of the

last-named charge. As to this the only contention made is that the count does not allege that the citizens against whom the conspiracy is alleged to have been formed were registered as required by the laws of Indiana to entitle them to vote at the election. Voting is not obligatory, but one possessing the prescribed qualifications of age, sex, citizenship, and residence is entitled to vote, and may do so if he will comply with those regulations which the law has provided to insure that none do vote but those possessing such qualifications, and that each voter shall have opportunity freely to vote once at the election, and that his vote shall be counted. Registration does not give the individual the required qualifications to constitute him a voter, but is for the due and proper identification of the individual as one possessing those qualifications. In order to vote, he must register at the time and place fixed by law, and must present himself at the legally constituted polling place, receive the ballot as provided by law, retire to a legally designated place and there mark the ballot as the law prescribes, and deposit only the ballot so received in a ballot box supplied according to law. If he neglects or refuses to comply with any of these requirements, he cannot vote. But is he then any the less a voter, or, having voted, does he thereupon cease to be a voter until the next registration day rolls around, when he may again register preparatory to voting at the next general election? In other words, is he to be considered a voter only for the brief period intervening between the time he registers and the close of election day? If this were so, then for the far greater part of the time Indiana would have no voters at all.

The Century Dictionary defines a voter as "one who votes, or has a legal right to vote; an elector." And it defines an elector to be "one who elects or has a right of choice; a person who has the legal right of voting for any functionary, or the adoption of any measure; a voter." The words "voter" and "elector" are interchangeably employed in the election and registration laws of Indiana, a consideration of which makes it evident that these terms as there employed have reference to those possessing the prescribed qualifications, having which, they are entitled to register and to do those other things which the law prescribes the voter shall do preliminary to actually depositing his ballot.

Section 6876, Burns' Stat. Ind., provides that one having the enumerated qualifications "shall be entitled to vote in the precinct where he may reside." Registration is not there stated as such a qualification. Section 6977e refers to the registration of "voters"; likewise section 6977w. Section 6977f, providing for places and notices for registration, prescribes a form of public notice headed "Important Notice to Voters of Registration," and it begins, "Every voter of the precinct is required to register at a session of the board," etc. Section 6977c provides for a registration board of three, one inspector and two clerks, who shall be voters of the voting precinct, the inspector to be appointed in August, and the clerks ten days before the meeting of the registration board. Section 6977x provides that in certain cases on petition of 300 voters, filed 80 days before the election, a session of the registration board shall be held on the 59th day before the election.

If by the term "voters," as employed in these acts, "registered

voters" was meant, there could be no such earlier registration day fixed for lack of the 300 voters who would be qualified by their registration to sign the petitions. But, more serious, and yet more anomalous, since registration must be by and through the registration boards, the members of which can be only qualified voters, if to be such qualified voters they are required to be registered, there could be no registration boards, and hence no registry, and consequently no voters, either before or after the election, and the registration law would defeat itself and the election as well.

Section 6209 provides for filing certificates and petitions of nomination with the Governor of the state not more than 60, nor less than 20, days before the day of election. Section 6899 provides that petitions for nomination of candidates for office shall be signed by "electors qualified to vote for such candidates." If by "electors qualified to vote for such candidates" were meant only those who are registered, no petition for nomination could lawfully be signed or filed more than 29 days before the election, except in those special cases where by petition a registration day is fixed 59 days before the election.

There are various statutes prescribing that to inaugurate certain public acts or projects—such as making certain improvements, or issuing bonds and the like—a certain number or proportion of voters must sign petitions therefor. If in such statutes the term "voters" was held to mean "registered voters," there would be only a very brief period out of each two years during which such statutory requirements could be complied with. It thus seems plain enough that the statutes, in the enployment of the term "voters," do not of necessity contemplate voters who are registered.

The count charges that the conspiracy was entered into on *September 1st* to prevent the persons named and others unknown from voting for Senator and Congressman at an election which was to be held the following *November 3d*—63 days later. Voters can register the twenty-ninth day before the election (§ 6977d), or, in case of petition therefor, on the fifty-ninth day before the election (section 6977x). On the date fixed by the indictment as that on which the alleged crime was committed through entering into the conspiracy charged, it was impossible for any voter to have been registered for the following November election. So, even if the indictment had charged that on September 1st, the date of the alleged conspiracy, the voters to be affected by the conspiracy were registered, the allegation as to registration would have to be disregarded, because under the law they could not possibly then have been registered.

If, therefore, this count is invalid, because it does not state that those against whom the alleged conspiracy was formed were registered, there could be formulated no valid indictment for any conspiracy to prevent persons from voting, if the conspiracy was formed and had its existence during the time intervening between the close of one general election and 59 days prior to the next general election; and during such long periods of time conspiracies might thus be conceived and brought forth with absolute impunity, so far as regards the conspiracy laws of nation or state. Such result was surely not intended, nor do the

holdings of the courts in similar and analogous cases sustain the contention made.

In Steigman et al. v. United States, 220 Fed. 63, 135 C. C. A. 631, the indictment considered was for a conspiracy to violate section 29b of the Bankruptcy Act, which provides that one "having knowingly and fraudulently concealed while a bankrupt * * * from his trustee any of the property belonging to his estate in bankruptcy" shall be punished as provided. The indictment failed to show that a trustee in bankruptcy had been in fact appointed, and it was urged that, if there never was a trustee, there could not be a conspiracy to withhold property from a trustee. The court said:

"In view of the fact that in this case the defendants were charged by indictment with the crime of conspiring to violate a statute of the United States, and were not charged by the indictment with the actual violation of that statute, we are of opinion that the appointment of a trustee was not essential to complete the offense of conspiracy, and therefore the allegation of the appointment of a trustee was not essential in charging that offense."

The opinion quotes with approval from United States v. Cohn et al. (C. C.) 142 Fed. 983, the language of Judge Holt in passing on a demurrer to an indictment charging a similar conspiracy to violate the Bankruptcy Act, as follows:

"A conspiracy to commit a crime always, in the nature of the case, precedes the commission of the crime; and, in my opinion, it does not follow, because, at the time a conspiracy is entered into to conceal property from a trustee, no trustee has been appointed, and no proceedings in bankruptcy begun, that therefore the crime of conspiracy under section 5440 cannot have occurred. The indictment alleges, as a part of the conspiracy, a plan to bring about the filing of petitions in involuntary bankruptcy and adjudications thereon, and that, pursuant to the conspiracy, property was removed and concealed before the proceedings, were taken, was intentionally omitted from the schedules, and was kept concealed from the trustee after his appointment and qualification. In my opinion, such a conspiracy constitutes a criminal offense. The true test is could a conviction be had if no bankruptcy proceedings were ever taken. I think it could, if, in addition to the organization of the conspiracy, any of the parties to it did any act to effect the object of the conspiracy. Undoubtedly a criminal prosecution, in such a case, would be harsh and unusual; but, in my opinion, a crime would have been committed in such a case, even if no proceedings in bankruptcy were, in fact, ever taken. A conspiracy to murder joined with a single act done by the conspirators to effect the object of the conspiracy would be a crime under section 5440, and would not cease to be a crime because no murder was committed."

Under the reasoning of these cases, which we consider sound, it may well be said that if on September 1st an unlawful conspiracy was formed to deprive citizens of their right to vote, as charged in the indictment herein, the crime was then committed, and conviction for such conspiracy might be had, wholly regardless of whether or not thereafter a single voter was in fact registered, or the election did in fact take place.

[4] But, apart even from this consideration, under the adjudicated cases it seems well settled that in an indictment for conspiracy to do an unlawful act, the unlawful act which is the object of the conspiracy is not required to be set forth with such particularity as in the case of a prosecution for the commission of the substantive offense, and

that in any event allegation of the qualifications of the voter would be sufficient if, as charged in the indictment herein, it is stated that the persons to be prevented from voting "were qualified voters and entitled to vote at said election."

In Williamson v. United States, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278, the indictment charged a conspiracy to commit subornation of perjury. To the objection that the indictment did not set out with technical precision the elements essential to the commission of the crime of subornation of perjury, the court said (207 U. S. 447, 28 Sup. Ct. 171 [52 L. Ed. 278]):

"But in a charge of conspiracy the conspiracy is the gist of the crime, and certainty to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is requisite in stating the object of the conspiracy."

It was further said in that case (207 U. S. 449, 28 Sup. Ct. 171, 52 L. Ed. 278):

"It was not essential to the commission of the crime that in the minds of the conspirators the precise persons to be suborned, or the time and place of such suborning, should have been agreed upon, and as the criminality of the conspiracy charged consisted in the unlawful agreement to compass a criminal purpose, the indictment, we think, sufficiently set forth such purpose."

In Ching v. United States, 118 Fed. 538, 55 C. C. A. 304, the court, referring to an indictment for conspiracy to commit an offense, said:

"In such cases the offense which is intended to be committed as the result of the conspiracy need not be described as fully as would be required in an indictment in which such matter was charged as a substantive crime."

United States v. Cahill (C. C.) 9 Fed. 80, involved an indictment for unlawfully preventing a qualified voter from exercising the right to vote. The person whose vote was refused was described as "a qualified voter." No specific qualifications were enumerated. The court said:

"While it may be conceded that where a person offering to vote sues an officer of election for refusing his vote, or where he is the party plaintiff whose right of action is dependent on his legal qualification, he should set out the facts on which his qualification rests, yet that rule does not apply where, as in this case, the defendant is not the voter, but a defendant in a criminal proceeding against him for unlawfully interfering with the voter. It will devolve on the United States at the trial to show affirmatively that Batton was a legally qualified voter, entitled to cast his vote for Representative in Congress at the election named, but the detailed facts on which his qualification depends need not be averred in the indictment."

And this reasoning in the last-cited case clearly distinguishes Wiley v. Sinkler, 179 U. S. 58, 21 Sup. Ct. 17, 45 L. Ed. 84, on which counsel for plaintiffs in error apparently place much reliance. This was an action for civil damages against election officers for willfully refusing to receive the plaintiff's ballot. It was held that the plaintiff must in his complaint allege that he had done all those things which at that time entitled him to cast his ballot, including in such requisites, registry; since, if he had not then been registered, it would have been the duty of the defendants to have prevented his voting.

A situation quite similar to that here was presented in Commonwealth v. Rogers, 181 Mass. 184, 63 N. E. 421, in which was consid-

ered an indictment for a conspiracy to procure persons to vote who were not entitled to vote, and to aid and abet illegal voters in voting. The qualifications, or rather the want of them, of those who were to be voted, were described by the words "not entitled to vote," and the allegations there, as here, embraced persons unknown as those who were to be so procured to vote. The court, speaking through Mr. Justice Holmes, said (181 Mass. 189, 63 N. E. 424):

"It is said that the first count is bad because it does not show how the persons whom the defendants conspired to procure to vote were not entitled to vote. The allegation embraces persons unknown, so that the requirement is impossible, and this illustrates the fact that such a conspiracy might be completed before any of the persons to be procured had been agreed upon. But it follows from that fact that the particular nature of the disqualification is in no way material to the offense. Therefore it seems to us unnecessary to the defense to require it to be alleged. * * * A similar objection is made to the other counts for abetting in voting persons not entitled to vote. * * * It seems an excess of formality to require a more detailed denial of the specific marks which constitute a qualification to vote. They all are denied by the phrase 'not entitled to vote.'"

An inspection of the transcript of record in the Mosley Case, supra, shows that in the indictment there the qualifications of the voters, whom it was alleged the conspirators intended to deprive of the benefit of their votes, were not set out at all further than to describe them (as was also done in the first count here) as qualified voters of the precincts named, and there, as here, it was alleged that persons unknown were also to be affected by the conspiracy. There was no allegation of registration, although Oklahoma had a registration law generally similar to that of Indiana and other states. Sections 3151 to 3177, Rev. Laws of Okla. 1910. The Supreme Court held the indictment good, reversing the District Court, which on demurrer had held otherwise. The question here under consideration was not, however, discussed in the court's opinion.

The allegation in the count here, that those to be deprived of their votes were "qualified voters and entitled to vote at said election," sufficiently informed the defendants of the nature of the charge in this respect, to enable them to meet it, and protect them against further prosecution for the same offense. More detailed allegation of the qualifications which would entitle the voter to cast his vote at the election would be formal rather than substantive. As to a similar situation, the Supreme Court in New York Central R. R. v. United States, 212 U. S. 481, at page 497, 29 Sup. Ct. 304, at page 308 [53 L. Ed. 613], aptly said:

"Objections were made as to the sufficiency of the indictment based upon its want of particularity in describing the offense intended to be charged. Section 1025 of the Revised Statutes of the United States [Comp. St. 1913, § 1691] provides that no judgment upon an indictment shall be affected by reason of any defect or imperfection in matter of form which shall not tend to the prejudice of the defendant, and, unless the substantial rights of the accused were prejudiced by the refusal to require a more specific statement of the manner in which the offense was committed, there can be no reversal. Connors v. United States, 158 U. S. 408, 411 [15 Sup. Ct. 951, 39 L. Ed. 1033]; Armour Packing Co. v. United States, 209 U. S. 56, 84 [28 Sup. Ct. 428, 52 L. Ed. 681]. An examination of the indictment shows that it specifically states the elements of the offense with sufficient particularity to fully advise the defendant

of the crime charged, and to enable a conviction, if had, to be pleaded in bar of any subsequent prosecution for the same offense."

We find that the first count properly and sufficiently charges that the defendants conspired to injure and oppress the persons therein named, and persons unknown, in their right to vote for a United States Senator and a Member of Congress at an election where such officers were to be elected, and is therefore a valid count.

[5] The plaintiffs in error were respectively sentenced upon each of the several counts, and the sentence of imprisonment in each case was made to run concurrently on all the counts; the longest term of imprisonment, as to the several counts, as well as the fine imposed, being in each instance upon the first count. Under these circumstances, the first count being sufficient to sustain the judgment of the District Court, the other counts need not be considered. Johnson v. United States, 215 Fed. 679, 131 C. C. A. 613, L. R. A. 1915A, 862; United States v. Lair, 195 Fed. 47, 115 C. C. A. 49; Bartholomew v. United States, 177 Fed. 902, 101 C. C. A. 182; Haynes v. United States, 101 Fed. 817, 42 C. C. A. 34; Tubbs v. United States, 105 Fed. 59, 44 C. C. A. 357; Claassen v. United States, 142 U. S. 140, 12 Sup. Ct. 169, 35 L. Ed. 966.

In the absence of a bill of exceptions, we are conclusively bound to presume there was evidence to warrant the jury's verdict on which the judgment is based; and, the record disclosing no error, the judgment of the District Court is affirmed.

VICTOR AMERICAN FUEL CO. v. TOMLJANOVICH.

(Circuit Court of Appeals, First Circuit. May 19, 1916.)

No. 1189.

1. MASTER AND SERVANT ⊂=118(1)—INJURIES TO SERVANT—SAFE PLACE OF WORK.

In this case a mine operator, under its common-law duty to furnish employés with reasonably safe place of work and safe appliances, should equip coal cars with suitable drags, so that, when loaded in one of several chambers in the mine, they will not escape and injure the miners.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 209; Dec. Dig. ⊂=118(1).]

2. APPEAL AND ERROR ⊂=193(3), 195—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—NECESSITY.

Though a complaint as amended might, under the rules prohibiting duplicity, have been subject to special demurrer, or objection might have been made to the mode of amendment, no objections or demurrers having been made below, the matter cannot be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1226, 1149; Dec. Dig. ⊂=193(3), 195; Pleading, Cent. Dig. §§ 1355, 1409.]

3. TRIAL ⊂=29(1)—MODE OF TRIAL—COMMENTS OF COURT.

In an action in the federal courts, it is not improper for the judge to suggest to plaintiff that he might elect on which count to proceed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 80, 508; Dec. Dig. ⊂=29(1).]

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4. PLEADING ⟸246(3)—AMENDMENTS—IMMATERIAL AMENDMENTS.
In a coal miner's action, where he could rely either on the statute or the common law, the granting of an amendment to conform the complaint to the exact words of the statute was not error.
[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 680; Dec. Dig. ⟸246(3).]

5. PLEADING ⟸248(12)—AMENDMENTS—NEW CAUSE OF ACTION.
In a servant's action, where he relied on the master's violation of statute as well as of his common-law duty to furnish a safe place for work, an amendment whereby the two grounds of liability were inserted in one count of the complaint, having formerly been set forth in two counts, is not objectionable as stating a new cause of action, in the absence of a special demurrer.
[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 694; Dec. Dig. ⟸248(12).]

6. APPEAL AND ERROR ⟸237(5)—REVIEW—MATTERS REVIEWABLE.
Where there was, at the trial, no specific motion for direction of a verdict in defendant's favor on the ground that the evidence, or the weight of the evidence, was against plaintiff's contention, although there were motions for directed verdicts on other grounds, the questions whether the evidence supported plaintiff's contention or the weight of the evidence was against him, cannot be reviewed on appeal; the power of the appellate court being limited to exceptions actually taken at trial.
[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. ⟸237(5).]

7. TRIAL ⟸256(1)—INSTRUCTIONS—REQUESTS.
With the rule applied that, where the rulings given were prima facie correct, appellant, if desirous of anything further, should bring the rulings to the attention of the court.
[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628, 633; Dec. Dig. ⟸256(1).]

8. EVIDENCE ⟸558(11)—OPINION EVIDENCE—CROSS-EXAMINATION OF EXPERTS.
On the cross-examination of medical experts, great latitude is allowed, and excerpts from medical works may be read to test the experts' knowledge.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2377, 2379; Dec. Dig. ⟸558(11); Witnesses, Cent. Dig. § 932.]

9. EVIDENCE ⟸364—PERSONAL INJURIES—MORTALITY TABLE.
In a personal injury action, the mortality tables may be received in evidence.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1520; Dec. Dig. ⟸364.]

In Error to the District Court of the United States for the District of Maine; Clarence Hale, Judge.

Action by Paul Tomljanovich, per pro. ami, against the Victor American Fuel Company. There was a judgment for plaintiff, and, motions for new trial (227 Fed. 951; 230 Fed. 467) being overruled, defendant brings error. Affirmed.

Frederick W. Hinckley, of Portland, Me. (Caldwell Yeaman, of Denver, Colo., and George H. Hinckley, of Portland, Me., on the brief), for plaintiff in error.

A. T. Hannett, of Gallup, N. M., and George C. Wheeler, of Portland, Me., for defendant in error.

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

PUTNAM, Circuit Judge. In this opinion the word "plaintiff" means the plaintiff in the District Court, and the word "defendant" means the defendant in that court.

[1] This is a suit for an injury caused to the plaintiff by the slipping away of a loaded car of coal in one of the chambers of a mine in New Mexico, with the result that the car was derailed, and, as the consequence of derailing, it broke loose and fell on the plaintiff, who was working as a miner at a point below the place where the car broke loose. There is no doubt that the statutory law of New Mexico, where the mine is located, required that one or more drags should have been attached to the car, which one or more drags would undoubtedly have derailed it, and prevented a collision with the plaintiff. It is not necessary to state the legislation of New Mexico at length, because, independently of any legislation, the common law obliged the defendant to provide a suitable drag or drags, which were the customary and simple preventive of such an accident, which was liable to occur at any time; and, if they had been provided, this accident would not have occurred. Under the circumstances, the furnishing of a suitable drag or drags was such an obvious and common incident, and so simple and essential a matter, that the lack of such furnishing, either under the statute or aside from the statute, rested on the defendant as a part of its obligation to furnish a suitable and reasonably safe place for the employment of the plaintiff, from which the defendant could not have relieved itself, all as shown by the settled rules of law.

There is also no question that if the defendant had furnished suitable drags at the hand of its servants, who were the coemployés of the plaintiff, so that any failure to use the drags was merely a failure on the part of his coservants, this fact would have been a defense to the defendant, whether the cause of action was based on the statutes of New Mexico or rested on the common law. The plaintiff testified that no such drags were furnished by the defendant, and he had never seen one in the mine; and one question is whether or not the testimony of the plaintiff, whose testimony was wholly unsupported, should have been accepted by the jury or should be set aside by this court. That proposition we will take up in its proper order.

The amount involved was a very large one; the injuries to the plaintiff having been very substantial, and the judgment rendered in his favor having been for $15,325. While the injuries occurred in New Mexico, the trial was at Portland, Me., and occupied several days, with many controversies and numerous exceptions, which, however, so far as we are concerned, on sifting out come down to few propositions.

The first question arises out of the fact that there were originally two counts in the plaintiff's declaration, one apparently based on the local statute, which required a drag, and the other based on the common law, which made the defendant responsible on the proposition substantially to the effect that the absence of a drag was, under the circumstances we have referred to, a failure to provide suitable equipment. There seems to have been some uncertainty as to the steps

taken by the various parties in this respect as to what they sought to accomplish; but the effect was that, before the verdict was rendered, and within the time within which, in accordance with the practice in the federal courts, such an amendment might have been allowed, the plaintiff waived his second count, and amended his first count by carrying to the latter so much of the second count as left it a count alleging lack of a drag in the manner required by the statutes of New Mexico, and also coupled with it an allegation that the drag was not furnished, and that, in the absence of the drag, there was at common law a failure to furnish proper appliances, or a proper place for labor, in accordance with the well-known rules of the common law.

[2] It is possible that, under the rules prohibiting duplicity in pleading, such a form of pleading would have been subject to a special demurrer, or an objection might have been made to thus amending the first count on the ground that it was duplicating the pleadings, and therefore offering a form of pleading which was subject to a special demurrer; but, while there were other pro and con objections and discussions about this and about proceeding on the consolidated cause of action, we are unable to find that there was any objection or exception taken of the class which was suitable for the condition in which the amendments left the pleadings, or that there was any action in these respects by the trial court which was substantially injurious to the defendant, or as to which it could have taken any exceptions except in the special manner to which we have referred, and which it did not take. Therefore we pass by that whole topic as of no consequence in the appellate tribunal, and without any further explanation in reference thereto.

The propositions raised by the assignment of errors in reference to this matter of amendments are entirely of a general character. The bulk of them relate to the matter of proof with reference to the count as amended, which does not touch any of the questions now raised to which we have referred. Among other things, the assignment says that there is no testimony that the place where the plaintiff was engaged in mining of coal was unsafe. This does not relate to the matter of making the amendments, but to the propositions which came in issue after the amendments were made, and which were met by the fact that the matters covered by the amendments were matters of the kind to which we have already referred as being what is imposed by law on employers with reference to what are usual, customary, and simple methods of avoiding dangers.

[3] It is also assigned as error that the court erred in suggesting to the plaintiff that he might elect on which count to proceed; but in this respect the entire conduct of the trial was fully in harmony with the practice in the federal courts, whatever it may be elsewhere.

[4] In the same way, the objection made by the assignment of errors that the court erred in suggesting to the plaintiff that he might amend by inserting the word "willful," which was required to conform to the exact language of the statute, was in fact an immaterial matter as the case terminated, because the verdict rested, not only on the statute, but also on the common law.

[5] Neither was it true, as assigned by the assignment of errors, that the amendments introduced a new and vital issue; and, in conclusion, everything further raised by the assignment of errors with reference to these amendments and the proceedings under them, will be disposed of by what we have to say with regard to the demand that the verdict be set aside with relation to anything which appertains to the merits of the case, particularly to the testimony of the plaintiff.

[6] The burden of the case depends on the motions to direct a verdict, which were refused, and are brought here by exceptions. The federal courts adhere closely to the English practice, by which, in ordinary cases, the question of setting aside a verdict as against evidence is for the trial judge. The practical rule is stated, though perhaps too strongly, in The Connemara, 108 U. S. 352, 360, 2 Sup. Ct. 754, 758 (27 L. Ed. 751) as follows:

"The facts are decided by the jury in the first instance. If the jury return a general verdict, clearly against the weight of evidence, or assessing exorbitant damages, the court in which the trial is had may set aside the verdict and order a new trial. But a court of error, to which the case is brought by bill of exceptions, or appeal, on matter of law only, cannot set aside the verdict, unless there is no evidence from which the conclusion of fact can be legally inferred."

Indeed, in the earliest cases in the Supreme Court, it was doubted whether, after all, a motion to set aside a verdict as against evidence was not an appeal on a mere question of fact as to which the Supreme Court could have had no jurisdiction (Marine Insurance Company v. Young, 5 Cranch, 187, 190, 3 L. Ed. 74, decided in 1809); although in the same case it was finally concluded that it would be improper for the Supreme Court to determine whether the inferior court ought or ought not to have granted the motion for a new trial on the ground that the verdict was contrary to evidence. In Maryland Insurance Company v. Ruden's Adm'r, 6 Cranch, 338, 340, 3 L. Ed. 242, it was ruled that the party against whom a verdict was rendered had no remedy except a new trial to be granted by the court in which the verdict was found. This was strictly the English rule; but, after all, it was settled, as in the case first cited, that it was only where there was no evidence, or there was nothing which, with all the inferences which the jury could draw from it, would sustain a verdict, that the Supreme Court had jurisdiction over the question.

Until it was so settled, the court had some difficulty in pointing out the difference in practice between the state courts and the Federal courts on this question. Brown v. Clarke, 4 How. 4, 15, 11 L. Ed. 850. Finally, the whole matter got settled down, as we have said; but, in Railway Company v. Heck, decided at the October term, 1880, 102 U. S. 120, 26 L. Ed. 58, Chief Justice Waite said: "Our power is confined to exceptions actually taken at the trial," adding some explanation thereto which is not important here. Also in Randall v. Baltimore & Ohio Railroad Company, decided September 10, 1883, 109 U. S. 478, 482, 3 Sup. Ct. 322, 324 (27 L. Ed. 1003) in an opinion by Mr. Justice Gray, it was declared that "it is the settled law of this court that, when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for

the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant." It proceeds that it is now settled in the House of Lords "that it is for the judge to say whether any facts have been established by sufficient evidence, from which negligence can be reasonably and legitimately inferred; and it is for the jury to say whether from those facts, when submitted to them, negligence ought to be inferred."

These expressions in this last case are cited in Louisville & Nashville Railroad Company v. Woodson, 134 U. S. 614, 621, 10 Sup. Ct. 628, 630 (33 L. Ed. 1032) as furnishing a rule by which the jurisdiction of the Supreme Court over exceptions can be measured; that is to say, that such exceptions may justly be taken "when the evidence given at the trial," with all the inferences that the jury could justifiably draw from it, is insufficient to support a verdict, a writ of error will lie to the Supreme Court. It may be rather strong to say, as in the language of Schuchardt v. Allen, 1 Wall. 359, 371 (17 L. Ed. 642) that "a motion for a new trial in the courts of the United States is addressed to the sound discretion of the tribunal which tried the case, and to grant or refuse it cannot be made the subject of exception"; but it is safe to say that the action of the trial court cannot be brought to the Supreme Court for review, unless there has been some specific conclusion on its part granting or refusing a new trial on the ground that it is either for or against the weight of the evidence.

Certainly it is safe to say that, in a case like the present, where the real issue was whether or not the drags were furnished by the defendant, and as to which issue the testimony was conflicting, that of the most important witness being directly to the contrary, no refusal to rule that the evidence was insufficient to warrant a verdict can be held erroneous in this court, unless the record shows express application for such ruling made to the trial court upon that specific ground alone, and distinctly raising the question as to the weight of the evidence. In the present case there was no such specific proceeding in the trial court. There were several motions for a direction of a verdict, if a mere request for such direction could be regarded as meeting the requirements of the case. But they were, however, all deficient. They are briefly stated in the introductory current review of the proceedings of the trial court; but they were stated fully, subsequently, by the exceptions drawn out at length. One motion was based on a request to direct a verdict for the defendant on the second count, which had been abandoned by the plaintiff with the express statement on his part that he was proceeding on the first count only. Another was based on a request that the trial court direct a verdict for the defendant on the first count, which was coupled with another request for a general direction of a verdict for the defendant on the entire case, without distinguishing between the counts. None of these requests for verdicts were clean requests on the ground that the evidence, or the weight of the evidence, was not with the defendant; but all were coupled with certain propositions mingling with the motions

claims for certain incidental propositions which so affected the rulings of the court that they were not based merely on the evidence, but induced or compelled the court, in either case, to rule on the motions expressly "as matter of law," and so stated; so that as the record stands we have no clean, direct ruling of the trial court on the mere issue whether or not the jury might be allowed to find on the evidence, or on the weight of the evidence, a verdict in favor of or against the defendant. Therefore, the court was never asked to rule as on the proposition made by Chief Justice Waite in Railway Company v. Heck, 102 U. S. 120, 26 L. Ed. 58, already cited, that the power of the Supreme Court "is confined to exceptions actually taken at the trial." The whole is confused from beginning to end; and we are left without what the common law always insisted on under the English statute of exceptions, that is, a ruling squarely on the proposition whether or not the finding of the verdict of the jury was in harmony with the evidence or the weight of evidence. Therefore, without undertaking to determine whether or not, under the federal practice, the Supreme Court has jurisdiction over an issue where there is direct testimony, as in the present case, in favor of the plaintiff, although evidently subject to criticism, we are not called on to determine ultimately whether in such a case the verdict can be disturbed because it is against the weight of evidence. The powers of the appellate court in matters of this sort from any point of view were considered effectively in this court in Odell Mfg. Co. v. Tibbetts, 212 Fed. 652, 656, 129 C. C. A. 188, where under the federal system the peculiar powers of the trial judge, with reference to motions to set aside a verdict where there is a conflict of proofs, was considered, and it was said, at page 657 (129 C. C. A. 193), that such things were generally not for the court, and especially not for the appellate court.

The foregoing disposes of what are really the essential questions in this case. The defendant submits to us for our consideration the ruling of the court instructing the jury apparently to the effect that the disregard of the New Mexico statutes on the part of the defendant was conclusive as against the defendant. This ruling would make some difficulty if it had been made the subject of any assignment of alleged error; but, as there is no such assignment, the question involved in it is not before us.

[7] Also, the plaintiff in error objects that the court refused to give a requested ruling as to the effect of the knowledge shown by the testimony of the plaintiff, that he knew the defendant was customarily disregarding the statutes requiring the use of drags; but the ruling of the court on this point was prima facie and ordinarily correct, and, if anything further was required, it should have been brought to the attention of the court, as shown in Texas & Pacific R. R. Co. v. Volk, 151 U. S. 73, 14 Sup. Ct. 239, 38 L. Ed. 78.

[8] With reference to reading from medical text-books on cross-examination, it is true that the courts have held, especially the Massachusetts Supreme Judicial Court, that counsel cannot, in their own case, and as a direct part thereof, thus read; but with reference to

the cross-examination of medical witnesses, very great latitude is necessarily allowed for indubitable reasons. All that was read in this case was as a part of the cross-examination of a medical witness, and, as said by the court, for the purpose of testing the knowledge of the witness.

In like manner, the proof of sundry conversations with the plaintiff which were objected to, but were admitted, were, so far as we can see from anything the record shows, entirely immaterial and harmless. They related to a conversation which may have been entirely friendly, and nothing more than that. The defendant did not go far enough in connecting the surroundings of the case, either by the statements of counsel or otherwise, so that we can apprehend their effect.

[9] The defendant objected to the proofs offered through standard life tables, but these were only the proofs ordinarily admitted, and which cannot be supplied in any other way. The defendant could have called for any qualifications desired in accordance with Texas & Pacific R. R. Co. v. Volk, already cited.

The judgment of the District Court is affirmed, with interest; and defendant in error recovers his costs of appeal.

NATIONAL CITY BANK OF CHICAGO v. KALAMAZOO CITY SAV. BANK.

(Circuit Court of Appeals, Sixth Circuit. May 2, 1916.)

No. 2721.

BANKS AND BANKING ⊂=42—LIEN OF BANK ON STOCK—PRIORITY AS BETWEEN BANK AND PLEDGOR—MICHIGAN STATUTE.

Comp. Laws Mich. 1897, § 6098, relating to banks, provides that "no transfer of stock shall be valid against a bank so long as the registered holder thereof shall be liable as principal debtor, surety or otherwise to the bank for any debt which shall be due and unpaid, * * * and no stock shall be transferred on the books of any bank, * * * where the registered holder thereof is indebted to the bank for any matured and unpaid obligations." *Held* that, under such provisions, as construed by the Supreme Court of the state, a pledgee of stock at a time when the registered owner does not owe the bank a debt which is then due acquires an inchoate or contingent priority over any existing, but unmatured, bank debt, which he may make a fixed priority by demanding a transfer on the books before such debt matures; but in the absence of such demand, or of a notice which means that he has elected to make it, or of facts which make that election unnecessary, on the maturity of any debt from the pledgor to the bank, its statutory lien takes precedence.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 50, 56-60; Dec. Dig. ⊂=42.]

Appeal from the District Court of the United States for the Western District of Michigan; Clarence W. Sessions, Judge.

Suit in equity by the Kalamazoo City Savings Bank against the National City Bank of Chicago. Decree for complainant, and defendant appeals. Affirmed.

The Michigan Buggy Company, a corporation, suspended payment August 1, 1913. It had been doing business with the Kalamazoo City Savings Bank,

a corporation under the Michigan banking law, and Palmer, one of the Buggy Company's officers, had guaranteed the bank against loss on the company matters. Palmer had been continuously a stockholder in the bank. On September 25, 1911, he borrowed $10,000 from the National City Bank of Chicago, and as collateral security therefor assigned and delivered to the Chicago bank 50 shares of his stock in the Kalamazoo bank. Thereafter he made payments on this loan and parts of the collateral were released until, in July, 1913, there remained $4,000 unpaid, and 20 shares of stock were still retained and held by the Chicago bank as collateral.

On July 26th the Buggy Company drew a draft for about $10,000 upon a Pennsylvania customer, and the Kalamazoo bank discounted this draft and credited the proceeds to the Buggy Company. It resulted that the Buggy Company had a credit balance in its account at the bank thereafter and until August 2d, on which day the draft was returned because acceptance was refused and it was charged back to the Buggy Company, creating a debit balance of about $7,000, which thereafter remained unpaid.

Section 6098, C. L. Mich. 1897, being part of the law governing state banks, provides: "The shares of stock of such bank shall be deemed personal property, and shall be transferred on the books of the bank in such manner as the by-laws thereof may direct, but no transfer of stock shall be valid against a bank so long as the registered holder thereof shall be liable as principal debtor, surety or otherwise to the bank for any debt which shall be due and unpaid, * * * and no stock shall be transferred on the books of any bank without the consent of the board of directors, where the registered holder thereof is indebted to the bank for any matured and unpaid obligations."

A controversy arose about their respective rights between the Chicago bank, as pledgee of the 20 shares of Palmer's stock, and the Kalamazoo bank, claiming a lien upon the same stock under this statute, on account of Palmer's guaranty of the Buggy Company's debt. Upon a bill filed in the court below by the Kalamazoo bank, that court held that its rights were superior, and that the Chicago bank must yield thereto its claims as pledgee. The Chicago bank brings this appeal.

M. M. Uhl, of Grand Rapids, Mich., for appellant.

Dallas Boudeman, of Kalamazoo, Mich., for appellee.

Before WARRINGTON and DENISON, Circuit Judges, and KILLITS, District Judge.

DENISON, Circuit Judge (after stating the facts as above). This statute has been accepted, by the Supreme Court of Michigan, as providing that the pledgee or purchaser of bank stock, who presents the certificates to the bank for transfer on its books, has an absolute right to such transfer as against any claim by the bank against its stockholder, unless such claim is upon a debt which is "due" in the sense of being past due; in other words, "due" and "matured," in different parts of the section, are synonymous. That court has also considered the respective rights of the bank and the pledgee in the cases later mentioned, and so far as it has thus construed the statute, it is, of course, our duty to follow; but some study of the principles involved in this situation, and in these Michigan cases, seems necessary before making their application to the facts in this case. We shall, for convenience, speak of the issuing corporation as the bank, and of the person loaning money upon the stock and taking it as collateral security as the pledgee.

It will be noticed that the statute contains two possibly effective provisions: The first is, "no transfer of stock shall be valid against the bank so long as," etc.; the second is, "no stock shall be transferred on

the books of any bank * * * where," etc. The first seems to relate to a transfer, in the broadest sense of that word, and the second to the entry of that transfer on the books so as to perfect the legal title. Considering the first provision by itself, it seems clear enough that not only the statutory provision but the converse must be accepted, and, accordingly, that a "transfer" is valid if the stockholder is not then liable to the bank upon a matured obligation; and so it would seem that the rights of the parties are to be judged as of the date when the pledgee acquires his interest. If this language alone were considered, it could hardly be material whether the interest, taken by a pledgee and assignee of certificates before transfer on the books, should be called legal or equitable; under either name, it is a substantial interest. This section does not purport to create or declare any lien in favor of the bank until the maturity of the debt, and it seemingly must follow that the pledgee's interest will be superior to any subsequently accruing statutory right in favor of the bank. However, the second statutory provision relates to the time when the pledgee demands a transfer on the books, and makes the right to such transfer conditional upon the nonexistence at that time of a debt to the bank which is then past due.

If the pledgee has acquired, by such original transfer, an interest good and valid against the bank, there is no equitable reason why this interest should be ousted by the subsequent maturity of the bank debt; yet the second statutory provision implies such ouster. There seems no way to reconcile the two provisions and give effect to each, unless it is upon the theory that the pledgee who takes the stock gets an inchoate or contingent priority over any existing and unmatured bank debt, which priority, as against the statute which still continues to threaten, the pledgee can fix and ripen only by demanding a transfer or doing some equivalent thing before the fatal incident—the maturity of the bank debt—happens. The pledgee is in the position of a mortgagee who has not recorded his mortgage, and is likely to lose his lien by the levy of execution by a creditor; this statute provides for an automatic execution; the lien, comparable to an execution lien, is precipitated by the mere coming of maturity.

It is to be noticed, also, that under this statute the usual equitable principles which fix priorities between conflicting claimants are wholly disregarded and an arbitrary rule is substituted. It seems plain that the statute does not intend to affect the stockholder's full control of his stock, so long as he is not in default at the bank, and that, though the pledgee or purchaser of stock may know that the stockholder is indebted to the bank for more than the value of the stock and that the debt will come due tomorrow, yet to-day he can acquire the stock by pledge or by purchase, present it for transfer on the books, and—lacking fraud—acquire a superior title. All the notices which the bank might serve would be waste paper. On the other hand, if the bank debt has matured before a demand for transfer or equivalent event happens, the right of the bank becomes superior by arbitrary provision, not by any equitable principle. The maturity of the debt does not prejudice the bank—rather the contrary; the bank does not do any-

thing or part with anything at maturity whereby it ought to be preferred over an outstanding superior equity. The date of the original loan by the bank, which is the only date as of which it can have equities against other claimants, is, in the statute, left out of account. These considerations confirm the conclusion that the statutory lien, when perfected by the happening of the statutory event, ought to prevail against the outstanding nonstatutory lien, which has not been perfected in the method provided.

It is obvious, we think, that the pledgee's demand for transfer, in order to satisfy this theory, need not be a present demand; an anticipatory one, or even a contingent one, may be equivalent. The important thing is the election by the pledgee to insist upon his right of priority, or his willingness to waive such right. The existence of the pledge does not necessarily imply that the pledgee will enforce his rights to the extent of injuring the bank. The stockholder may be amply responsible for the pledgee's loan, the pledgee may have other sufficient security, special and personal considerations would often control, the chance that a debt to the bank will mature and remain unpaid before the pledgee's debt matures may seem very small—in many cases, the pledgee would deliberately elect not to make claim, as against the bank, even at some risk to the pledgee. It follows that mere knowledge by the bank of the pledgee's loan is not equivalent to notice or knowledge that the pledgee will insist upon his priority. This, again, confirms the conclusion that the statute ought to be construed to give the priority to the bank upon maturity, unless, before that time, the pledgee has elected to demand his priority and the bank has knowledge of such election.

Are the Michigan decisions consistent with this conclusion? In Michigan Trust Company v. State Bank, 111 Mich. 306, 69 N. W. 645, it does not appear whether the bank or the pledgee first gave credit, but not until after the maturity of the bank debt did the pledgee give notice to the bank that the pledgee held the stock as collateral and intended looking to it for payment of the note. The lien or claim of the bank was held valid as against the pledgee; and the formal notice from the pledgee is treated as being the demand, or equivalent to the demand, for transfer to which the statute refers. In Citizens' Bank v. Kalamazoo Bank, 111 Mich. 313, 69 N. W. 663, the same situation existed, and the same result was reached. In Oakland Bank v. State Bank, 113 Mich. 284, 71 N. W. 453, 67 Am. St. Rep. 463, it is taken as clear without discussion that the lien of the bank was superior, where it was for a debt which was due before the pledgee acquired his interest. In Brinen v. Muskegon Bank, 174 Mich. 414, 140 N. W. 529, the only question in dispute was whether the debt to the bank was in fact matured when the pledgee demanded the transfer; and it was conceded that the pledgee was without remedy if the bank debt had, at that time, matured.

With one exception, these are all the Michigan decisions found, and they do not suggest that anything less than a demand for transfer, or a clear notice that transfer will be demanded, if necessary, given to the bank before its debt matures, will serve to prevent the otherwise

ensuing statutory reversal of the then existing superiority of right. The exception is Just v. State Bank, 132 Mich. 600, 94 N. W. 200. This case is urged upon us as holding that if the bank, before its debt matures, has knowledge in any manner of the outstanding pledge, the statute does not take normal effect, but the right of the bank remains, after maturity as before, inferior to the pledgee's right. In the Just Case, the facts were, as finally worked out by the court, that on December 2, 1897, a stockholder was indebted to the bank on a note which did not become due until July, 1898. On the former day the stockholder borrowed from the pledgee $2,000, assigning a stock certificate as collateral. The pledgee never made any formal demand for transfer, or served written or other formal notice of its election to insist upon having the stock; but before July, 1898, the bank had full knowledge from different sources of the existence of the pledge. The pledgor was dead, his estate was insolvent, and the bank knew that the pledgee was claiming the rightful title to the stock, and that either the bank or the pledgee must suffer loss. Under these circumstances, it was held that the bank, before its debt became due, had "notice" of the pledge, and that, therefore, the pledgee must prevail.

Here, for the first time, we have mentioned the subject of notice to the bank, as distinguished from a demand for transfer on the books. There is nothing in the statute about notice. We must query what is meant by "notice," and why it is necessary or what is its effect. Is "notice" synonymous with "knowledge"? Obviously, a notice may have either one of two functions (or both): It may be intended to give knowledge, and so affect the action to be taken by the person who is thus informed; or it may be intended to assert a demand or evidence an election. If this statute gave to the issuing bank a lien arising when it gave credit to its stockholder, then notice (at that time) in its first above-mentioned function—to give knowledge—would be important; but the statute does not declare any lien then arising. The statutory lien is postponed until the maturity of the debt.

In the Just Case, it is clear that notice merely for the sake of giving knowledge was of no possible importance. The loan by the bank had been made before the pledgee acquired its interest. A complete knowledge of the transaction with the pledgee, acquired on the next day by the bank, could not affect its future action, either to its help or to its prejudice. Its own lien would accrue by statute on the date of maturity, as it did, and no reason is suggested why the existence of knowledge by the bank of the collateral transfer to the pledgee should make any difference in the taking effect of this statute. The bank could not change its rights, either by acting or by not acting, as the result of its knowledge. If we take "notice" as being equivalent to "knowledge," this case would seem to create an exception to the statute, which mentions only demand for transfer, and could include only such notice as was tantamount to a demand; if, however, "notice" in this latter sense is intended, the facts of the case justify the use of the word, because there can be no doubt that the bank knew the pledgee would insist upon a transfer just as well as if it had been so told by the most formal notice.

The Just Case cites a number of decisions as establishing the proposition that the weight of authority in this country pronounces the right of the bank inferior, if it had notice of the pledgee's claim. An examination of these decisions and authorities discloses that, so far as they involve mere knowledge, as distinguished from formal demand or election, they consider statutes which, by their language or by construction, involve the ordinary equitable principles of priority rather than any arbitrary rule. From no one of them is the inference to be drawn that under a statute where the pledgee acquires ultimate priority, although, when he made the loan, he knew of the existing debt to the bank, can he displace the statutorially ensuing priority of the bank merely because the latter had knowledge of the pledgee's loan when the bank debt matured. This is persuasive that the Supreme Court of Michigan did not intend to make its decision regarding "notice" cover mere knowledge in a case where no election by the pledgee to stand upon its pledge had ever been made or could be presumed. We therefore conclude that the Just Case does not require us to depart from the construction of the statute which would otherwise seem imperative—viz., that the bank is not required to transfer the stock on the books unless, before the maturity of the bank debt, the pledgee has demanded a transfer or has given a notice, which means that he has elected to claim his full rights, or unless the facts make that election so certain that formal notice is unnecessary. All practical considerations of fair dealing—and presumptively the Legislature intended to promote fair dealing—lead to the same conclusion. If the pledgee wishes to exercise his power to stop the running of this statute, he has only to record his mortgage—that is, to serve a formal demand or notice; if, for any reason, he is unwilling to do this, he should not have the same benefit through outside or accidental knowledge of the pledge coming to the bank. He should not take benefit from the fact that the bank in some way gets knowledge of the pledge, when, perhaps, he intended even not to allow the bank to learn of it. He should not be entitled to say that notice of some facts puts the bank on inquiry, and it is bound to follow the inquiry and ascertain the existence of the pledge, and thereby lose the lien it otherwise would get, although this notice and the final knowledge that the pledge exists could not affect in the slightest the bank's subsequent conduct.

This conclusion disposes of one "notice" which is claimed to have been given to the Kalamazoo bank by the Chicago bank. It was by way of a casual conversation between the representatives of the two banks on July 30th, and was a mere statement that the Chicago bank had some of Palmer's stock. There was no mention of the amount of stock or the amount of the loan; Palmer was not then thought to be even of doubtful responsibility, so far as appears; the talk fell far short of any definite notice of election to claim the stock, and the circumstances did not make that notice unnecessary; and there was such a lack of assertion of right by the Chicago bank that the Kalamazoo bank did not even see occasion to assert its own right. We cannot think that, by this statement, the pledgee could avoid the effect of the statute.

The other claimed notice may present a different question. It con-

sists of some knowledge received by the Kalamazoo bank before the discounting of the Pennsylvania draft which is the basis of the Kalamazoo bank's present claim. In spite of the silence of the statute, it may be thought that the bank should not be allowed to assert its statutory right against the pledgee, if, when it made the loan to its stockholder, it knew of the pledge then outstanding. It is not necessary to decide this question. See Hotchkiss v. Bank (C. C. A. 6) 68 Fed. 76, 15 C. C. A. 264, involving this question under a Connecticut statute. If mere knowledge may have that effect, it must at least be reasonably definite and certain, and the facts must raise the presumption that the knowledge was or should have been in the minds of the bank officers when the loan was made. We see no reason for applying to such a situation the strictness of the rules, regarding notice and putting on inquiry, enforced against one who is trying to displace an existing legal right because he is a good faith legal purchaser. Here the burden is the other way. The legal right—the statutory lien—is in the bank, and the pledgee is trying, upon equitable grounds, to displace it. The pledgee should, at least, make clear that the bank acted in bad faith. The statement by Palmer to the Kalamazoo bank, that some of his certificates were held by the Chicago bank, was made in May, 1912. Palmer then owned 65 shares. In the interval, before July, 1913, his Chicago indebtedness had been renewed and shifted several times. He had taken down most of the certificates there held; he had dealt with and sold a considerable number of certificates, which had been transferred on the books; and upon the reissue of the bank's capital, he had produced and surrendered the very certificates in exchange for which those now in dispute were issued, as if they were his own. These things are ample to neutralize the effect of such notice as the Kalamazoo bank had more than a year before, and such a situation does not justify a holding that the statute does not operate according to its terms.

The decree is affirmed.

CARROLL et al. v. DULUTH SUPERIOR MILLING CO.

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

No. 4465.

1. TRADE-MARKS AND TRADE-NAMES ⟸33—REQUISITES OF ASSIGNMENT—NECESSITY OF TRANSFER OF BUSINESS.

A trade mark or name cannot be assigned, except in connection with the transfer of the particular business in which it has been used, with its good will, and for continued use upon the same articles or class of articles.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 37; Dec. Dig. ⟸33.]

2. TRADE-MARKS AND TRADE-NAMES ⟸35—ASSIGNMENT—VALIDITY.

A verbal agreement by the owner of a milling business in which he used a trade-mark, in giving a mortgage on the mill property, that the trade-mark should pass to the mortgagee in aid of the mortgage, did not

give the mortgagee title to the trade-mark, where the mill was destroyed by fire, the business discontinued, and the mortgage was never foreclosed.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 39, 40; Dec. Dig. ⟸35.]

3. TRADE-MARKS AND TRADE-NAMES ⟸68—UNFAIR COMPETITION.

There can be no unfair competition, where there is no competition in fact, as where the parties do not sell their goods in the same territory.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 79; Dec. Dig. ⟸68.]

Appeal from the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Suit in equity by Peter F. Carroll and Edwin R. Freeman, partners as Henry Koper & Co., against the Duluth Superior Milling Company. Decree for defendant, and complainants appeal. Affirmed.

John M. Coit, of Washington, D. C., for appellants.

Hjalmar H. Boyesen, of New York City (Sullivan & Cromwell, of New York City, Crassweller, Crassweller & Blu, of Duluth, Minn., and Ralph L. Collett and R. Bernard Crispell, both of New York City, on the brief), for appellee.

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

CARLAND, Circuit Judge. Appellants brought this action to restrain appellee from unlawful competition in business and for damages. The alleged unlawful competition is the use by appellee in the manufacture and sale of flour of a trade-mark known as "Freeman's Superlative," of which appellants claim to be the owners. Appellee admits the use of the trade-mark, but alleges that it is the owner thereof. The question to be decided, therefore, is one of title. The trial court dismissed appellants' bill. The facts which must determine the question involved are substantially as follows:

In 1876 a copartnership composed of A. A. Freeman and his brother, Marcus L. Freeman, acquired a flouring mill in La Crosse, Wis., and entered upon a general flour milling business. A. A. Freeman was the active partner in charge and the originator of "A. A. Freeman & Co., Superlative" trade-mark. Marcus L. Freeman was inactive, and engaged in the furniture business on his own account in New York City. A. A. Freeman was also a member of the firm of Charles Haight & Co., flouring merchants of the same place, the members of the firm being Charles Haight, A. A. Freeman, A. Irving Freeman, and Henry Koper. This firm was a large purchaser of flour from A. A. Freeman & Co. for about 10 years subsequent to 1876. The firm of Charles Haight & Co. during this time had advanced to the firm of A. A. Freeman & Co. the sum of $196,840. On November 5, 1878, the firm of A. A. Freeman & Co. registered the "A. A. Freeman & Co., Superlative" trade-mark as a label in the Patent Office. There is no question but that up to October 7, 1885, the trade-mark was the property of A. A. Freeman & Co. On that

date, however, A. A. Freeman, his wife, and Marcus L. Freeman, executed and delivered to Charles Haight, Henry Koper, and A. Irving Freeman a mortgage embracing the land upon which the mill at La Crosse stood, "together with the flouring mills, elevators, buildings, engine and boiler houses, with all the machinery, fixtures, and appurtenances, and everything in said premises situate, belonging, and appertaining to said mills." This mortgage was given to secure the payment of said sum of $196,840 on or before September 1, 1890. The amount secured by the mortgage was not paid. In June, 1891, the firms of A. A. Freeman & Co. and Charles Haight & Co. failed. It does not appear from the record just what legal form these failures assumed. It does appear, however, that the mortgage was assigned by Charles Haight & Co. to the Phœnix National Bank of New York City, to secure the bank for the indebtedness owing to it by said firm. The mortgage was not recorded until after it was past due, namely, June 4, 1891, and the assignment to the bank was not recorded until February 15, 1892.

Shortly before the failure of A. A. Freeman & Co. and Charles Haight & Co. the mill of A. A. Freeman & Co., at La Crosse, was wholly destroyed by fire. The bank foreclosed the mortgage, and title to the land on which the mill stood was conveyed to the city of La Crosse. It is not claimed by appellants that any right or title to the trade-mark in question passed from A. A. Freeman & Co. to Charles Haight & Co., by virtue of the terms of the mortgage. It is claimed, however, that at the time the mortgage was executed there was a contemporaneous oral understanding and agreement between A. A. Freeman and Charles Haight & Co. that the trade-mark should pass to Charles Haight & Co., together with the good will of A. A. Freeman & Co. Marcus L. Freeman testifies to this fact, and he is corroborated by the testimony of Henry Koper, deceased, given in the proceeding in the United States Patent Office to cancel trade-mark No. 66,288, filed by the Duluth Superior Milling Company. Henry Koper died in 1910, A. Irving Freeman in 1886, Charles Haight in 1891, and A. A. Freeman in March, 1909.

After the execution and delivery of the mortgage Charles Haight & Co. kept a representative at La Crosse to look after their interests. Henry Koper ordered the flour that was shipped to Haight & Co., and the flour was sold by Haight & Co. under the "Freeman Superlative" brand. In June, 1891, when the firms of Charles Haight & Co. and A. A. Freeman & Co. failed, Henry Koper, assuming to be the surviving member of the firm of Charles Haight & Co., connected himself with the firm of Grinnell, Minturn & Co., merchants and exporters in New York City, and became manager of their flour department, and sold flour under the brand in question. M. L. Freeman continued his furniture business in New York City, while A. A. Freeman endeavored to enlist capital for the building of another mill. The testimony on the part of appellants shows that when Koper went with Grinnell, Minturn & Co., he arranged with the Consolidated Milling Company, of Minneapolis, Minn., to manufacture for him a high grade of flour, and thereafter he made his

purchases of this flour from the Consolidated Milling Company, to whom he sent his stencil or brand "Freeman's Superlative," and on Mr. Koper's instructions the Consolidated Milling Company branded the flour "Freeman's Superlative" and shipped the same to Mr. Koper or his customers, as he instructed them to do. This arrangement lasted for a few months, when Mr. Koper arranged with Mr. A. Ruyter and Mr. H. Wehmann, both of whom composed the firm of H. Wehmann & Co., to act as his broker in Minneapolis for the purchase of flour. Thereafter H. Wehmann & Co. bought large quantities of flour from the Minneapolis Flouring Mills Company for account of Mr. Koper, and he sent to that mill his stencil "Freeman's Superlative." On his instructions they branded the flour and shipped it to Henry Koper or his customers as Henry Koper directed them to do. About 1892 there was a new mill erected at West Superior, Wis., and Mr. A. A. Freeman, of the former firm of A. A. Freeman & Co., of La Crosse, Wis., having secured the position of manager of that mill, the mill was called the Freeman Milling Company.

About this time Koper induced the firm of Grinnell, Minturn & Co. to become heavy stockholders in the Freeman Milling Company, and for that reason he transferred his brands and trademark from the mills in Minneapolis to the Freeman Milling Company at West Superior. Among these brands which he transferred to them was this brand "Freeman's Superlative," and thereafter the Freeman Milling Company branded the flour "Freeman's Superlative," and shipped it to Mr. Koper and his customers as they were directed by Mr. Koper. Koper continued to favor this mill with his trade from the fall of 1892, or early in 1893, until 1899, when the Freeman Milling Company became a part of what was at that time known as the United States Flour Milling Company. Koper continued to trade with the United States Flour Milling Company, as he had with the Freeman Milling Company. About a year later the United States Flour Milling Company went into the hands of a receiver, and was later reorganized as the Standard Milling Company, and the different mills at West Superior and Duluth were grouped together as a subsidiary company, and known as the Duluth Superior Milling Company, the appellee in this case.

Koper continued to make his purchases from the Duluth Superior Milling Company, and it branded the flour on his instructions with his brand "Freeman's Superlative," and shipped the same as directed by Mr. Koper. On December 31, 1902, the firm of Grinnell, Minturn & Co. retired from business, and on the 1st of January, 1903, the firm of Henry Koper & Co. was formed, consisting of Henry Koper, Peter F. Carroll, and Edwin R. Freeman. This firm continued the flour business of Grinnell, Minturn & Co. and purchased their flour of the Duluth Superior Milling Company, who, on instructions from Henry Koper & Co. branded their different purchases with their "Freeman's Superlative" brand, and shipped the same to Henry Koper & Co. or their customers as directed by Koper & Co. and were so doing at the time the testimony in this

case was taken. After the death of Koper in 1910 appellants continued the business as Henry Koper & Co.

The parties to this action agree as to the ownership of the brand "Freeman's Superlative" up to the time the mortgage was given by A. A. Freeman & Co. to Charles Haight & Co. Appellee traces its title to the trade-mark in question by evidence which shows that after the burning of the mill of A. A. Freeman & Co. at La Crosse, Wis., in 1890, A. A. Freeman sought capital with which to build another mill. The residents of the city of West Superior, Wis., were anxious to establish industries at that point, and one Edgar A. LeClair, with certain associates, joined with A. A. Freeman in forming a corporation for the purpose of erecting and operating a flour mill in said city of West Superior. In June, 1891, the Freeman Milling Company was incorporated under the laws of the state of Wisconsin, and in June, 1892, the mill commenced producing flour. A. A. Freeman, who had co-operated in the organization of the corporation which bore his name, became general manager of the mill.

Grinnell, Minturn & Co., who had been induced by Koper to subscribe to $25,000 par value of the capital stock of the corporation immediately became large buyers of flour from the Freeman Milling Company, branded "A. A. Freeman Company, Superlative," being later changed to "Freeman Milling Company, Superlative," and continued to buy such flour from the Freeman Milling Company and its successors until the firm went out of business on December 31, 1902. About the time of the organization of the Freeman Milling Company, the trade-marks which had been in use in the mill of A. A. Freeman & Co. at La Crosse, Wis., together with the good will of the business in connection with which they had been used, were assigned by A. A. Freeman, through one C. E. Billquist, who seems to have been a member of Grinnell, Minturn & Co., to the Freeman Milling Company; the roundabout transfer having been made on advice of counsel in order to avoid the possibility of litigation with Freeman's creditors. Billquist was also a director in the Freeman Milling Company. Fifteen thousand dollars par value of the stock of the Freeman Milling Company was assigned and delivered to A. A. Freeman's nominee in consideration of the assignment of the trade-marks and good will.

Without stating in detail the particular transactions, it may be said that whatever title the Freeman Milling Company obtained to the trade-mark in question was transferred and became vested in the appellee, the Duluth Superior Milling Company. It appears without dispute from the evidence that the territory in which Henry Koper & Co. sells "Freeman's Superlative" flour, is the metropolitan district of New York, New Jersey, Philadelphia, Baltimore, Washington, and up the Hudson to Albany, and there is no evidence that appellee ever sold any flour under the brand "Freeman's Superlative" in that territory. The claim of the appellee is that it owns the brand "Freeman's Superlative," and that Henry Koper & Co. and the firms to which it has shipped flour were its agents in selling flour on commission.

On October 29, 1906, the Duluth Superior Milling Company, ap-

pellee, filed for registration the trade-mark in question in the United States Patent Office, and the same was duly registered November 19, 1907. On August 20, 1909, Henry Koper filed with the Commissioner of Patents an application to cancel the same. Issue was joined upon the petition for cancellation, and subsequently the examiner of interferences on August 20, 1910, rendered a decision sustaining the same. The Duluth Superior Milling Company appealed from this decision to the Commissioner of Patents, who on December 6, 1910, affirmed the decision of the examiner. The Duluth Superior Milling Company then appealed to the Court of Appeals of the District of Columbia. The Court of Appeals affirmed the decision of the examiner and commissioner upon the following ground:

"No good purpose would be subserved by a review of the evidence, and we therefore, content ourselves with the finding that appellant was not under the evidence in this case the sole and exclusive user during the ten years necessary to entitle it to such registration, of the mark whose registration it procured."

The application to register the trade-mark was made under the fourth proviso of section 5 of the Trade-Mark Act of February 20, 1905 (33 Stat. 725, c. 592 [Comp. St. 1913, § 9490]); said application showing the exclusive use of the trade-mark by the Duluth Superior Milling Company for the 10 years next preceding the date of said act. We do not think the decision of the Court of Appeals on the application to cancel the trade-mark is decisive of the question involved in the present proceeding. It appeared in the proceedings on that application that, during the 10 years prior to the date of the Trade-Mark Act of 1905, Henry Koper and other firms had used the same trade-mark; therefore the Duluth Superior Milling Company was not entitled to have it registered as its trade-mark under that act. The question of title does not seem to have been adjudicated.

[1] We are now from the foregoing facts to determine whether or not the appellants are the owners of the trade-mark in question. The burden of proof is upon them. Assuming that there was an oral agreement at the time the mortgage was given in 1885 by A. A. Freeman & Co. to Charles Haight & Co. that the good will and trade-marks which were used in connection with the business of A. A. Freeman & Co. in the manufacture and sale of flour at La Crosse, Wis., should pass to Charles Haight & Co., concerning which we have very grave doubts, what became of the trade-mark thereafter? Charles Haight & Co. did not purchase outright the business of A. A. Freeman & Co., and it is well known that a trade-mark or name cannot be assigned, except in connection with the assignment of the particular business in which it has been used, with its good will, and for continued use upon the same articles or class of articles. An attempted assignment of a naked trade-mark, disconnected from any business or good will, is void. Crossman v. Griggs, 186 Mass. 275, 71 N. E. 560; Falk v. American West Indies Co., 180 N. Y. 445, 73 N. E. 239, 1 L. R. A. (N. S.) 704, 105 Am. St. Rep. 778, 2 Ann. Cas. 216; Lea v. New Home Sewing Machine Co. (C. C.) 139 Fed. 732; Bulte v. Igleheart, 137 Fed. 492, 70 C. C. A. 76. In Paul on Trade-Marks, par. 97, p. 162, it is said:

"Trade-marks may also be acquired by purchase or inheritance; but as a trade-mark cannot exist by itself, it follows that it can be acquired, other than by original appropriation, only as appurtenant to an established business, or the good will thereof, and it can be held by the transferee, the same as by an original proprietor, only so long as its use is continued, upon or in connection with an article of the character or species to which it was originally attached."

Again, at paragraph 117, p. 228, it is further said:

"As a mere abstract right, having no reference to any particular person or property, a trade-mark cannot pass by assignment or descend to a man's legal representatives. The reason for this is that, as an abstract right, apart from the business in which it is used, a trade-mark has no existence."

[2] We must assume that, if the good will and trade-mark was transferred by oral agreement as alleged, it was transferred to Charles Haight & Co. in order that the mill might be operated in their interests for the purpose of recovering the amount of their debt against A. A. Freeman & Co.; in other words, that it was in aid of the mortgage. This state of the case would not give Charles Haight & Co. any authority, when the business itself of A. A. Freeman & Co. was destroyed in 1890, to appropriate the trade-mark of A. A. Freeman & Co.; but, assuming for the sake of argument there was such authority, we cannot see how, when Charles Haight & Co. failed, and left as surviving partners A. A. Freeman and Henry Koper, Koper, as against the claims of Freeman, could appropriate the trade-mark as his own. Charles Haight & Co. or Koper never foreclosed the mortgage. Koper was not a member of A. A. Freeman & Co., and all that may be said in favor of Koper being the owner of the trade-mark is that he used it in the sale of flour.

When A. A. Freeman & Co. were manufacturing flour he used it. When Charles Haight & Co. were operating the mill at La Crosse he used it. When he was in the employ of Grinnell, Minturn & Co., and when he was one of the members of the firm of Henry Koper & Co., he used it. But we cannot find from the evidence that Koper ever obtained a valid title to the trade-mark from A. A. Freeman & Co. or Charles Haight & Co. in view of the fact that he was not a member of the firm of A. A. Freeman & Co., and A. A. Freeman was a member of the firm of Charles Haight & Co. We are of the opinion that appellants have not met the burden of proof which rests upon them as to their title to the trade-mark in question, and we have so much doubt about that title that we are of the opinion that no injunction should issue restraining appellee from its use. We are further convinced that we ought not to issue an injunction, for the reason that there is no evidence in the record whatever that the Duluth Superior Milling Company, appellee, ever competed in any way in the sale of flour bearing the trade-mark in question, in the territory in which appellants sell.

[3] This is a case of unfair competition, and not for the infringement of a technical trade-mark, and, if there is no competition, there can be no unfair competition. Borden Ice Cream Co. v. Borden Condensed Milk Co., 201 Fed. 510, 121 C. C. A. 200; Corning Glass Works v. Corning Cut Glass Co., 197 N. Y. 173, 90 N. E. 449; Apollo

Bros. v. Perkins, 207 Fed. 530, 125 C. C. A. 192; Investor Publishing Co. v. Dobinson (C. C.) 82 Fed. 56; Forney v. Engineering News Publishing Co., 57 Hun, 588, 10 N. Y. Supp. 814; Hanover Star Milling Co. v. Allen, 208 Fed. 513, 125 C. C. A. 515, affirmed by Supreme Court March 6, 1916; Simplex Automobile Co. v. Kahnweiler, 162 App. Div. 480, 147 N. Y. Supp. 617; Astor v. West 82d Street Realty Company, 167 App. Div. 273, 152 N. Y. Supp 631; Sartor v. Schaden, 125 Iowa, 697, 101 N. W. 511.

The judgment of the trial court is affirmed.

NELSON v. PATSEL et al.

(Circuit Court of Appeals, Ninth Circuit. March 27, 1916.)

No. 2662.

1. SEAMEN ⊜10—PROVISIONS—COMPENSATION FOR REDUCED ALLOWANCE.
A provision in shipping articles signed by seamen for a voyage from San Francisco to Alaska and return that the scale of provisions should be that prescribed by Rev. St. § 4612, as amended by Act Dec. 21, 1898, c. 28, § 23, 30 Stat. 762 (Comp. St. 1913, § 8392), is a valid and enforceable contract, and its violation entitles the seamen to recover the compensation provided by Rev. St. § 4568, as amended by Act Dec. 21, 1898, c. 28, § 14, 30 Stat. 758 (Comp. St. 1913, § 8357).

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 34–38; Dec. Dig. ⊜10.]

2. SEAMEN ⊜10—PROVISIONS—COMPENSATION FOR REDUCED ALLOWANCE.
The compensation to which a seaman is entitled under Rev. St. § 4568, as amended by Act Dec. 21, 1898, c. 28, § 14, 30 Stat. 758 (Comp. St. 1913, § 8357), for reduction in the quantity of provisions supplied from that specified in the scale provided, attaches to a reduction in each article, and not to an aggregate reduction.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 34–38; Dec. Dig. ⊜10.]

3. SEAMEN ⊜10—PROVISIONS—COMPENSATION FOR REDUCED ALLOWANCE.
A shipowner can only be relieved from liability for failure to furnish to seamen provisions in accordance with the statutory scale on some one of the grounds specified in Rev. St. § 4568, as amended by Act Dec. 21, 1898, c. 28, § 14, 30 Stat. 758 (Comp. St. 1913, § 8357).

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 34–38; Dec. Dig. ⊜10.]

Appeal from the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Suit in admiralty by Carl Patsel and others against P. M. Nelson, charterer of the schooner Roy Somers, for short allowance of food furnished libelants as seamen. Decree for libelants, and respondent appeals. Affirmed.

Duncan McLeod, Ira A. Campbell, and McCutchen, Olney & Willard, all of San Francisco, Cal., for appellant.

H. W. Hutton, of San Francisco, Cal., for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. Libelants signed shipping articles before the United States commissioner at the port of San Francisco to serve as seamen on board of the American schooner Roy Somers from the port of San Francisco to Koggiung, Alaska, and such other Alaskan points as the master might direct, and return to San Francisco for final discharge, either direct or via one or more ports on the Pacific Coast, for a term not exceeding nine calendar months. It was agreed that the crew would load and discharge all cargoes and ballast, if required, and work on shore or in boats, as the master or agent of the charterer should direct, subject to the agreement attached to the shipping articles. In the agreement attached to the shipping articles were stipulations relating to the employment of the crew as fishermen in certain waters in Alaska. The wages of the crew were fixed in the shipping articles by specified sums—some by the run, and some by the month. A scale of provisions and substitutes, as required by section 4612 of the Revised Statutes (Comp. St. 1913, § 8392) to be allowed and served out to each of the crew during the voyage, was contained in the shipping articles. There was also a provision that the seamen should have the option of accepting the fare the master might provide, but the right at any time to demand the agreed and statutory scale of provisions.

It is alleged in the libel that upon the return voyage of the schooner from Koggiung, Alaska, the vessel was used for the sole purpose of transporting libelants and supplies to San Francisco, and that during said return voyage the respondent failed to furnish the libelants with water of a suitable quality and provisions in the quantities provided by the statute. The particulars in which the respondent failed in this respect are set out in the libel, and it is alleged that by reason of the premises the libelants were entitled to recover of respondent, as wages for shortages of food and bad water, certain specified amounts, aggregating the sum of $162 each, or the total of $3,402 for all the libelants.

The respondent answered, and admitted the hiring of the libelants as seamen to serve on the American schooner Roy Somers, of which respondent was the charterer, from San Francisco, Cal., to Koggiung, Alaska, there to catch fish for respondent, and to return as seamen on board of such schooner to the port of San Francisco; admitted that the libelants signed shipping articles for such voyage and service before the United States commissioner at the port of San Francisco; admitted that in the shipping articles it was agreed that respondent would supply each of the libelants with the scale of provisions mentioned and set forth in section 4612 of the Revised Statutes of the United States, or the lawful equivalent or substitute therefor; admitted that in pursuance of such contract of hire each of the libelants entered into the service of respondent on board of said schooner at San Francisco, and proceeded in said vessel to Koggiung, Alaska, at which place they left said vessel and went on shore and caught salmon for said respondent, and thereafter returned on board said vessel, and the vessel with all of the libelants on board left Koggiung for San Francisco on August 9, 1914, and arrived in San Francisco on September 7, 1914, and that each of said libelants worked as a

seaman on board said vessel on such return voyage; admitted that on such voyage to Koggiung and return the vessel was used for the sole purpose of transporting libelants and supplies to said Koggiung and bringing salted salmon from said Koggiung to San Francisco, and denied that she never at any time engaged in fishing; denied that on the return voyage the water supplied by the respondent to be used in cooking food for libelants was at all times bad, and alleged that there was at all times a supply of good water on board; denied that there was any shortage in the supply of provisions served to the libelants on the return voyage, except in respect to potatoes, and in that behalf the respondent alleged the potatoes were taken from San Francisco on the voyage northward, but the same could not be preserved in good condition throughout the summer months, while libelants were engaged in fishing in Alaska, and that it was impossible to procure in Alaska any potatoes for the return voyage, and that the failure to have any potatoes on said voyage was due to no act of negligence or failure on the part of respondent, but was the result of natural causes over which respondent had no control.

The court below entered a decree in favor of each of the libelants to recover from the respondent, for the shortage of provisions mentioned in the libel and shown by the proof, the following amounts:

Water	$14 50
Potatoes or yams	29 00
Rice	6 00
Onions	8 00
Beans	2 00
Salt pork	6 00
Total	$65 50

It is contended by the appellant that the court was in error in holding that the respondent was required to provide the scale of provisions appended to section 4612 of the Revised Statutes. In support of this contention reference is made to certain provisions of the statute and amendments thereto which have the effect of relieving vessels in the coastwise trade from the requirement that shipping articles shall contain the scale of provisions which each seaman carried to sea as one of the crew shall receive.

[1] The statute may be, and probably is, open to the construction contended for; but we do not see how that relieves the respondent from his liability under section 4612 of the Revised Statutes. It does not appear that the Roy Somers was engaged in the coastwise trade on the voyage in question, or that it was otherwise exempt from the statutory requirement as to shipping articles or the scale of provisions therein provided. In any event, the respondent entered into a written contract with the libelants that section 4612, R. S., should be a condition of their employment. The condition was reasonable, proper, legal, and enforceable; and the libelants being entitled to the scale of provisions provided in that section by the terms of their contract, as well as by the statute as we construe it, the respondent's liability is measured by section 4568 of the Revised Statutes, under which the decree for the libelants was entered in this case.

[2] Section 4568 (Comp. St. 1913, § 8357) provides that. if the allowance of any provisions which any seaman is entitled to receive under section 4612, R. S., is reduced, or if it be shown that any of such provisions were, or had been during the voyage, bad or unfit for use, the seaman shall receive, by way of compensation for such reduction or bad quality, according to the time of its continuance, the sums mentioned in the section, to be paid to him in addition to, and to be recoverable as wages:

First. If his allowance is reduced by any quantity not exceeding one-third of the quantity specified by law, a sum not exceeding 50 cents a day.

Second. If his allowance is reduced by more than one-third of such quantity, a sum not exceeding $1 a day.

Third. In respect of bad quality, a sum not exceeding $1 a day.

It is contended in respect to these allowances that the statute means that the food allowances must be taken as a whole, and not by articles, and that a reduction occurs only when all the articles of food required to be served on any one day falls below the percentage provided by the statute. The statute provides that the allowances attach to the reduction in *any* of the articles of food mentioned in the scale from the quantities specified, and not a reduction in the *aggregate* of the daily allowances. The purpose of the statute was plainly to require a variety of food and its allowance on certain days of the week, as well as the quantity of the articles of food therein specified. The wording of the statute with its specification of allowable substitutes seems to us conclusive of this question. A specified article of food cannot be withheld without furnishing a specified substitute, and hence the allowance must attach to a reduction in each article of food required, and not to an aggregate reduction.

[3] It is next contended by the respondent that, having asked Swanson, the cook, to furnish the respondent with a list of provisions required for the voyage, the latter had discharged his duty to the libelants when provisions had been furnished in accordance with the list. The testimony about this list is not clear; but we do not think the fact, if established, is material. The provisions furnished for the voyage, whether in accordance with the cook's list or not, were insufficient to serve the crew with the quantity of provisions provided in the statute. There was a reduction in the provisions furnished, and that is the test of the respondent's liability.

The agreement of the master was that he would supply the crew with provisions in accordance with the schedule annexed to section 4612 of the Revised Statutes. This was a positive agreement, made in accordance with the mandatory terms of the statute. The only qualification was the reference, in section 4568 of the Revised Statutes, to circumstances which should be taken into consideration by the court for the modification or reduction of compensation as the justice of the case might require. The qualification is:

"But if it is shown to the satisfaction of the court before which the case is tried that any provisions, the allowance of which has been reduced, could not be procured or supplied in sufficient quantities, or were unavoidably injured or lost, or if by reason of its innate qualities any article becomes unfit for use

and that proper and equivalent substitutes were supplied in lieu thereof, the court shall modify or refuse compensation, as the justice of the case may require."

As the decree is not for the full amount claimed by the libelants, nor for the full amount for which there was some testimony tending to establish, we do not know that the circumstances referred to in the statute were not fully considered by the court. On the contrary, the presumption is that such circumstances were considered and operated to reduce the maximum allowance that might have been imposed by the court. There was testimony that the cook told the master of the vessel and another witness, just before leaving Alaska, that he had provisions for 35 days. The cook denies having made such statement; but whether he made it or not is immaterial. The cook's statement would not relieve the master from his liability for a failure to supply the provisions required by the contract and by the statute.

It is objected that the testimony does not establish the bad quality of the water, upon which the court allowed compensation in the sum of $14.50. The voyage took 29 days. The testimony tends to establish the fact that the bad water was in use 27 days for cooking purposes. The maximum compensation for that time would have been $27. We think that the compensation of $14.50 is fully supported by the evidence.

There is no question about the shortage of potatoes. No potatoes were served on the return voyage, and no substitute furnished. The maximum compensation of $29 was unquestionably justified.

With respect to the reduction in the quantities of rice, for which compensation of $6 was allowed; reduction in the quantities of onions, for which compensation of $8 was allowed; reduction in the quantities of beans, for which compensation of $2 was allowed; and reduction in the quantities of salt pork, for which compensation of $6 was allowed—we find the testimony sufficient to sustain the decree.

The statute is clearly mandatory, and is designed to secure for each seaman a timely and suitable quantity, quality, and variety of food for the service for which he has been employed. If there has been no failure on the part of master, shipowner, or charterer to comply with the statute in this respect, it can be easily established by proof, and the court need not be left in any doubt upon the subject. In this case the lower court heard the witnesses and was able to judge of their credibility and the weight of the testimony. The presumption is that the decree is correct, and that presumption is not overcome by any testimony that appears in the record.

The decree of the District Court is affirmed.

THE PLYMOUTH.

THE LANGHAM.

(Circuit Court of Appeals, Sixth Circuit. April 12, 1916.)

No. 2724.

COLLISION ⇐95(6)—STEAMER AND BARGE IN TOW—FAULT.

A collision in St. Clair river on a clear and calm day between the second of two barges in a tow which was turning to go down the river and an upbound steamer *held* due to faults on the part of both vessels; the barge for using an insufficient towline, which parted when she was partly turned, causing her to move across the river and against the steamer, and also for not anchoring at once, and the steamer being in fault for not reducing speed when at a distance of three-fourths of a mile it became apparent that the barge was not following the other vessels of the tow.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200–202; Dec. Dig. ⇐95(6).]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; William L. Day, Judge.

Suit in admiralty for collision by J. Joseph McTigue, owner of the barge Plymouth, against the steamer Langham, John J. Adams, claimant, with cross-libel. Decree against the Plymouth, and libelant appeals. Modified.

For opinion below, see 211 Fed. 763.

D. E. Warner and L. B. Ware, both of Cleveland, Ohio, for appellant.

R. G. McCreary and Goulder, White & Garry, all of Cleveland, Ohio, for appellee.

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

HOLLISTER, District Judge. Libel by McTigue, owner of the Plymouth; cross-libel by Adams, owner of the Langham—both vessels having been injured in a collision between them in the St. Clair river.

The empty barge, Plymouth (213 feet long), with donkey engine forward, and two anchors, about 1,200 pounds each, on the forecastle deck, lay at the dock below the mouth of Belle river, which flows into the St. Clair just below Marine City, Mich. To the southeast lies Fawn or Woodtick Island toward the Canadian side of the main channel, here about 1,800 feet wide. For a few feet between the island and the deep channel, the water is about 5 feet deep.

The steamer Adiramled (300 feet long), having the barge Melbourne in tow (168 feet long), came up the St. Clair and took the Plymouth also in tow; the Plymouth's towline being fixed to the stern of the Melbourne. The towlines were each 300 feet long. The distance from the bow of the Adiramled to the stern of the Plymouth was about 1,226 feet. The Adiramled proceeded up stream sufficiently to straighten out the tows and get headway for them—about 1,500 feet—and swung out into the stream, her helm and the helms of the tows ported,

for the purpose of gradually turning around and coming down stream.

The steamer Langham, a wooden freighter 281 feet long by 48 beam, laden with coal, was coming up stream in about the middle of the channel at about 10 miles an hour. It was toward the middle afternoon of a bright, clear day (August 21, 1909), with little wind. The Adiramled saw the Langham when she was abreast of the Salt Works on the American side about a mile and a half away. The Langham saw the entire maneuvers of the Adiramled and her tow, and there were no obstructions of any kind to prevent a full view by both parties.

The Adiramled and her tow had the right of way, and signaled to go down on the Canadian side. The Langham, however, signaled to go up on that side, and the Adiramled consented. The Adiramled was then headed down stream; the Melbourne had nearly come around, and the Plymouth had not yet turned, but lay athwart the river approaching midstream.

Upon consenting to give the Langham the Canadian side, the Adiramled ported her helm to carry her and her tow toward the American side, and signaled her engineer to go ahead strong. He did so, and the line between the Melbourne and the Plymouth parted, leaving the latter at about midstream and headreaching slowly toward the Canadian side. She was under way, but not sufficiently to respond to her tiller hard aport. The current was about a mile and a half an hour.

When the first interchange of signals was made between the Adiramled and the Langham, the latter checked some, and checked again, down to about 4 miles an hour, when the Adiramled consented to give her the course, and there was, at that time, a full half mile between the vessels, each being about in midstream, the Langham somewhat nearer the Canadian side and toward the island. The Adiramled, slowly turning toward the American side, followed by the Melbourne, which had come around and was headed downstream, had proceeded as far from the Plymouth as, at least, 1,500 feet, when the Langham passed the Adiramled at a distance of about 200 feet; the Plymouth slowly proceeding toward the Canadian shore and drifting. When the Langham passed the Melbourne, the captain of the Langham saw that the towline between the Melbourne and the Plymouth had parted. Seeing, then, that if he continued on his course he could not clear the Plymouth, he backed his vessel hard for two or three minutes, and she brought up in the shallow water near the shore of the island. At that time the vessels came together at practically right angles, the bow of the Plymouth striking about 35 feet abaft the stem of the Langham.

When the line broke, the captain of the Plymouth ran forward to the donkey engine, and blew danger signals continuously until up to the time of the collision. These signals could certainly be heard a mile and a half away. When the passing signals were exchanged, the distance between the Langham and the Plymouth was in the neighborhood of three-quarters of a mile; and when the Langham passed the Adiramled, the distance between the stern of the Melbourne and the Plymouth, now drifting broadside down stream with some, though slight, headway, was gradually increasing, so that at that time there must have been in the neighborhood of at least 1,500 feet between the Langham and the Plymouth.

At a distance (by the weight of the evidence) of three-quarters of a mile the Langham knew something had happened to the Plymouth. She saw her lose the continuity of her course in not following the Melbourne. Her captain, although he says he did not hear the danger signals, saw the puffs of steam; but he must be held to have known, as did his mate, Gleason, that something was wrong with the Plymouth, and that she might drift into his course. Nevertheless he proceeded, and it was not until he was abreast of the Melbourne and actually saw what had happened that he reversed and backed in the effort to escape a collision which had become inevitable. His own story tells how the collision occurred:

"Q. Isn't it a fact, Captain, that the Plymouth didn't follow the Melbourne after you agreed that you would take the Canada side and she would take the American side, and as soon as the Adiramled started toward the American side? A. We were in a position that we couldn't do anything but back up; she was heading straight across the river. Q. When did the Plymouth stop following the Melbourne? A. Immediately after the Melbourne got straightened down the river. Q. Now, with reference to the time you exchanged the signal of one blast? A. About a half a mile apart. Q. That is, the Adiramled was half a mile away when the Adiramled (Plymouth) stopped following the Melbourne? A. I don't know anything about that; that is the time I exchanged whistles with the Adiramled. The Plymouth didn't come around at all. Q. When, with reference to the exchange of whistles, did she stop following the Melbourne? A. I suppose a minute or two. Q. And at that time the Langham and the Adiramled were half a mile apart, were they? A. Yes. The Court: Didn't you say that this Plymouth wasn't following the boat immediately in front of it, and you didn't discover it until you got abreast of that second tow? A. Well, they were coming around making the turn in the river. I didn't know what the reason was, but she wasn't following. I couldn't tell why she didn't come around, but I saw her in that shape heading up the river, and they didn't come around any more, but the towline was gone when I came up abreast of the Melbourne; then I saw there was but one thing we could do, and that was to back up, because I couldn't recover myself to try to go under his stern. We fetched up on the Island and the Plymouth came in and hit us. * * * The Court: If you were keeping the proper sort of lookout, why didn't you see that the rope was gone? A. It happened so quick—we didn't expect it was going to part. The Court: I mean after you exchanged the one blast, why didn't you discover that the Plymouth was drifting? A. Couldn't see the line. The Court: You could see the Plymouth, couldn't you? A. Yes; he was a little to the westward of the Melbourne. Q. Didn't the maneuvering of the Plymouth indicate that something was wrong? A. No, sir; not until we got up and was alongside of the steamer did I discover the line was parted. Then I couldn't recover ourselves, as we were swung to the Canada side. If I undertook to go under his stern, I would have run into the Plymouth; that is the reason I kept on backing."

The captain of the Langham ignored the plain fact that the Plymouth, with no means of propulsion, had left her natural course and might block his course. He paid no heed to the Plymouth's danger signals, of which he saw the steam, and which there is no reason he could not have heard. He did not again check, after getting permission to take the Canadian side, until, when abreast of the Melbourne, he actually saw that the line had parted. He backed his vessel then with great vigor, and, bringing up on the island, could go no further. As it was, the Plymouth nearly cleared the Langham. It is probable he thought, when he saw the Plymouth was not coming around, that

he could get between her and the Canadian shore. When he realized that he could not, he tried to back out of the way.

We think, if he had acted on the warning the appearance of the Plymouth and her danger signals gave him, and had proceeded with the caution which the circumstances required, he could have regulated his speed so as to have passed under the stern of the Plymouth. But, whether he could have done that or not, we think he ought not to have proceeded at a speed so great that he could not get out of the way of a helpless vessel drifting into his water, whose condition he knew, or ought to have known, when he was three-quarters of a mile away and could easily handle his boat going against the current.

While the testimony is conflicting, and the relative positions of the boats and matters of time and distance are necessarily uncertain, yet we think the story outlined above is established by the great weight of the evidence. In addition to other testimony, the negligence of the Langham is shown by the evidence of the captain himself. We think the Langham was at least partly to blame for the accident. So was the Plymouth, primarily.

Some effort was made to show the Plymouth's nine or ten inch hawser was a good rope; but its history and service were scarcely disclosed, and, more important still, its parts had disappeared. It was, however, conclusively shown that when the Adiramled increased her speed toward the American side, which undoubtedly was the cause of the break in the hawser, there was no jerk, or unusual strain, upon the hawser. The inference cannot be escaped that, if it had been in good condition, it would not, with the strain put upon it—the Plymouth going light—have broken.

The appellee claims negligence on the Plymouth's part in not anchoring when the towline parted. Circumstances must determine the propriety, or want of it, of the conduct of the crew of a vessel relative to the manipulation of anchors. There is evidence tending to show that an anchor should have been on the cathead, ready to be cast overboard. This could be done in a fraction of a minute. There is evidence that the cathead is no place for an anchor, particularly when being towed. It is clear that, when a barge is moored to a dock, the cathead is no place for an anchor. It would seem that anchors, whether a boat is at a dock or under way, should not be permitted to swing from hawse holes. There can be no doubt that when at the dock the anchors were properly enough on the forecastle deck. The Plymouth had just left the dock. The weather was fine. There was no sea. Apparently, there was no reason for the captain of the Plymouth, or any one of her crew, to suspect the condition of the towline. There was no reason to believe, even after the towline parted, that the Langham, three-quarters of a mile down the river, would have any difficulty in keeping out of the way. Still we think that the captain of the Plymouth, knowing his vessel was adrift and reaching into the Langham's course, and having steam up on his donkey engine, could have cast his anchors, or one of them. We cannot say that this would have averted the accident. We think it might have done so. It being the duty of the Plymouth to do everything it reasonably could to avert possible accident, she should, at least, have tried to come to anchor.

In the court below the entire blame was ascribed to the Plymouth, but, as we think both vessels were blameworthy, the damages and the costs below should be equally divided between the parties, with costs of this appeal to appellant; and the case is remanded, with directions to the District Court to enter a decree consistent with this opinion.

WATKINS et al. v. ILLINOIS CENT. R. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. May 2, 1916.)

No. 2765.

RAILROADS ⊜129(1)—SALES—CONTRACTS—CONSTRUCTION—"ACCRUED LIABILITIES."

The vendors of a railroad were by the terms of the contract of sale to give possession on a certain date, and were to receive the income up to such date and to pay all "accrued liabilities." The tariff schedule then in force provided that on presentation of satisfactory evidence to the freight claim agent that manufactured products had been shipped from any point over the road the charges on the material therefor shipped in should be reduced to a lower rate given in the schedule. After the transfer, satisfactory evidence was produced to the freight claim agent that lumber shipped out was made from logs which the road had carried in before the transfer and on which the higher rate had been paid, and the difference between the two rates was refunded. *Held*, that such rebate was an "accrued liability" at the time of the transfer, within the meaning of the contract, and that the vendors, who received the higher rate, subject to the contingency of making the refund, were liable therefor.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 392, 399; Dec. Dig. ⊜129(1).

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

Appeal from the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Suit in equity by the Illinois Central Railroad Company and others against John H. Watkins and others. Decree for complainants, and defendants appeal. Affirmed.

Caruthers Ewing, of Memphis, Tenn., for appellants.

C. N. Burch, of Memphis, Tenn., for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. This appeal involves only the true meaning of the phrase "accrued liabilities," as used in a contract. Watkins and his associates owned the entire capital stock of a short railroad, which may be distinguished as the Tennessee Railroad. They sold this capital stock to the Illinois Central Railroad Company, and a carefully written contract, between vendors and purchaser, was made. It was clearly the general purpose to have the contract take effect as of January 1, 1913, and it accordingly provided that the vendors should indemnify and keep harmless the

purchaser and the Tennessee Railroad from all liability "for or on account of any claims or liabilities of whatever kind or nature incurred by the Tennessee Company before the 1st day of January, 1913, and that all current income of the said Tennessee corporation accruing before the date last aforesaid shall be appropriated by or belong or be payable to the vendors, to the intent that all income and all accrued liabilities * * * shall be borne by and belong to the vendors, * * * while all income and liabilities accruing * * * after the said date * * * shall be borne by and belong to the purchaser or the Tennessee corporation." Another clause provided that the vendors will "defend any suits which may arise against the said Tennessee corporation on account of transactions before [January 1, 1913], and pay any judgments rendered therein."

The Tennessee Railroad, before and after January 1, 1913, was engaged in shipping logs to Hickman, Ky., and in shipping out of Hickman, for the same shipper, manufactured products made from logs. A tariff, duly filed and in force, provided that:

"Upon presentation of satisfactory evidence to the freight claim agent of the [Tennessee Railroad] that the manufactured products have been shipped from all points via [the Tennessee Railroad], the charges on all material into such points will be reduced to the basis of rates specified on page 3."

The concrete meaning of this provision was that if the shipper paid (e. g.) 3 cents per 100 pounds upon his logs shipped into Hickman, and thereafter presented "satisfactory evidence" that he had shipped out the manufactured products over the same road, he was entitled to a refund of 1½ cents per 100 pounds against the sum he had paid on the inbound shipment. During the two or three months following January 1st, this shipper presented to the Tennessee Railroad "satisfactory evidence" of such shipment of manufactured products, and thereupon vouchers were allowed in his favor for refunds against the freight he had paid on inbound logs before January 1st. The controversy between the parties was at to which one, vendors or purchasers, must bear this burden.

The vendors insist that the liability cannot properly be called "accrued," so long as it remains contingent, and that since, on January 1st, the duty of the Tennessee Railroad to make refund was contingent upon the action of the shipper in thereafter manufacturing the logs into a different form and shipping the product out over this railroad, it is a perversion of the contract to charge this liability upon the vendors. We cannot think the word "accrued" or the phrase "accrued liability" has any such fixed and established, hard and fast meaning that the question is settled as soon as the statement is made. Some of the dictionary definitions of "accrued" are ample to cover such a liability as this; the parties did not say "matured," or "fixed and definite," or use other unambiguous language. They selected a word which may be applied in more than one way to the circumstances that later arose; but they are presumed to have intended its use in a particular sense, and that intent is to be determined from all parts of the contract and from the situation existing when it was made. The Supreme Court of Wisconsin, in construing

a statute, and after repeating that all its parts must be considered together, said:

"The verb 'to accrue' is often and properly used to convey the same idea as * * * 'to arise.'" Emerson v. Shawano, 10 Wis. 433, 435.

Most of the cases cited in the attempt to put a fixed meaning upon "accrued liability" are cases arising under statutes of limitation, where the question is when a right or a right of action accrued. Of course, there is no complete right of action until there has been a default, and so definitions of the words in this environment are not of much help here.

Considering all parts of the contract and the existing course of business, we think the natural inference is that this liability was to be charged against the operations of 1912. The vendors were reserving for themselves the 1912 income; that is, they were appropriating this very 3 cents per 100 pounds which it later developed could not be collected to the extent of 1½ cents if it was unpaid, or to that extent must be refunded if it had been paid. This refund was not charged upon or in reduction of the outbound freight rate accruing in 1913. It was, in effect, a correction of the erroneous inbound charge made in 1912. The substance of the tariff was that the inbound rate was 1½ cents in one contingency and 3 cents in another contingency, but that the higher rate must be paid and the excess temporarily held until the contingency was determined. Adopting the parties' broad idea of drawing the line of January 1st between what the vendors transferred and what they kept, we think this item belonged on the 1912 side of the line, and that the language does not clearly show their intent to put it on the other side. This conclusion is confirmed by the covenant of the vendors to be responsible for all liabilities "incurred" before January 1st, and to defend suits which might arise against the Tennessee Railroad "on account of the transactions before the date aforesaid." If the Tennessee Railroad refused to pay these refunds and the shipper brought suit, it would, indeed, be difficult to say that the suit did not arise on account of transactions before January 1st, or that the liability had not been incurred before that date.

Another consideration leading to the same conclusion is that according to the course of business from month to month the refunds which might later become owing on account of these inbound shipments, were entered upon the books of the Tennessee Railroad under an account entitled "Freight Claims—Suspense" and charged against "Freight Earnings." This seems to be a declaration that the liability was expected to develop into something which must be paid, and it apparently implies (although the bookkeeping is not fully disclosed) that the amount of the suspense claims was cut out of the 1912 net operating revenue shown by the books. Certainly it indicates a recognition by the parties that these refund claims constituted a liability which might arise on account of the transactions before January 1st.

The vendors further insist that the identity between the logs shipped in and the later outbound product did not sufficiently ap-

pear to make these claims lawful, under the tariff, against the Tennessee Railroad, and hence that the court could not recognize them as a liability within the contract. Decisions are cited of the courts and of the Interstate Commerce Commission which require a strict standard of identity in applying a transit rate; but this is not at all a transit tariff, or one covering "milling in transit." It does not provide, in any event, for a through rate from point of origin to point of destination. It is solely a regulation affecting the amount of the inbound rate. It was accorded to all shippers alike, the tariff was duly filed, and neither its fairness nor validity seems open to question. Just exactly what measure of identity between inbound and outbound materials it contemplated might give rise to dispute; but the tariff forecloses such dispute by providing that the refund will be allowed upon evidence satisfactory to the freight claim agent. It is not suggested that the agent acted unfairly or arbitrarily for the purpose of taking any advantage, or that he acted otherwise than in accordance with his best judgment and the established long-standing practice of all parties, in which practice the vendors had acquiesced.

We think the vendors are wrong in their contentions stated, and the decree below must be affirmed.

TOTTEN, Inspector, v. PITTSBURGH MELTING CO.

(Circuit Court of Appeals, Third Circuit. May 22, 1916.)

No. 2093.

FOOD ⊂⊃3—MEAT INSPECTION—STATUTORY PROVISIONS.

Under Meat Inspection Acts (Act June 30, 1906, c. 3913, 34 Stat. 674; Act March 4, 1907, c. 2907, 34 Stat. 1260), the Secretary of Agriculture made regulations that a shipper of meat food products must certify that the product is not capable of being used as food by man, is suitable only for industrial purposes, and is of such character, or for such use, that denaturing is impracticable. The act declares that no meat food product can be shipped or carried in interstate commerce unless it has been first inspected, examined, and marked as inspected and passed in accordance with the terms of the act and the rules and regulations prescribed by the Secretary of Agriculture. Complainant rendered oil from beef fat in machinery which had been used to produce oleo oil, used in making oleomargarine. *Held*, that complainant's oil was a food product, though it was not used for making oleomargarine, but was shipped abroad for other purposes, and therefore could not be shipped under the act, unless inspected or denatured; the fact that the oil was uncooked, and would not be eaten until mixed with other substances, not preventing it from being a "food."

[Ed. Note.—For other cases, see Food, Cent. Dig. §§ 3, 4; Dec. Dig. ⊂⊃3.

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

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Bill in equity by the Pittsburgh Melting Company against G. E.

Totten, Inspector. From a decree for complainant (229 Fed. 214), defendant appeals. Reversed, with instructions to dismiss.

E. Lowry Humes, U. S. Atty., and B. M. Price, Asst. U. S. Atty., both of Pittsburgh, Pa., for appellant.

Samuel McClay, Wm. M. Robinson, and Reed, Smith, Shaw & Beal, all of Pittsburgh, Pa., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. The decree of the court below enjoined the Baltimore & Ohio Railroad Company and G. E. Totten, an inspector in the service of the Department of Agriculture, from interfering with certain export shipments of the Pittsburgh Melting Company. A full statement of the controversy will be found in 229 Fed. at page 214. Much that is there said need not be referred to now; in our opinion the decision of the present appeal turns upon a question of fact, and merely requires us to state briefly our conclusions upon that question. In a few preliminary words, the situation is this:

For many years the Melting Company and its predecessors in business have been engaged in rendering, or converting, the fat of animals—chiefly, if not altogether, the fat of cattle, as we understand the evidence—into oil, stearine, tallow, cracklings, and grease. Nothing except the oil is now in question; this, in the view of the company, is "tallow oil," while the government describes it as "oleo oil," the substance that is the basic constituent of oleomargarine. At one time the company was engaged in making oleomargarine; about 30 years ago, however, hostile Pennsylvania legislation compelled it to abandon the business, but the fact appears, and is relevant, that the oil now in question is made by the same appliances that the company then used. About 90 per cent. of the company's oil is carried to New York over the Baltimore & Ohio Railroad, and is shipped from there to Holland and one or two other European countries. During several years after the Meat Inspection Acts went into effect (34 Stat. 674, 1260), the plant of the Melting Company was under government inspection, but the inspection was withdrawn in 1909 in consequence of a disagreement that need not now be gone into. In 1910 the company was indicted for a violation of the act, but was acquitted. As a result of the verdict, the company discontinued a proceeding in equity that was then pending between the same parties and involved substantially the same subject-matter as is now before the court. During the next 5 years the company shipped its oil abroad as an inedible fat, and was not interfered with by the Department. The tierces were labeled "Inedible," and in other respects the regulations of the Department then in force were complied with. But on November 1, 1914, new regulations went into effect, and among them was a requirement that a shipper of meat food products must certify that the product—

"* * * is not capable of being used as food by man, is suitable only for industrial purposes, is not for food purposes, and is of such character or for such a use that denaturing is impracticable."

This revived the disagreement, and in January, 1915, the company, while attempting to ship its oil under the old regulations, was prevented from doing so, until the District Court restrained the defendants by preliminary, and afterwards by final, injunction. The scope of the decree is sufficiently apparent from the opinion in 229 Fed., where it also appears that the vital question in the case is whether the oil in dispute is, or is not, a meat food product.

By the express language of the act, no meat food product can be shipped or carried in interstate or foreign commerce unless it has first been—

"* * * inspected, examined, and marked as 'inspected and passed,' in accordance with the terms of this act and with the rules and regulations prescribed by the Secretary of Agriculture."

If, therefore, the oil is a meat food product, the statute denied it the right to be carried, for concededly it had neither been inspected, nor examined, nor officially marked. If it is not a meat food product, it is not included in the act at all. In considering this question, we remark, first, that the substance under inquiry is clearly proved to be "oleo oil." Apparently there is little, if any, chemical difference between tallow oil and oleo oil; but they differ distinctly in methods of manufacture, and in appearance, taste, and smell. As already stated, the plaintiff makes its oil by the same machinery that was formerly used in the manufacture of oleomargarine; moreover, it is made by the process that is appropriate for rendering oleo oil, and not by the process employed for rendering tallow oil; and, finally, it exhibits all the characteristics of the former substance. Whatever name one may choose to give it, the evidence leaves us no room to doubt what it really is.

Being oleo oil, therefore, is it a meat food product? It is, of course, a meat product. Is it a food? In its condition as an oil immediately after rendering, it is occasionally eaten as food, just as olive oil is eaten; but so rarely that we lay no stress upon that fact; but the evidence shows without contradiction that for shortening purposes, and as a grease in cooking, it is often used by bakers and householders just as lard is used, and, still further, that without being refined, or undergoing any chemical change, it is the principal ingredient of oleomargarine. In manufacturing this substitute for butter, oleo oil is mechanically mixed by churning with other substances, such as milk, a little butter, salt, neutral lard, or cotton seed oil. What the oleo oil was before the mixing, it continues to be afterward, and there can be no doubt that the mixture is fit for human consumption and is largely used for food. The oil has probably some industrial uses also, although the evidence is not very clear on this point; but we think there can be no reasonable question that its chief use is to be the base of oleomargarine. Of this substance it constitutes more than 50 per cent. As a food product, we see no essential difference between oleo oil and lard, and it can hardly be questioned that lard is a food. Nor, indeed, do we see any essential difference as a food between olive oil and oleo oil. The former is probably more palatable, and is more often used alone; but its chief use is to be mixed with other foods

for flavoring purposes. Obviously, the fact that the oleo oil has not been cooked is not decisive. A raw egg is food before as well as after it is mixed with the other ingredients of a salad dressing; and lard is food before as well as after it is mixed with flour and water. Indeed, to our minds the proposition under discussion seems so evident that we find some difficulty in giving reasons to support it. Congress has excluded from interstate and from foreign commerce all uninspected meat food products, and as this was within the legislative power the duty of the court is to enforce the law.

If this conclusion is sound, the other questions considered below and argued here cease to be important. Being a meat food product, the plaintiff's oleo oil could not be carried in interstate or in foreign commerce—in this case, to Holland—without previous inspection, and, as the shipment that gave rise to the dispute had not been inspected, the defendants were justified in the course of conduct they pursued.

As a final word we may add that the Melting Company does not make oleomargarine, and does not knowingly sell oleo oil directly to such manufacturers, either here or abroad. What is done with the oil after it reaches the consignees in other states, or in other countries, is a matter beyond the company's control. But, of course, this consideration is not decisive. Congress has chosen to forbid interstate and foreign commerce in meat food products, unless they have previously been inspected here, and, as we have already pointed out, the question before us now is merely one of legislative power and of statutory construction. We may also say that the Department's regulations permit shipments of oleo oil after it has been "denatured"—i. e., so treated by the addition of some substance (for example, power distillate, a petroleum product) as to prevent its use as a food while leaving its value for industrial purposes practically unimpaired. We refer to these matters to show that they have not been overlooked; they do not affect the course of the argument or the conclusion we have reached.

The decree is reversed, with instructions to dismiss the bill.

McCARTNEY et al. v. CLOVER VALLEY LAND & STOCK CO.

(Circuit Court of Appeals, Eighth Circuit. May 5, 1916.)

No. 4496.

1. BROKERS ⟸43(3)—CONTRACTS—"NOTE OR MEMORANDUM IN WRITING."
Correspondence relating to the employment of a broker to effect a sale of land is a sufficient "note or memorandum" of the contract of employment to satisfy Civ. Code Cal. § 1624, declaring that an agreement authorizing a broker to sell land for compensation is invalid unless in writing, or some note or memorandum thereof be in writing.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 44; Dec. Dig. ⟸43(3).

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

2. BROKERS ⟸43(3)—COMMISSION CONTRACTS—CORRESPONDENCE.
Where by correspondence between brokers and its treasurer a corporation disposed of land, the correspondence, though signed by the treasurer individually, having been submitted to the other office holders, expressed the contract between the parties.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 44; Dec. Dig. ⟸43(3).]

3. FRAUDS, STATUTE OF ⟸116(5)—AGENCY.
Civ. Code Cal. § 2309, declaring that oral authorization is sufficient for any purpose, except that authority to enter into a contract required by law to be in writing can only be given by an instrument in writing, does not apply to an officer of a corporation and require that such officer's authority to contract with a broker for the sale of corporate realty for compensation shall be in writing, for an officer is not a mere agent of the corporation.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 255, 256, 260; Dec. Dig. ⟸116(5).]

4. EVIDENCE ⟸158(26)—PAROL EVIDENCE—ADMISSIBILITY.
Authority from the board of directors to an executive officer to execute a deed or mortgage for a corporation may be shown by parol.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 507–513; Dec. Dig. ⟸158(26).]

5. CORPORATIONS ⟸426(4)—RATIFICATION—WHAT CONSTITUTES.
Despite Civ. Code Cal. § 2310, declaring that ratification can only be made in the manner that would have been necessary to confer an original authority, the board of directors of a corporation, where they encouraged the treasurer to negotiate with a broker endeavoring to exchange corporate realty, accepted the results of the broker's employment, and carried out the exchange with knowledge, ratified the employment so as to render the corporation liable for the broker's compensation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1702, 1710, 1712; Dec. Dig. ⟸426(4).]

6. BROKERS ⟸49(1)—COMMISSIONS—RIGHT TO.
Though brokers who effected an exchange of lands for a corporation had, previous to their employment, received a prospectus by the corporation reciting that no compensation would be paid except after written contract with the company, they are entitled to compensation under an executed contract; for after their services were rendered and accepted the law imposed the obligation to pay.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 70; Dec. Dig. ⟸49(1).]

7. BROKERS ⟸69—COMPENSATION—RIGHT TO.
Where a broker without any agreement to dispose of property on set terms rendered services in effecting an exchange of property, the owner who accepted his services is liable for reasonable compensation; the case being different from where the owner sets his price when the broker must produce a purchaser ready, able, and willing to buy at the price fixed, to claim commission or compensation.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 55; Dec. Dig. ⟸69.]

In Error to the District Court of the United States for the District of Utah; J. A. Marshall, Judge.

Action by H. M. McCartney and others against the Clover Valley

Land & Stock Company. There was a judgment for defendant, and plaintiffs bring error. Reversed and remanded.

E. B. Critchlow, of Salt Lake City, Utah (Pierce, Critchlow & Barrette and W. J. Barrette, all of Salt Lake City, Utah, on the brief), for plaintiffs in error.

A. L. Hoppaugh, of Salt Lake City, Utah (George Y. Wallace, Jr., and Dey, Hoppaugh & Fabian, all of Salt Lake City, Utah, on the brief), for defendant in error.

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

AMIDON, District Judge. The plaintiffs are real estate brokers residing at Los Angeles, Cal., and the defendant is a Utah corporation owning a large ranch in the state of Nevada. Several years prior to the transactions here involved, the company had sold its personal property and ceased active business. The only property which it owned was the ranch, which it was desirous of selling or exchanging for productive property. It was a close corporation consisting in the main of four controlling stockholders. Its president was old and in poor health so that he was unable to perform the duties of his office. The chief executive officer was a Mr. Wallace, who was treasurer and a director of the company. Its correspondence in the main emanated from and was addressed to him at his private office.

The plaintiff, McCartney, in the month of February, 1913, learned of the desire of defendant to sell or exchange its ranch. At the same time he learned of a party by the name of Harris who owned a large office building in Los Angeles which he was desirous of exchanging for ranch property. Thereupon McCartney opened correspondence with Mr. Wallace seeking to act as a broker in effecting the exchange. The correspondence was voluminous and continuous between Mr. Wallace and Mr. McCartney from that time until the exchange was finally consummated. There was no separate formal contract distinct from the correspondence employing plaintiffs as brokers. It is also true that all the letters were addressed to, and signed by, Mr. Wallace personally. The name of the corporation was not used, nor was Mr. Wallace's official position attached to his name in any of the letters. After the exchange was effected, plaintiffs demanded their commissions, and, upon the refusal of the company to comply with the demand, the present suit was brought seeking to recover 5 per cent. upon the value of the property exchanged. The case was tried to the court without a jury, a jury having been waived in writing. The court made findings of fact and conclusions of law and entered judgment dismissing the complaint. The plaintiffs requested findings of fact in their favor, and saved exceptions to the refusal of the court to make such findings as well as to the findings actually made. It is conceded that the contract is controlled by the laws of California.

The trial court based its decision upon the following statutes of that state (Civ. Code):

"Sec. 1624. The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be

charged, or by his agent: * * * (6) An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission."

"Sec. 2309. An oral authorization is sufficient for any purpose, except that authority to enter into a contract required by law to be in writing can only be given by an instrument in writing.

"Sec. 2310. Ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, or where an oral authorization would suffice, by accepting or retaining the benefit of the act, with notice thereof."

The trial court ruled that plaintiffs failed to make out a case upon two grounds: First, that there was no contract or note or memorandum thereof in writing subscribed by the defendant or by its agent, employing plaintiffs as brokers. Second, that Wallace, as agent of the corporation, had no written authority empowering him to employ the plaintiffs.

[1] We think the decision was wrong upon both grounds. The correspondence is an ample note or memorandum of the contract employing plaintiffs to satisfy section 1624 of the California Code. It has been the uniform holding of the courts of that state that this statute does not require any formal contract. The "writing" which it demands may be embodied in letters and telegrams. All that is necessary is that the fact of employment be expressed in writing, signed by the party to be charged, or by his agent. Toomy v. Dunphy, 86 Cal. 639, 25 Pac. 130, 131; Kennedy v. Merickel, 8 Cal. App. 378, 97 Pac. 81; Naylor v. Adams, 15 Cal. App. 548, 115 Pac. 335. These decisions are in accord with the general rule on the subject in this country and England. Ryan v. United States, 136 U. S. 68, 10 Sup. Ct. 913, 34 L. Ed. 447; Bibb v. Allen, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819.

[2] Was the contract expressed in these letters the contract of the corporation? As already stated, they were signed by Mr. Wallace individually, and there was no power of attorney or resolution of the board of directors formally authorizing him to employ plaintiffs. The evidence, however, shows that the corporation was in a state of suspended animation. There had not been a meeting of its stockholders since 1902. The directors then elected simply continued in office. The directors seldom met. Their action was usually taken by personal conferences among the members of the board, or by correspondence. The board consisted of Mr. Noble, the president, Mr. Wallace, the treasurer, Mr. Flowers, the secretary, who, however, had only a nominal interest, Mr. Stone, who resided in Wyoming, and Mr. Lyman, who resided in Omaha, Neb. Mr. Wallace testified that all the letters which he received from the plaintiff McCartney, and all the letters which he wrote to him, were submitted to the other members of the board, and fully canvassed by them, and the entire negotiation had their approval. At the instance of the other members of the board, Mr. Wallace went to Los Angeles to examine the office building which was to be exchanged for the ranch, and to confer with Mr. McCartney and the owner of the building in regard to the exchange. Mr. McCartney accompanied Mr. Harris, the owner of the building, to

inspect the ranch, at the instance of Mr. Wallace. Mr. Wallace's expenses incurred in these matters were paid by the corporation. The exchange which was brought about through the plaintiffs' agency was consummated by the formal action of the board, and it thereby accepted the benefit of their services. We think this evidence established a contract binding upon the defendant.

[3, 4] In our judgment section 2309 of the California Code, requiring an agent's authority to execute a contract in writing to be itself in writing, does not apply to the executive officers of a corporation. It has never been the practice to require powers of attorney to confer authority upon such agents. We think the statute was intended to apply to agents proper; that is, persons who were not officers of the corporation. The executive officer of a corporation is something more than an agent. He is the representative of the corporation itself. It was early decided that directors, though they are only agents of the corporation, are exempt from the rule which requires the authority of an agent to be in writing in order to vest him with power to execute a deed. Burr v. McDonald, 3 Grat. (Va.) 215; Beckwith v. Windsor Mfg. Co., 14 Conn. 594; Despatch Line v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203.

Let it be once established that the making of the contract is within the scope of the officer's authority, then no separate writing is required from the board or the stockholders to meet the requirements of the statute of frauds. There has been much discussion in the courts as to the implied authority possessed by the different executive officers of a corporation. The cases on the subject are collected in the last edition of Cook on Corporations, § 715 et seq. The point at issue, however, in those cases, was not the form of the authority, but its extent. Nothing is said in any of them about the statute of frauds, although many of them involve deeds and mortgages of real estate so that the power of an independent agent to act on behalf of the corporation could only have been given by a written power of attorney. The courts have never held, so far as we can discover, that the power of executive officers to execute contracts which would fall within the statute of frauds must be in writing. Counsel has cited us to no such case, and we have been unable to discover any. It has frequently been held that authority from the board to an executive officer to execute a deed or mortgage on behalf of the corporation can be shown by parol. If the matter was controlled by the statute of frauds, this, of course, could not be done. Boggs v. Lakeport Agricultural Ass'n, 111 Cal. 354, 43 Pac. 1106; Fuel Co. v. Lee, 102 Wis. 426, 78 N. W. 584; Murray v. Beal, 23 Utah, 548, 65 Pac. 726. There are numerous authorities in which deeds and mortgages executed on behalf of corporations by executive officers without any resolution of the board, or any authority in writing, have been sustained. Railway Companies v. Keokuk Bridge Co., 131 U. S. 371, 9 Sup. Ct. 770, 33 L. Ed. 157; G. V. B. Mining Co. v. First National Bank, 95 Fed. 23, 36 C. C. A. 633; Union Pacific Ry. Co. v. Chicago, Rock Island & Pac. Ry. Co., 51 Fed. 309, 2 C. C. A. 174; Missouri Pac. Ry. Co. v. Sidell, 67 Fed. 464, 14 C. C. A. 477; First National Bank v. G. V. B. Mining Co. (C. C.)

89 Fed. 439; Alaska & Chicago, etc., Co. v. Solner, 123 Fed. 855, 59 C. C. A. 662; Galbraith v. First National Bank, 221 Fed. 386, 137 C. C. A. 194; Zihlman v. Cumberland Glass Co., 74 Md. 303, 22 Atl. 271; Starwitch v. Washington, etc., Co., 64 Wash. 42, 116 Pac. 459, Ann. Cas. 1913A, 262; Alton Mfg. Co. v. Garrett, etc., Inst., 243 Ill. 298, 90 N. E. 704; Miller v. Bellamore, etc., Co., 86 Conn. 548, 86 Atl. 13; Ismon v. Loder, 135 Mich. 345, 97 N. W. 769; Smith v. Bank of N. E., 72 N. H. 4, 54 Atl. 385; Indiana, etc., Co. v. Robinson, 29 Ind. App. 59, 63 N. E. 797; Burke v. Sidra Bay Co., 116 Wis. 137, 92 N. W. 568; Melledge v. Boston, etc., Co., 59 Mass. (5 Cush.) 158, 179, 51 Am. Dec. 59. The rule is stated as follows by Cook, in the last edition (7th) of his work on Corporations (volume 3, p. 2471):

"A corporation may enter into a written contract under seal without a formal vote or written entry of a vote by the directors. Where the directors are present, and all assent to the execution of the contract, this is sufficient."

[5] Here the employment of the plaintiffs was known to and approved by the stockholders of the corporation, and the members of its board of directors. That approval was given in the manner in which the corporation, which had ceased its active business, had been accustomed to act. The board of directors were fully informed of the employment, and encouraged Mr. Wallace to go forward with the negotiations and to consummate the transaction, if possible. Finally the board accepted the result of plaintiff's employment and carried out the exchange. The corporation thus received, with full knowledge, the benefit of the plaintiff's services. We think the contract of employment under such circumstances was as binding upon the corporation as if it had been authorized by formal vote of the board, and this is in accord with numerous decisions of the courts. Cunningham v. German Ins. Bank, 101 Fed. 977, 41 C. C. A. 609; First National Bank v. G. V. B. Mining Co. (C. C.) 89 Fed. 439; In re Cincinnati, etc., Co., 167 Fed. 486, 93 C. C. A. 122; Galbraith v. First National Bank, 221 Fed. 386, 137 C. C. A. 194; Thompson on Corporations, § 1409.

[6] Some time previous to the employment of the plaintiffs, the corporation issued a prospectus which closed with the following language:

"No brokerage commission will be paid except after written contract with the Clover Valley Land & Stock Company with respect thereto."

Plaintiffs had this prospectus before them, and knew of the provision. We do not think, however, that this impairs their right to compensation. The provision quoted relates to executory contracts. It has nothing to do with the payment for services which had been fully rendered and accepted by the corporation. After the services had thus been rendered and accepted there was no occasion for any contract to pay for them. The law imposed the duty.

[7] A distinction should be drawn in this case between two classes of employment of real estate brokers. If the terms of the sale or exchange are specifically fixed in advance, and the broker undertakes to find a purchaser who will take the property upon the prescribed terms, then he is entitled to no commission unless he finds such a pur-

chaser. The transaction here involved is not of that class. Here the terms of the exchange or sale of the ranch were to be left to negotiations between the defendant company and the purchaser produced by the broker. When that is the nature of the employment, if the broker produces a customer, and renders such aid as he is asked to render in consummating the sale or exchange, then, if the vendor of the property accepts the purchaser and consummates the sale or exchange, he becomes liable for a reasonable compensation or brokerage. That is the nature of the transaction involved in the present case.

It is hardly necessary to add that our reversal of the judgment of the trial court cannot properly be treated as an intimation that the commissions claimed in the complaint are a reasonable compensation for plaintiffs' services. That question is remitted to the trial court for its determination.

The judgment of the trial court is reversed, with directions to grant a new trial.

SHARPE et al. v. CHARTIERS OIL CO. et al.

SCHUYLER et al. v. SAME.

(Circuit Court of Appeals, Sixth Circuit. June 6, 1916.)

Nos. 2787, 2788.

CORPORATIONS ⊂=573(3)—REORGANIZATION AGREEMENT—POWERS OF COMMITTEE.

A plan and agreement for the reorganization of an insolvent corporation, prepared by a reorganization committee and approved by the stockholders and bondholders, clothed the reorganization committee and voting trustees, who were to hold and vote the new stock, with full powers to act for the corporation, and to "acquire, manage, control, operate, or dispose of" the whole or any part of its property. The voting trustees were empowered to "exercise all rights and powers as absolute owners of the stock." The agreement further provided that, after acquiring the property of the old company, the corporation should execute a mortgage securing its bonds issued in large part to the old bond and stock holders, which should cover all the property of the new company "owned at the execution of the mortgage or thereafter acquired." Prior to the execution of such mortgage the corporation, through the reorganization committee, whose acts were approved and ratified by the voting trustees, executed an oil and gas lease on lands of the company, and the mortgage was made subject to such lease. *Held*, that the execution of such lease was within the powers of the committee and voting trustees, and in the absence of fraud or bad faith was valid and binding on the corporation, and could not be attacked by minority stockholders or bondholders, and that as a matter of fact it was executed in good faith and in the interest of efficient management of the affairs of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2296; Dec. Dig. ⊂=573(3).]

Appeal from the District Court of the United States for the Eastern Division of the Southern District of Ohio; John E. Sater, Judge.

Suit in equity by the Chartiers Oil Company against the Hocking Valley Products Company and others. Decree for complainant, and defendants Frank M. Sharpe, Ludwig Koempel and others, and defend-

ants Sidney S. Schuyler, John R. Chadwick, and Charles L. Burnham, copartners, James W. Murphy, William F. Osborne and others, separately appeal. Affirmed.

Wm. L. Day, of Cleveland, Ohio, W. B. Crisp, of New York City, and John H. Price, of Cleveland, Ohio, for appellants.

Lawrence Maxwell, of Cincinnati, Ohio, Carl Ehlermann, Jr., of New York City, W. O. Henderson, of Columbus, Ohio, and A. Leo Weil, of Pittsburgh, Pa., for appellees.

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

SESSIONS, District Judge. The Columbus & Hocking Coal & Iron Company was an Ohio corporation with an issued capital stock somewhat in excess of $7,200,000 and owning about 13,000 acres of iron, coal, oil and gas lands located in the state of Ohio, which were subject to a first and supplemental mortgage amounting to $2,000,000, and also owning substantially all of the capital stock of a subsidiary corporation known as the Columbus & Hocking Clay & Brick Company, which in turn owned about 3,000 acres of clay land and a brick plant subject to a mortgage of $1,000,000. In January, 1910, the Coal & Iron and the Clay & Brick Companies were in financial distress and unable to meet their maturing obligations, and upon application of creditors, receivers were appointed for each of them by the Circuit Court of the United States for the Southern District of Ohio.

Soon after the receivers were appointed the security holders and stockholders began planning to reorganize the companies upon a better financial basis. The three defendants Alexander Gilbert, Frank B. Keech and Frank N. B. Close were appointed a reorganization committee. In May, 1910, a so-called deposit agreement was made, in and by which the defendant Bankers' Trust Company was designated as depositary, the bondholders and stockholders were requested to deposit with the depositary their bonds and stock, and the reorganization committee agreed to formulate and submit plans for the reorganization of the companies. Between July 1, 1910, and October 1, 1910, the reorganization committee prepared and submitted complete plans and agreements for the reorganization of the Coal & Iron Company. In their final form the plans and agreements so prepared and submitted prescribed and defined the authority and powers of the reorganization committee and, in substance, provided for the organization of a new corporation with capital stock of $4,600,000 and a first mortgage bond issue of $2,000,000 to take over the properties of the Coal & Iron and Clay & Brick Companies; a corresponding scaling down of the stock and securities of the old companies and, through the depositary, the exchange thereof for the mortgage bonds and stock of the new company; an assessment of $10 per share upon the stock of the Coal & Iron Company and in consideration of the payment thereof the delivery of an equal amount of the bonds of the new company; the creation of a sinking fund for the retirement of the new bonds; and the appointment of three voting trustees to receive and to control as owners all of the stock of

the new company. These plans and agreements were assented to and approved by the bondholders and stockholders, including appellants, of the old companies, and thus were effective.

Pursuant to the reorganization plans and agreements, the committee organized the defendant, Hocking Valley Products Company, selected its board of directors and other officers and procured them to qualify as such, and also, between July 27, 1911, and August 15, 1911, purchased at foreclosure sale the properties of the old companies, paying for the same with the securities and cash proceeds of the assessment which had been deposited with the Bankers' Trust Company for that purpose, and caused such properties to be transferred and conveyed to the new corporation. Subsequently the defendants Nicholas Biddle, Justin Du Pratt White, and Frank N. B. Close were appointed voting trustees. Mr. Biddle and Mr. White were selected by the security holders.

The oil lease here in controversy was made and executed on the 22d day of August, 1911, and immediately thereafter was properly recorded. The lease is in the usual form and by its terms the Hocking Valley Products Company granted and leased to the plaintiff, Chartiers Oil Company, "for the term of ten years * * * and as much longer as oil and gas are found in paying quantities," all of the oil and gas rights in and under its lands together with the exclusive right of drilling and operation. The Chartiers Oil Company paid a bonus of $185,000 for the lease and agreed to deliver free of expense into tanks or pipe lines for the Products Company one-eighth of all the oil produced and saved on the premises and further agreed to drill at least ten additional wells. After their appointment the voting trustees ratified and approved the lease.

On September 23, 1911, the Hocking Valley Products Company executed and delivered to the Bankers' Trust Company, trustee, a mortgage upon all of the properties which it then owned, including in effect its interest in the oil lease, to secure the payment of its first mortgage gold bonds to the amount of $2,000,000. The amount of bonds actually issued and delivered was $1,836,300. By its terms this mortgage was subject to the oil lease to the Chartiers Oil Company and also subject to several other leases authorized by the court and made by the receivers while they were in possession of the property.

The original bill of complaint in this case was filed by the Chartiers Oil Company to quiet its title to the oil lease and to remove a cloud thereon created by two suits in New York and one in Ohio brought by some of the appellants herein to cancel the lease or to have it decreed to be subordinate to the mortgage. The Hocking Valley Products Company, the members of the reorganization committee, the Bankers' Trust Company as trustee, the voting trustees and the present appellants were made defendants. All of the defendants answered, but none of them opposed the granting of relief to plaintiff except appellants, who, as bondholders or stockholders, answered and asked for the same affirmative relief as they had sought to obtain in the suits in the state courts of New York and

Ohio. This appeal is from the decree of the lower court quieting plaintiff's title to the oil lease and denying relief to appellants.

Appellants' chief contention is that the making, execution and delivery of the oil lease were unauthorized and constituted a breach of trust and the misapplication and diversion of trust property in fraud of the rights of the bondholders and stockholders of the Hocking Valley Products Company. The question thus presented is largely, if not wholly, one of fact. The modified plan of reorganization provides that the new "mortgage shall cover all the property of the new company owned at the execution of the mortgage or thereafter acquired." Appellees insist that thereby permission is given, impliedly if not expressly, to lease or otherwise dispose of part of the new company's property before the execution of the mortgage. However that may be, the reorganization plans and agreements, which were entered into with deliberation and presumably contain the entire contract of the parties thereto, will be searched in vain for any prohibition, either express or implied, of the making of a lease with priority over the mortgage. On the contrary, with many verbal repetitions and variations too lengthy to be here recited or even summarized, these agreements clothe the reorganization committee and the voting trustees with broad, comprehensive and absolute powers to acquire, manage, control, operate or dispose of the whole or any part of the property in their hands in accordance with their own judgment and discretion and to the same extent that the bondholders and stockholders might personally do. Finally, with the apparent purpose of removing every possible limitation upon the power and authority of the reorganization committee and the voting trustees, the agreements provide:

"The committee may construe the plan or any modification thereof or substitution therefor, and this agreement, and their construction thereof or action thereunder in good faith shall be final and conclusive. They may supply any defect or omission or reconcile any inconsistency in such manner and to such extent as shall be necessary to carry out the same properly and effectively, and they shall be the sole judge of such necessity."

And:

"During the term of this agreement the voting trustees shall possess and be entitled to exercise all rights and powers as absolute owners of the stock deposited hereunder including the unrestricted right to vote for every purpose and to consent to any and all corporate acts."

The conclusion is irresistible that the oil lease was authorized and is valid unless it is tainted with fraud or bad faith.

Appellants' pleadings are replete with charges of fraud and bad faith, but satisfactory proof thereof is wanting. No claim is made that trust property has been used for private benefit or gain, or that any individual has been guilty of misconduct involving moral turpitude. The gravamen of the charge made is that the leasing instead of operating the oil property was a breach of duty and of contract. In this connection it must be remembered that at the time the lease was made the lands belonging to the corporation were not "proven" oil territory. A former lessee, after drilling several wells

at large expense and finding only two which produced oil in paying but constantly diminishing quantities, had abandoned the venture. It must also be borne in mind that appellants' suits and cross suits to set aside the lease were brought after the present lessee had drilled upwards of 60 wells and done other development work at an expense, including the bonus paid, of more than $1,000,000, and had demonstrated that the oil properties could be successfully and profitably operated. If a loss instead of a profit had resulted, it is quite certain that no complaint would have been heard. Having risked nothing these minority stockholders and bondholders seek to reap all the benefits of another's sowing. As said by the District Judge who heard this case:

"The evidence, as a whole, spread upon the record is altogether insufficient to establish fraud, or a pledge or an obligation that the proposed corporation would itself conduct an oil business."

It is difficult to perceive how appellants or other bondholders and stockholders have been injured by the lease. The old company had failed. The new company, even with the funds derived from the cash assessment, did not have adequate or sufficient capital to prosecute the necessary oil development work. Without the bonus paid by the Chartiers Oil Company, the payment of the early installments of interest on the new bonds would have been doubtful if not impossible. Thus far the interest has been paid promptly. The bondholders are not concerned in the methods of the operation of the property otherwise than as such operation may affect the security and ultimate payment of their bonds. The final plans of reorganization provided for the creation of a sinking fund of fifteen cents per barrel of oil produced to pay and retire the bonds. In the mortgage:

"The company covenants and agrees that until the bonds hereby secured shall have been fully paid, or the moneys to redeem the same as herein provided shall have been deposited with the trustee, it shall and will pay to the trustee within six months after the close of each fiscal year of the company as and for a sinking fund for the further security of the bonds issued and outstanding hereunder and for the redemption and retirement thereof as herein provided * * * a tax or royalty of fifteen cents (15c) per barrel or fifty-two (52) gallons of oil pumped or taken by the company directly from the property, * * * and also on the oil which was, during such fiscal year, pumped or taken by a lessee or licensee of the company from property subject at the time of taking to the lien of this indenture."

This covenant has been kept and from the sinking fund so created upwards of $300,000 of the bonds have been paid and retired, thereby increasing the security of those still outstanding.

The stockholders are not concerned with priorities as between the lease and mortgage. Both are superior to the stock. The mortgage trustee and the holders of more than 80 per cent. of the stock and bonds of the company have at all times been satisfied with the lease. The mortgage expressly authorizes the company to lease its property on the terms upon which it has been leased, requiring only that the specified royalties shall be paid into the sinking fund as they have been paid. Hence, if the lease had been made after the mortgage was executed and recorded the priorities might have been fixed as

they are in the existing instruments. At any rate, even if prematurely made, the lease has been fully ratified and is not now open to attack upon that ground.

The conclusion reached makes it unnecessary to consider or decide other questions argued and submitted relative to the Chartiers Oil Company's knowledge, actual or constructive, of the provisions of the reorganization plans and agreements and of the existence of a trust thereby created; the effect of the recording statutes of Ohio; the estoppel of appellants by the terms of their agreements and by the acceptance and rentention of their stock and bonds and the interest upon the latter as well as other profits and advantages; and their right to bring suits for the Products Company or the mortgage trustee or for their own indirect benefit.

The decree of the lower court is affirmed.

MEMPHIS ST. RY. CO. v. BOBO. SAME v. MOORE. SAME v. McCOY.

(Circuit Court of Appeals, Sixth Circuit. June 6, 1916.)

Nos. 2790, 2842, 2843.

1. COURTS ⊕=311—FEDERAL COURTS—JURISDICTION.
The jurisdiction of the federal courts upon diversity of citizenship depends upon the personal citizenship of the parties of record, and not upon the citizenship of the parties whom they represent.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 858; Dec. Dig. ⊕=311.]

2. COURTS ⊕=259—FEDERAL COURTS—JURISDICTION.
The jurisdiction of the federal courts arising from diversity of the citizenship of the parties cannot be impaired or annulled by state statutes.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 795, 796; Dec. Dig. ⊕=259.]

3. COURTS ⊕=259—RESIDENCE—ADMINISTRATOR—ACTION FOR DEATH.
Under Acts Tenn. 1903, c. 501, declaring that, whenever a nonresident qualifies as an executor or administrator of a person dying in or leaving property in the state, he shall, for the purpose of suing or being sued, be treated as a citizen of the state, a nonresident administrator of one killed while riding on the car of a Tennessee street railway company may sue in the federal courts, for the statute must be construed as relating to suits in the state courts, and not as intending to attempt to deprive the federal courts of their jurisdiction.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 795, 796; Dec. Dig. ⊕=259.]

4. CARRIERS ⊕=280(1)—CARRIAGE OF PASSENGERS—DUTY OF CARE.
It is the duty of a carrier of passengers to exercise the highest degree of care and caution approved by human experience, consistent with the nature, extent, and operation of its business.
[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1085–1088, 1102, 1106, 1109; Dec. Dig. ⊕=280(1).]

5. CARRIERS ⊕=300—CARRIAGE OF PASSENGERS—NEGLIGENCE.
Where the conductor of a street car, who preceded the car in order to signal the motorman when to cross the tracks of a steam railroad company, signaled to the motorman to cross, although the smoke and steam of a passing train obscured his view in one direction, so that he could not see

an approaching train, which struck the car, he was guilty of negligence as a matter of law, though the conductor had no reason to anticipate another train at that hour, rendering the street car company liable to its passengers injured.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1211, 1212; Dec. Dig. ⊂⊃300.]

6. WITNESSES ⊂⊃267—EXAMINATION—CROSS-EXAMINATION.

Where a witness was fully cross-examined as to a matter, the trial judge, in his discretion, may refuse to permit further repetition.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 923–930; Dec. Dig. ⊂⊃267.]

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Actions by J. W. Bobo, administrator of the estate of Walter Owens, deceased, by S. C. Moore, administrator of the estate of Ivy B. Douglas, deceased, and by E. O. McCoy against the Memphis Street Railway Company. There were judgments for plaintiffs, and defendant brings error. Affirmed.

Roane Waring, of Memphis, Tenn., for plaintiff in error.

Caruthers Ewing, of Memphis, Tenn., for defendant in error Bobo.

W. Crabtree, of Memphis, Tenn., for defendants in error Moore and McCoy.

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

SESSIONS, District Judge. The Memphis Street Railway Company (defendant) operates an interurban electric railway from the city of Memphis to the town of Raleigh, running east and west through the town of Binghamton, where it crosses at right angles the double tracks of the Illinois Central Railroad. On September 17, 1914, at about 6:30 p. m., a train of defendant's cars, consisting of a motor car and a trailer, approached this crossing from the west and stopped to allow a long southbound freight train to pass upon the west set of the Illinois Central tracks. While the freight train was passing, the conductor of the electric train stood upon the ground near the front of the motor car. Immediately after the southbound train had cleared the crossing, the conductor walked east across both tracks and signaled his train to come ahead. At that time his view south was obstructed by a cloud of dust and smoke from the southbound freight train. In obedience to the signal so given the motorman started his cars, and when the trailer was upon the east Illinois Central tracks it was struck by a northbound freight train, and many passengers were killed and injured. Walter Owens and Ivy B. Douglas were killed, and E. O. McCoy was seriously injured. Hence these suits.

[1-3] In each of the two suits brought by administrators, the jurisdiction of the United States District Court for the Western District of Tennessee is challenged upon the alleged ground of want of the requisite diversity of citizenship of the parties. The defendant is a citizen of Tennessee. The administrators J. W. Bobo and S. C. Moore,

are both nonresidents of Tennessee and citizens of other states. A statute of Tennessee (chapter 501, Acts of 1903) provides:

"That whenever a nonresident of the state of Tennessee qualifies in this state as the executor or administrator of a person dying in or leaving assets or property in this state, that for the purposes of suing or being sued, he shall be treated as a citizen of this state."

The insistence of the railway company is that, by virtue of this statute, "when a nonresident of Tennessee qualifies as administrator of an estate of a resident of Tennessee, that nonresident becomes a citizen of Tennessee." This contention cannot be sustained. It must be assumed that the state Legislature by this statute intended to fix the status of nonresident executors and administrators as litigants in the courts of Tennessee, and did not intend to interfere with rights which are granted by the federal Constitution and the acts of Congress. Doubtless the state Legislature could have denied to nonresidents the right or privilege to act as executors or administrators of the estates of deceased residents of the state (In re Mulford, 217 Ill. 242, 75 N. E. 345, 1 L. R. A. [N. S.] 341, and note, 108 Am. St. Rep. 249, 3 Ann. Cas. 986), but no attempt has been made so to do. On the contrary, the right of a nonresident to act as administrator of an estate in Tennessee is expressly recognized by this legislation. No attempt is made to convert an actual nonresident into a citizen of Tennessee, or to provide for the revocation of the letters of administration of a nonresident administrator in case he avails himself of his constitutional right to bring suit in the proper court of the United States.

In each of these cases the administrator is acting under permission and authority granted to him by the state and is a citizen of another state. No question is raised as to his right to administer on the decedent's estate. It is settled that the jurisdiction of the federal courts depends upon the personal citizenship of the parties to the record, and not upon the citizenship of the parties whom they represent. Rice v. Houston, 13 Wall. 66, 20 L. Ed. 484; Amory v. Amory, 95 U. S. 186, 24 L. Ed. 428; Mexican Cent. Ry. Co. v. Eckman, 187 U. S. 429, 23 Sup. Ct. 211, 47 L. Ed. 245; Continental Ins. Co. v. Rhoads, 119 U. S. 237, 7 Sup. Ct. 193, 30 L. Ed. 380; C. H. & D. R. Co. v. Thiebaud (C. C. A. 6) 114 Fed. 918, 922, 52 C. C. A. 538; Bishop v. B. & M. R. R. (C. C.) 117 Fed. 771.

It is also settled that the jurisdiction of a federal court arising from diversity of citizenship of the parties to the suit cannot be impaired or annulled by a state statute. Hess v. Reynolds, 113 U. S. 73, 77, 5 Sup. Ct. 377, 28 L. Ed. 927; Ellis v. Davis, 109 U. S. 485, 498, 3 Sup. Ct. 327, 27 L. Ed. 1006; Hyde v. Stone, 20 How. 170, 175, 15 L. Ed. 874; Harrison v. St. L. & San Francisco R. R., 232 U. S. 318, 34 Sup. Ct. 333, 58 L. Ed. 621, L. R. A. 1915F, 1187; Barrow Steamship Co. v. Kane, 170 U. S. 100, 111, 18 Sup. Ct. 526, 42 L. Ed. 964; Herndon v. C., R. I. & P. Ry. Co., 218 U. S. 135, 30 Sup. Ct. 633, 54 L. Ed. 970; Madisonville Traction Co. v. Mining Co., 196 U. S. 239, 253, 25 Sup. Ct. 251, 49 L. Ed. 462; Cable v. U. S. Life Ins. Co., 191 U. S. 288, 306, 24 Sup. Ct. 74, 48 L. Ed. 188; Donald v. Philadelphia, etc., Co.,

241 U. S. 329, 36 Sup. Ct. 563, 60 L. Ed. ——, decided by the Supreme Court May 22, 1916.

[4, 5] Coming, then, to the merits of the cases: The alleged errors in the trials all cluster about the question of whether, under the evidence in each case, the court would have been justified in directing a verdict for the plaintiff as to the negligence and consequent liability of the defendant. The question of the negligence of the conductor of this train at the time of the accident was submitted to the jury, but under instructions which required the jury to find that he was negligent if "his view down the track was cut off or was so obscured by smoke and dust incident to the passage of the southbound Illinois Central Railroad Company train that he could not see the train" and if he did not delay "signaling the street car ahead for a reasonable time to allow the smoke and dust to settle, rise or float out of the way so as not to obstruct his view down the track." The evidence shows beyond dispute that the conductor's view down the track to the south was temporarily obscured and obstructed by the dust and smoke from the train which had just passed, that but for the dust and smoke he could have seen the approaching train if he had looked, that he did not wait for the dust and smoke to pass away before signaling the street car to come upon the crossing, and that he did not see the approaching northbound train until the accident was inevitable. Hence the effect of the instructions given was a directed verdict against the defendant upon the question of its liability.

The defendant rested its defense upon the theory that the street car conductor had good reason to believe, from the usual operation of trains at that place, that there would be no train approaching from the south at that time, and had a right to assume that, if a train was coming, its engine would be equipped with a proper headlight and it would give warning of its approach by bell or whistle or both, and that, if he acted upon such belief and assumption and used reasonable care, he was not negligent in signaling the car to cross the tracks without waiting for the dust and smoke to clear away. This theory was embodied in several requested instructions to the jury which were refused.

Defendant's contention entirely ignores the radical and fundamental difference between the degree of care for his own safety required of the user of a highway at a railroad crossing and that imposed upon a carrier for the protection of its passengers. The law exacts from the former the use of reasonable care only, while it demands from the latter the exercise of the greatest and highest degree of care and caution approved by human knowledge and experience and consistent with the nature, extent and operation of its business. Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291, 23 L. Ed. 898; Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. Ed. 141; N. Y., N. H. & H. R. Co. v. Lincoln, 223 Fed. 896, 139 C. C. A. 334; Pittsburgh Rys. Co. v. Givens, 211 Fed. 885, 888, 128 C. C. A. 263; Ramjak v. Austro-American S. S. Co., 186 Fed. 417, 108 C. C. A. 339; Irvine v. D. L. & W. R. Co., 184 Fed. 664, 106 C. C. A. 600; Cavin v. Southern Pacific Co., 136 Fed.

592, 69 C. C. A. 366; Railroad v. Kuhn, 107 Tenn. 106, 64 S. W. 202; 4 Ruling Case Law, 1144 et seq.

The street car conductor had in his keeping the lives and safety of the passengers upon his train. The railroad tracks which he was compelled to cross were a plain warning of danger. He knew that trains might be running upon those tracks at any time. He also knew that the cloud of dust and smoke which obstructed his view to the south would be scattered and dissipated in a few moments. By the exercise of even a moderate degree of care, caution, and diligence he could have known of the approach of the northbound train and thus have prevented an appalling disaster. Whatever might be the effect of his own negligence, if the conductor were here seeking to recover damages from the Illinois Central Railroad Company for injuries to himself (McCrory v. C., M. & St. P. Ry. Co. [C. C.] 31 Fed. 531; N. Y. S. & W. R. Co. v. Thierer, 209 Fed. 316, 126 C. C. A. 242; C. & N. W. Ry. Co. v. Andrews, 130 Fed. 65, 73, 64 C. C. A. 399, and cases there cited), it is certain that, in signaling the street cars to cross the railroad tracks without waiting for the dust and smoke to clear away, and without making sure whether another train was approaching, he was, as a matter of law, guilty of such negligence as to render his employer liable for the injuries resulting therefrom to the passengers in his charge. The concurring negligence, if any, of the Illinois Central Railroad Company and its servants, does not relieve this defendant from liability to these plaintiffs.

[6] Complaint is made of what is claimed to have been an undue restriction of the cross-examination of the fireman of the Illinois Central train who was a witness for the plaintiff in one of the cases. The subject upon which the witness was being interrogated was whether the locomotive whistle was blown for the crossing, and, if so, when and where. The ground had already been fully covered in the cross-examination of the witness, and, if the excluded questions and answers were at all material, the trial judge acted well within his discretion in preventing mere repetition of previous testimony.

The judgment in each case is affirmed.

THE SUFFERN.

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

No. 122.

COLLISION ⊂=95(2)—TUG AND FERRYBOAT MEETING—SUDDEN CHANGE OF COURSE.

A tug, intending to cross the North River from the New Jersey side, but proceeding up practically parallel with the shore not far off the pier heads, *held*, on conflicting evidence, solely in fault for collision with a meeting ferryboat for swinging to starboard across the bow of the ferry boat when they were quite near each other.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200–202; Dec. Dig. ⊂=95(2).]

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

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

Suit in admiralty for collision by Abraham J. Balaban, owner of the steam tug Robert White, against the ferryboat Suffern; the Erie Railroad Company, claimant. Decree for claimant, and libelant appeals. Affirmed.

This cause comes here upon appeal from a decree holding libelant's steam tug Robert White solely responsible for a collision with claimant's ferryboat Suffern.

James J. Macklin, of New York City (James J. Macklin and De Lagnel Berier, both of New York City, of counsel), for appellant.

Barry, Wainwright, Thacher & Symmers, of New York City (James K. Symmers and Earle Farwell, both of New York City, of counsel), for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The collision occurred on January 14, 1914, about 7 a. m., in the North River; the weather being clear and the tide about the first of the flood. The Suffern was bound from her slip at Twenty-Third street, Manhattan, for the Erie Railroad ferry slip, Jersey City. The tugboat was bound from Port Liberty coal docks to Christopher street, Manhattan; she proceeded up along the Jersey shore at first about 200 feet off the pier heads, edging further out until, when about abreast of, or a little above, the Erie ferry, she swung over to starboard for her destination at Christopher street. The collision occurred because the Suffern also swung towards mid-river; the starboard bow of the ferryboat struck the port side of the tug.

The accounts of the navigation given by the respective parties are diametrically opposed. From it, however, we have reached the conclusion that until the time when navigation mutually to each other began the tug was still proceeding up river; she may have been edging out a bit from the Jersey piers, but her course was still substantially up river; the course of the Suffern was substantially down river; we see no warrant anywhere in the testimony for finding crossing courses and the application of the starboard hand rule. The vessels were approaching substantially on opposite courses; they were under the first rule.

All the witnesses from the White say that the Suffern was nearer the Jersey shore than the White; that both vessels were approaching on courses which would, if unchanged, enable them to pass port to port with abundant clearance. If this were the situation the navigation of the White was entirely proper; she blew one whistle and turned still further to starboard.

The witnesses from the Suffern, however, describe a different situation; they say the White was nearer to the Jersey shore than the Suffern was; that each bore on the starboard bow of the other; that if courses were prolonged they would have passed each other starboard to starboard with a clearance of 400 feet. If this be so, there was no obligation for either to pass on the port side of the other, and it

was proper for either vessel to sound the appropriate signal and haul over further to port, and the Suffern was not in fault for sounding two whistles and going still further to port.

It would seem more likely that the tug, which was going to New York, should have ported to change her course than that the ferryboat, which was coming from New York, should have gone so close to the Jersey shore before she headed down river that it would be necessary for her to swing out towards mid-river in order to make her round to so as to enter her slip. In this direct conflict of testimony, the District Judge naturally resorted to the independent witnesses from the two other tugs, who were in a position to see—especially the master of the Meta, which was coming down river about 200 feet behind the Suffern and 200 feet nearer the Jersey shore. This witness testified that before she swung the White was coming up river and was not only on the starboard hand of the ferryboat, but also on the starboard hand of the Meta although the latter was 200 feet nearer than the Suffern to the Jersey shore.

Judge Hough accepted the version of the independent witnesses and since he saw all the witnesses in the case, except one who, being in hospital, was examined on deposition, we see no reason to reverse his findings as to the facts. Such being the situation he rightly found the White in fault for swinging four points to starboard across the bow of the Suffern. This swing we are satisfied took place when the boats were quite near each other, and produced the dangerous situation which naturally resulted in collision.

The decree is affirmed, with costs.

WHITAKER v. TODD et al.

(Circuit Court of Appeals, Third Circuit. April 22, 1916. Rehearing Denied May 25, 1916.)

No. 2078.

1. PATENTS ⇐165—CONSTRUCTION—DIFFERENTIATION OF CLAIMS.
A limitation expressed in one claim of a patent, but omitted from another, should not be read into the latter, if it can be avoided.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 241; Dec. Dig. ⇐165.]

2. PATENTS ⇐328—VALIDITY AND INFRINGEMENT—PRINTING APPARATUS.
The Todd patent, No. 793,249, for a printing apparatus for printing words on checks and drafts as a protection against alteration, the type and platen having complementary serrated faces, which abrade the paper, was not anticipated and discloses invention. Claims 1 and 3 *held* infringed.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Suit in equity by George W. Todd and Libanus M. Todd, doing

business as G. W. Todd & Co., against John Whitaker, doing business as the J. Whitaker Manufacturing Company. Decree for complainants, and defendant appeals. Affirmed.

For opinion below, see 226 Fed. 791.

Howson & Howson, of Philadelphia, Pa., for appellant.

Melville Church, of Washington, D. C., and Frederick F. Church, of Rochester, N. Y. (Cyrus N. Anderson, of Philadelphia, Pa., and Church & Rich, of Rochester, N. Y., of counsel), for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. The bill of complaint charges infringement of claims 1, 2, 3, 5 and 8 of Letters Patent No. 793,249, granted June 27, 1905, to the appellee as assignee of Libanus M. Todd, for printing apparatus. The District Court found certain of the claims valid and infringed and others not sustained or not infringed. 226 Fed. 791. This is an appeal from that part of the decree adjudging claims 1 and 3 valid and infringed and awarding an injunction and an accounting as to them.

The subject matter of the patent, while described generally as "printing apparatus," is that class of printing apparatus designed to protect checks and drafts from alteration, by printing upon them, in embossed and serrated letters and numerals, well known words, for example, "NOT OVER FOUR HUNDRED 400."

The mechanism of the check protecting machine of the patent is enclosed in a casing, and consists of a metal cylinder, drum or type-wheel, upon whose periphery are rows of projecting type characters extending parallel with its axis; a co-operating platen arranged to contact with the type-wheel; an ink roller serving the double purpose of inking the type characters and holding or centering them in position for co-action with the platen; and appropriate means to bring these parts into action and thereby to produce upon paper, embossed, serrated and inked letters and numerals. Upon the printing or impression surfaces of the type characters is a plurality of parallel ridges and grooves which extend circumferentially of the type-wheel. These have a sharp cutting edge, and form a part of the printing surfaces for receiving and transferring ink.

The platen is made of hard metal, upon whose impression surface are ridges and grooves corresponding in number, direction and size with those upon the type-wheel. Upon contact, the ridges of the platen enter the grooves upon the printing characters, and the ridges of the printing characters enter the corresponding grooves upon the platen. By this co-action the fiber of the paper is abraded, disrupted and cut on both its upper and under sides. To effect this co-action in the commercial machine manufactured under the patent, the ridges and grooves on the type characters are extended around the type-wheel in a direction parallel with the plane of its rotation and at right angles to its axis, so that when the cylinder comes in contact with the platen at any point in its revolution, the ridges upon the face of the type co-act with

the complementary grooves upon the platen. The essential principle of this universal co-action is the maintenance of perfect alignment of the complementary ridges and grooves just before and at the instant of contact, and this principle is reduced to practice in the device of the patent by snugly fitting the revoluble type-wheel and the platen against the side walls of the casing in a manner to obtain perfect alignment and prevent lateral motion at this critical point. This was the capital conception of the patentee. There is a clear distinction mechanically between ridges and grooves which encircle a cylinder precisely parallel with the plane of its revolution and ridges and grooves which in any degree deviate from that exact course. In the first, perfect alignment between the ridges and grooves of the cylinder and those of the platen, when once attained by mechanical means, is never disturbed by the mere revolution of the cylinder; while the revolution of a cylinder, with ridges and grooves deviating ever so slightly from the true circumferential direction, throws its ridges and grooves in and out of alignment with those of the platen, and co-action is uncertain until the movement is arrested by some mechanical centering means and the ridges placed in alignment for contact. Therefore, whether the course of ridges and grooves be truly circumferential or spiral, and without regard to the maintenance or disturbance of alignment during the initial movements of the cylinder or platen, practical and actual co-action and registration in a machine of any type can be attained only by mechanical means of some sort, and by such mechanical means as will procure perfect alignment just prior to and at the instant of contact. Hence we are not so much concerned with the theory of complementary co-action of circumferential and spiral serrations, as we are with the means disclosed by the patent in suit and the means employed by the defendant to bring the serrations upon the face of the type, whatever may be their direction, into alignment and contact with their complementary serrations upon the face of the platen. The patent discloses means to procure such alignment and produce such contact. If these means constitute patentable invention and if the defendant employs them, a deviation in the direction of serrations will not save him from the charge of infringement. Let us inquire what is the construction of the defendant's machine, the result attained by it, and the means employed to produce that result.

The parts of the defendant's machine which figure in this controversy are the same as those of the patent in suit, namely, a type-wheel or drum carrying upon its periphery rows of projecting type characters, a platen, and an ink roller. In the defendant's device, the ink roller serves the single purpose of applying ink to the type characters. The cylinder is put and held in position for printing by other centering means. The printing faces of the type characters are serrated with a plurality of parallel ridges encircling the cylinder. These parallel ridges are not circumferential of the cylinder in the sense of being precisely parallel with its plane of revolution. There is a slight deviation from the true circumferential course, actual, though invisible. The ridges are like a continuous screw thread, beginning at one end of the cylinder and spirally encircling it until it runs off at the other

end. The cylinder is not a true cylinder. It is a helix, and its shape is removed from that of a true cylinder in the same minute degree that the direction of the spiral ridges deviates from that of truly circumferential ridges; that is, the pitch of the type wheel or cylinder conforms to the direction of the ridges. In the defendant's machine, as in that of the patent, the ridges are .025 of an inch apart. The results desired are two. The first is the printing of words from some desired row of projecting type characters. This is accomplished in the two machines by centering means of different kinds, by which type characters on the cylinder are brought in true printing position with the impression surface of the platen. The second thing desired is a cut or abraded surface of the printed letters. To produce this, the two machines imperatively require precise co-action of the complementary ridges and grooves on the printing surfaces of the letters projecting from the cylinder, and the ridges and grooves upon the platen. This is absolutely necessary not only to avoid collision of the ridges and consequent destruction of their apexes, but also to obtain the registration which produces the desired abrasion and cutting of the paper. To accomplish such exact engagement, it is manifest that at least just before and at the time of impact, the theory of precise alignment must be embodied in mechanism, which must first establish alignment and thereafter prevent its disturbance by any lateral motion.

Both the patentee and defendant employ such mechanism. In the machine of the patent, the alignment of the ridges and grooves is fixedly maintained *at all times* by the fixed positions of the cylinder and platen in the casing, but in the machine of the defendant, the helical drum is suspended well up in the casing, the ridges of which, when the cylinder is at rest, may be entirely out of alignment with the ridges of the platen. When registration is desired, the platen in the machine of the patent is raised vertically against the clyinder by one straight movement, while in that of the defendant, the operation is reversed, and the cylinder is brought down against the platen by a variety of movements. In the machine of the patent there is no lateral movement of either the drum or platen at any time. The latter is raised in its fixed position to register with the former in its fixed position, and so long as their positions remain fixed, the alignment remains perfect and the co-action complete. But a vertical movement of a helical drum containing spiral ridges against a platen containing complementary diagonal grooves, would, without means to procure final alignment, be wholly ineffective to assure registration. To obtain registration by co-action of spiral and diagonal ridges in the defendant's machine, which are out of alignment when not in action, a cam is employed to revolve and laterally move the spiral drum on its axis in the upper portion of the chamber of the casing until in its part revolution and succeeding descent its spiral ridges are brought into perfect alignment with the complementary diagonal ridges on the platen. This alignment is procured by bringing one end of the helical drum into contact with a lug on one wall of the casing and by compressing the other end by a spring attached to the other wall of the casing. Thus the defendant's irregularly shaped drum snugly slips into the very

casing enclosure which the patent points out as the means for securing perfect alignment just before the instant of contact, from which place the drum, with its spiral ridges held by the wall lug and spring in precise alignment with their complementary grooves on the platen, descends a small fraction of an inch to contact and registration. After it reaches the arresting points between the walls and starts upon its final motion of descent, no further revolutions of the cylinder occur and no lateral movements of the cylinder are possible. In other words, the defendant's machine, unlike that of the patent, does not *at all times* maintain alignment of its complementary ridges and grooves, but obtains such alignment *just before the time of contact,* and by the same wall embracing means maintains and continues it until contact is complete. This is admitted by the defendant's expert, subject to a qualification, which, however, does not disturb the certainty that the defendant's helical drum is caught in its revolving and lateral movement by the wall lug and spring, and thereafter is directed in a true course to the point of contact, though the distance be minute. It therefore appears that while the initial movements of the moving parts of the two machines are different, both machines disclose the correct theory of registration to be a fixed and true alignment, and both procure such alignment at the only time it is necessary by employing the fixed walls of the casing to prevent lateral motion. Fixed alignment was disclosed by the patentee as a requisite to perfect co-action and accurate registration. As means to attain it, the patentee pointed out the two walls of the casing in which to snugly place the drum and platen. The defendant adopted these two walls as supports for a lug and spring, and used the lug and spring so attached to the walls as his means to procure alignment and prevent lateral movement just before and at the instant of contact.

Unless the claims of the patent in issue are to be restricted to a device containing circumferential ridges literally parallel with the plane of their rotation, we are of opinion that the means employed in the defendant's machine to secure registration must be considered full mechanical equivalents of those found in the machine of the patent.

Claim 1 of the patent in suit is as follows:

"In a printing apparatus, the combination with a *revoluble type-wheel* provided with printing characters upon its periphery, the impression surfaces of the characters being provided *with a plurality of circumferentially arranged grooves,* of a platen mounted to co-operate with the characters of the type-wheel having projections arranged to register with the grooves formed thereon."

Claim 3 is distinguished from claim 1, in that it includes a "type support" that is not limited in construction to "a revoluble type-wheel," and provides for "a plurality of parallel ridges" without defining their direction. The defendant maintains that the expression "circumferentially arranged grooves" found in the first claim, means grooves arranged circumferentially of the cylinder in position precisely parallel with its plane of rotation, and that the expression "a plurality of parallel ridges" found in the third claim, means the same thing, and therefore as the ridges of the machine of the defendant are spiral,

neither claim is infringed. This contention is based upon an expression found in the specification, by which the patentee discloses the advantage of a mechanism containing serrations upon a cylinder arranged in planes parallel with the plane of its rotation. This is stated by the patentee as follows:

"Moreover, a material advantage is secured by forming these ridges of the printing characters so as to extend circumferentially of the type-wheel in planes *parallel to the plane of rotation* thereof, for the reason that the printing faces of the type characters will accurately register with the impression surface of the platen at every degree of rotation of the wheel, thereby avoiding the necessity of precisely centering the type characters opposite the platen in order to secure a proper register of the ridges and depressions of the respective parts as would be necessary should these ridges extend spirally or in any direction other than circumferentially of the wheel."

[1] The defendant seeks to limit claims 1 and 3 by this statement of the patentee in the specification. But we are inclined not to apply this disclosure to claims 1 and 3, but rather to consider it with reference to claim 2, which by identical terms with those found in the specification describes and limits the circumferential arrangement of serrations to a direction "parallel to the plane of rotation." This unquestionably is the patentee's preferred arrangement as disclosed by the language of the specification, and while the patent is limited to that arrangement by claim 2, it is not so limited by claims 1 and 3, unless we hold that the three claims mean the same thing. This of course we should avoid, if the language of the claims makes it possible. Zittlosen Mfg. Co. v. Boss, 219 Fed. 887, 135 C. C. A. 551; O'Rourke v. McMullen, 160 Fed. 933, 88 C. C. A. 115; Thomson-Houston v. Nassau (C. C.) 110 Fed. 647; Lamson v. Hillman, 123 Fed. 416, 59 C. C. A. 510; Ryder v. Schlichter, 126 Fed. 487, 491, 61 C. C. A. 469.

Claim 2 contemplates by exact terms a circumferential arrangement of serrations precisely "parallel to the plane of rotation thereof." Claim 1 is distinguished from claim 2 by providing in general terms for circumferentially arranged serrations without defining or limiting their direction with regard to the plane of rotation. Claim 3 is distinguished from claim 1 in that it provides a "type support" without defining or limiting its shape to that of a revoluble type-wheel and in that it provides a plurality of parallel ridges without requiring them to be either truly or substantially circumferential in their arrangement. Of course we are deciding nothing with respect to claim 2, because it is not in issue, but we are employing that claim, the terms and meaning of which correspond precisely with the defendant's interpretation of claims 1 and 3, in order to distinguish the claims and discuss the defendant's contention. Construing claim 2 to mean what its unambiguous language conveys, we feel free to give to claims 1 and 3 an interpretation different from that which must be given to claim 2, and an interpretation, which, in our opinion, is justified by the language of the claims and the disclosures of the specification. We construe claims 1 and 3, with respect to the direction of ridges and grooves, to be broad enough to permit their arrangement in a direction other than

truly circumferential in the sense of being parallel with the plane of their revolution, and in so doing we find that if the claims are not invalid because of anticipation by the prior art, they are clearly infringed by the full mechanical equivalents employed in the device of the defendant.

[2] The validity of claims 1 and 3 of the patent is vigorously attacked on the ground that they are anticipated by many patents appearing in the prior art. While we have carefully considered all of them, we will be able to discuss only a few in this opinion.

The devices of Ocumpaugh patents, No. 734,932 and No. 749,577, are similar. Each shows a type-wheel with rows of projecting type characters mounted upon its periphery, an ink roller, and a platen. The platen is soft and the type characters are smooth.

The Carsley patent, No. 152,329, is for a check stamp designed to emboss ink characters upon a check. The Carsley device is nothing more than a flat die and a counter-die, and the patent discloses nothing new in die and counter-die co-action.

The Pardi patent, No. 675,404, is a seal press with opposing die numbers. These are without serrated printing characters.

The Rogers and Hall patent, No. 592,533, discloses a type disk upon whose surface are mounted numerals. Secured to and revolving with the type disk is a thin spring metal disk having flexible arms corresponding in number and position with each numeral upon the wheel. These arms perform the function of inverted or superimposed platens. The platen arms are perforated with lateral slots. Over the disk is mounted a hammer or thrust, whose impression surface is covered with a type ribbon. In operation, the type disk is revolved so as to bring a desired numeral under the hammer. The paper is introduced between the numeral and the perforated platen arm. A blow upon the hammer drives the ink ribbon against the perforated platen, the platen against the paper, and the paper against the ridges of the numeral, with the result that the paper is embossed in the form of the numeral, abraded on its under side, and colored on its upper side by contact with the ribbon through the slots of the platen. In this way the paper is embossed, cut and printed. In this device the type characters are not inked nor is there co-action of serrated characters and serrated platens. The result of the action is an embossed check serrated on its under side, and a plurality of parallel lines printed but not cut on its upper side. There is nothing in the device which even suggests co-action between serrations on type characters and platen, the problem of exact registration or its solution.

Hendrick patent, No. 104,148, discloses a diagonally serrated metal platen designed to cut or abrade the under surface of paper when type heads, arranged in a super-structure, are thrust down upon it. The type heads consist of several disks nested together, upon the edges or peripheries of which are type characters with plain smooth surfaces, across which is suspended a type ribbon. A blow upon the connecting thrust drives the ribbon-covered type characters against the check, inks the check, not the type, and causes a rupture of the paper on its under side by contact with the serrations upon the plate. There is a ser-

rated platen without serrated type, and co-action of ridges and grooves is not suggested.

Several Beebe patents are confidently relied upon to prove anticipation or prior invention. Beebe patent, No. 576,999, contains a revoluble type disk not a cylinder, having mounted upon its face, not upon its periphery, printing characters or numerals, and an ink roller and a platen with depressions intended for co-action with the ridges of the printing characters. The two parts are not formed with a plurality of ridges and grooves, but are formed with one single V-shaped ridge on each, upon the old theory of male and female dies, with the object of producing abrasion of the paper. The principle suggested by this patent is that of die and counter-die.

Beebe patent, No. 594,319, shows a series of conical printing pins arranged to form the outline of numerals when brought into contact with a platen containing depressions made to correspond with their points. This is far removed from the mechanical problem of the patent in suit.

The Beebe patent, No. 783,171, approaches nearest in structure and in theory of operation to those of the patent in suit. It has a cylindrical type-wheel, upon whose periphery are rows of projecting type characters, an ink roller and a platen. The type characters are serrated like those of the patent in suit, running in a direction circumferential of the type wheel. The platen, however, is of hard rubber, and, of course, is not serrated. Therefore, the problem of Todd and the manner in which he solved it, are not suggested by the one similar feature in this Beebe patent.

Todd, the patentee of the patent in suit, holds two patents. The first is No. 784,602, which comprises a cylindrical type-wheel, upon whose periphery are formed projecting rows of printing characters running parallel with the axis of the cylinder, an inking roller and a platen. The faces of the type characters are plain, having neither ridges nor depressions, and the platen has a surface preferably of soft rubber or other yielding material, and, of course, without ridges and depressions.

Thus the prior art discloses serrated platens with smooth type, serrated type with smooth platens, but does not disclose both type and platen serrated, calling for co-action and precise registration. With these disclosures of the prior art, counsel for the appellant present the question most favorable to their contention, by asking whether there is invention in bringing together in the old machine of the Todd patent just described, Hendrick's serrated platen and Beebe's serrated type. In addressing ourselves to this question, it is certain that alone neither Hendrick nor Beebe suggested a device containing serrations upon both type characters and platen, nor together did they reveal the advantages of cutting or abrading both the upper and under surfaces of an embossed letter or numeral, or suggest the means to produce that result. Before Todd, neither the thing which his device accomplishes nor the means for its accomplishment appeared in the art. That the machines of the patent contain merit is evidenced not merely by the vigor of this controversy, but by the fact that in the

ten years of their manufacture the public has taken over 200,000 of them at an aggregate cost of about six million dollars. We believe this is due, not to persistence in advertising, but to the novelty and utility of the device, developed and produced by the invention of the patentee. We are of opinion that his invention was not anticipated by the prior art, and therefore hold claims 1 and 3 valid and infringed.

The decree below is affirmed.

GENERAL ELECTRIC CO. v. PHILADELPHIA ELECTRIC & MFG. CO.

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

No. 2062.

PATENTS ⊂⊃328—ANTICIPATION—INCANDESCENT LAMP SOCKET.

The Jones patent, No. 818,253, for an incandescent lamp socket consisting of three parts, claim 1, is too broad, in view of the prior art, and void for anticipation.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Suit in equity by the General Electric Company against the Philadelphia Electric & Manufacturing Company. Decree for defendant (226 Fed. 488), and complainant appeals. Affirmed.

Samuel O. Edmonds, of New York City, for appellant.

Howson & Howson, of Philadelphia, Pa., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. The patent in suit, now owned by the General Electric Company, is No. 818,253, applied for by Walter J. Jones in December, 1900, but not granted until April, 1906. Its subject is "improvements in incandescent lamp sockets, * * * especially those used in incandescent lighting." The questions involved will be better understood after a brief statement concerning the kind of lighting referred to.

Electric light may be produced in an arc lamp or in an incandescent bulb. Both kinds of lamp may be arranged in series, but this controversy has nothing to do with arc lamps, or the arc system. In an incandescent system the current flows from one terminal of the dynamo through the filament in each bulb and returns to the other terminal. A break at any point in the circuit extinguishes every light; the current ceases to flow and the circuit is "open." The break may be in the connecting wire or in the lamp itself (meaning by "lamp" the whole structure, and not merely the bulb), but in this suit we are concerned only with accidents to the lamp. Manifestly, such accidents may occur while the current is flowing, either at night or at any other time, and the whole system will cease to operate if the bulb or the lamp is removed; the current must be shut off, and every light in the series will be put out. This problem was presented early in the art, and was solved as follows: As a lamp consists of two parts, a socket and a

glass bulb, the latter being removably attached to the former, it was clear that the bulb could be separated without disturbing the circuit if the flow of current could be somehow continued through the socket. A device for this purpose was speedily found in an "automatic line-closing contact"—hereafter called a "line-closer"—which may be made of two metallic prongs, positioned in the path of the current, that are normally in electrical contact, but are adapted to be forced apart when the bulb is pushed or screwed into the socket, and to spring back automatically into contact when the bulb is taken out. While the bulb is in place, the circuit is complete through the filament, but when the bulb is removed the prongs spring together and the circuit is maintained. Accordingly, the use of line-closers enabled a bulb to be replaced without breaking the circuit or extinguishing any other light in the series.

But a line-closer did not provide a remedy for another contingency, namely, the burning out or breaking of the filament in the bulb itself. In this event, also, the current at once ceases to flow, and every light will go out. To solve this further problem, the "film cut-out" was devised—hereafter called a "cut-out." This in effect is a switch, positioned in the path of the current above the filament, and is so made that upon the breaking of the filament a short circuit is immediately established and the current flows along the new path without interruption. The switch has two members, nearly but not quite in electrical contact while the current is flowing normally through the filament; they are kept apart by the obstacle of a thin film or wafer of insulating, or dialectric, material. The wafer is sufficient to prevent electrical contact between the two members until the filament breaks, but as soon as this happens the current seeks the easiest path, overcomes the slight resistance of the film, establishes a short circuit, and leads the current by this road to the other lamps in the series.

In a successful system both the line-closer and the cut-out are indispensable, and both had been devised at an early period in the art. These subjects are dealt with in several patents, and each patent assumes and follows (as it must) the known characteristics of the electric current. Every device is limited to a physical structure; that is, to a particular arrangement of physical elements, embodying one or both of the two contrivances just described. A short review of the important steps that had been taken will show the point that had been reached in December, 1900.

We shall consider five patents only; and, first, No. 444,929, applied for in 1886 by the well-known electrical expert, Elihu Thomson, and granted in 1891. It was assigned to the Thomson-Houston Electric Company, the predecessor of the General Electric Company, and the device was used for several years, but, having proved unsatisfactory, was abandoned in March, 1891. The lamp had two parts, a bulb and a socket, and the bulb contemplated was to be of the ordinary incandescent type. Probably for this reason, both the line-closer and the cut-out were placed in the socket; the result being that when a bulb was to be replaced, or a new film put in, the current had to be shut off altogether. This was necessary to protect the operator, but evidently the situation was inconvenient. In order to better it, Thomson employed a bulb of special construction, having a particular kind of base

attached thereto, and transferred the cut-out from the socket to the base, thereby obviating the need of shutting off the current when a new bulb was put in. In this form the device went into more general use during the next nine or ten years, but the cost of these special bulbs was greater and increased the loss when they were scrapped. As just stated, this Thomson device had two parts, a socket containing the line-closer, and a specially made bulb whose base contained the cut-out.

The next patent to be considered, No. 348,875, to Wightman and Lemp, was applied for and granted in 1886. This device also had two parts, a socket, and a bulb, and each was specially constructed. The line-closer was placed in the socket, and the cut-out in the base of the bulb; in these respects the lamp was like Thomson's improvement. But the patentees disclosed a meritorious detail which will be referred to again, namely, a particular form of spring to be used as the line-closer. This is the "beaded" form of curve, by whose use a continuous electrical contact is maintained while the metallic prongs attached to the bulb are separating the prongs attached to the socket, or are being withdrawn therefrom.

In 1889 an Italian patent was issued to Giovanni, and this also shows a socket and a bulb; the socket containing the line-closer, and the bulb containing the cut-out. Here also the springs are so shaped (although not beaded) as to close while the bulb is being removed from the socket, thus establishing a circuit between the two outside conductors before the terminals attached to the bulb are wholly withdrawn from electric connection with such conductors. In this manner the current is prevented from "arc-ing" or jumping, a feature often accompanied with danger.

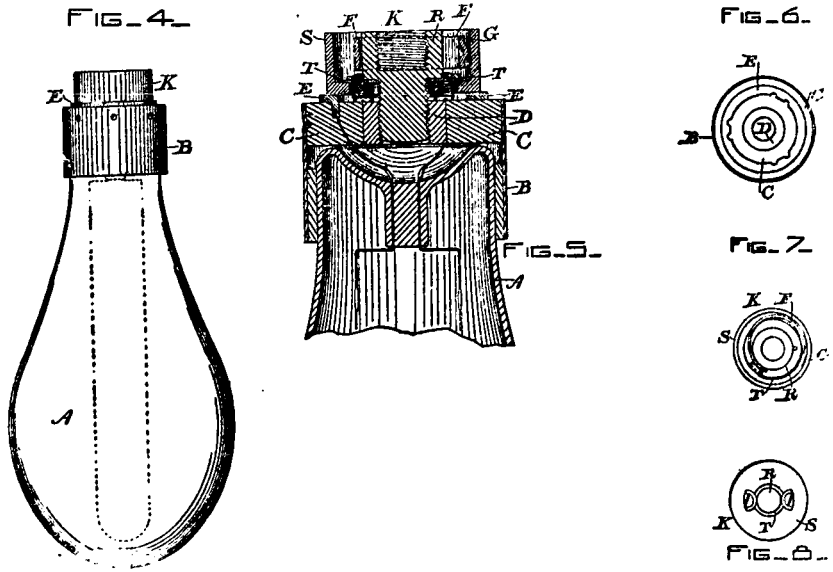
The next patent is No. 455,559, applied for by Henry Ball in 1890, and issued in 1891. This lamp is substantially like Thomson's, except that the bulb has an Edison screw base instead of a special base. The socket is insulated by porcelain, and contains both the line-closer and the cut-out. Reserving for a moment the remaining patent (to Wirt), we observe that, when Jones entered the art in 1900, the course of events had been as follows: In the first instance an ordinary incandescent bulb was used, and the coacting socket was a single whole containing both the line-closer and the cut-out. This socket was dangerous and inconvenient, and was abandoned in 1891; thereafter (speaking generally) the bulb had a special form of base that contained the cut-out, while the line-closer was left in the socket.

Turning now to Wirt (No. 465,508, applied for in 1890 and granted in 1891), we find a new thought suggested to the art, namely, to add a third element to the socket and the bulb—or, rather, to make three parts out of the old two. This patent was developed while Wirt was employed by the Thomson-Houston Company, and was acquired by the General Electric Company in 1892. It did not go into commercial use, but the device is fully described, is properly in the art, and must be reckoned with. The main defense below and in this court rests upon the alleged anticipation of Jones by Wirt, and the disclosure of the patent must therefore be examined with care. Wirt's object was

to improve "cut-outs for incandescent lamps," and the device he described was intended—

"to provide an automatic short-circuiting device for incandescent lamps operated in series. * * * It consists of a spring attached to one of the terminal pieces of the lamp and bearing by its resiliency against the opposite terminal, from which, however, it is normally insulated by means of a small piece of paper. This paper is a sufficient insulation under normal circumstances to prevent electrical connection between the opposite terminals of the lamp; but under abnormal conditions, occasioned by a breakage of the carbon or other accident to the lamp, this paper will be perforated by the increased potential between the parts on opposite sides of it, and the spring will then come into positive engagement with the metal and form a short circuit for the lamp."

Having thus described the well-known function of a cut-out, he turns to his particular object, namely, a special form of construction, and says that in practice he might apply the construction directly to a lamp (meaning a bulb), or—and here is the new thought—"I may provide *an independent piece* adapted to be included between the base of the lamp and the lamp-socket, which contains the short-circuiting device or cut-out above described." He then describes the form that is to be applied directly, and shows it in the usual two parts—a socket and a bulb—the socket containing a line-closer, and the bulb having a special base containing his cut-out. He then takes up in turn his new thought, and illustrates it in Figs. 4 and 5. Evidently what he had in mind in this alternative construction was the use of an ordinary incandescent bulb, and he thus describes the use of what he calls an "independent piece," or an intermediate piece," or a "separable piece":



"In Figs. 4 and 5, K represents an independent piece adapted to be attached to lamps which have not been provided with my cut-out. It is provided on one side with contacts corresponding to the contacts of the lamp-socket, so

that the lamp may be attached to it just as it is ordinarily attached to its socket. On the other side, piece *K* has a receiving screw-socket and a contact-ring corresponding to the similar parts *D* and E of the lamp-base, so that it may enter the lamp-socket just as the lamp itself might do. By this means my cut-out is made as an independent piece adapted to be inserted between the lamp and its socket. In this form I have shown the piece *K* as composed of two short concentric cylinders *R* and *S*, separated from each other by an insulating-ring *T*. The part *R* has upon one side a screw adapted to enter the screw-socket *D* in the base of the lamp, and at the other end it is formed into a screw-socket corresponding to *D*, and adapted to enter the lamp-socket just as the part *D* might do. The outer cylinder *B* forms a structural support, and at the same time is adapted to connect with ring *E* and also take the place of said ring to make contact in the socket. The spring *F* in this case is attached to interior cylinder *R*, and is spring-pressed against cylinder *S*, but insulated therefrom by a paper film, as in the former case.

"The device which I have thus described forms a neat and effective cut-out for a series lamp by making but a slight change in the lamp as at present constructed, and, if necessary, no change whatever."

And claim 5 broadly claims this combination in terms that seem to read clearly on the device of Jones.

The complete lamp contemplated by Wirt consists of three parts, each distinct and separable from the other two—first, the ordinary incandescent bulb carrying a filament; second, the independent piece containing the cut-out; and, third, the socket containing the line-closer. In other words, he divided the socket into two parts, an upper and a lower, each part having a distinct function. One part receives the current and carries the line-closer; the other part transmits the current and carries the cut-out. The cut-out is put in the independent part, and being thus detached from the base of the bulb is saved for further use when the bulb is scrapped. And the line-closer is put in the other part of the old socket, for the Thomson device had shown the danger and inconvenience of assembling the line-closer and the cut-out in the same member. The cut-out was put in a new member, and this was separable both from the bulb and from the other part of the socket.

It is true that this suggestion did not bear commercial fruit, and Wirt himself (being now in the plaintiff's employ) depreciated this form of his own device. But the fact seems to be this: The new member was unsatisfactory, not because it was independent, or intermediate, but for other reasons. It was small, and it was not insulated; sometimes it would bind, and removing it was then inconvenient and dangerous, while similar objections attended the replacing of a film. And it was of metal, a conductor of current, but of course there would be no invention in substituting porcelain or some other nonconductor. Jones uses porcelain for the second and third members of his combination, and no doubt this is a beneficial change; but it does not rise to the dignity of invention, the function of the member remaining the same—to say nothing of the prior use of porcelain in the art. Now, although Wirt testified that his intention was to make the independent or intermediate member "a permanent part of the lamp," to be screwed upon the base "never to be divorced therefrom while the lamp remained usable," the patent contains no such statement, but, on the contrary, refers to the

separableness of that member, and shows a separable construction. As it seems to us, the situation is plain enough; for the first time Wirt disclosed a three-part structure, the function of each part being independent, and the position of the cut-out being in the new member.

This brings us to the patented device in suit, which has been manufactured and sold since 1901, and has had a considerable commercial success. It has been in strong hands, and this may have had something to do with its increasing sale. No doubt, also, its success has been helped by the growing use of the incandescent series, due at least in part to the successful employment of current regulators about 1900, and to the general use of the tungsten filament since 1910. But its success is probably due in part also to its own merits, and we do not wish to depreciate it. In our opinion, however, it is not entitled to the commanding place in the art that is claimed for it. It is a three-part device, and its scope will appear in the following paragraphs from the specification:

"My invention relates to sockets for incandescent lamps, and especially those used in series incandescent lighting. In such a system it is necessary to provide some means for keeping the circuit closed in case a lamp burns out or is removed from its receptacle. Moreover, it is highly desirable to provide such an arrangement of contacts that there will be no danger of an arc when one removes the socket from the receptacle. These objects I accomplish by the invention which forms the subject of the present application. I provide a receptacle with spring-contacts which remain closed until the spring-contacts on a lamp socket are thrust in between them. The lamp-contacts are normally separated by a piece of insulation of low dielectric strength, so that it will break down and shunt the lamp in case the lamp-filament breaks or burns out. The spring-contacts on the lamp-socket are so arranged that when the socket is withdrawn from the receptacle said springs remain in engagement with those on the receptacle until after the latter have closed together, thus preventing the formation of an arc.

"The receptacle is composed of a disk *A* of insulating material, such as porcelain, having a central hole *a* and oppositely-arranged grooves *a'* running from said hole toward the edge of the disk. In each groove is received one end of a flat metal spring-contact *B*, which is fastened by a screw *C* and has also a screw *D*, provided with a nut *d* for attaching the line-wire terminals. Each spring has a bead *b* and an inclined end *B'*, said ends being normally in contact when no lamp is in circuit, as shown in Fig. 3.

"The lamp-socket *E*, of porcelain or the like, contains the usual contacts *e e'* for the lamp-terminals, each in electrical connection with a flat metal spring *F* projecting from the bottom of the socket. Each spring has a bead *f* and an inclined end *f'*, said ends clamping between them a flat piece of insulation *G*, such as paper, silk, or the like. The bottom of the socket has a protecting washer *H*, of rubber or the like, to keep the socket from chipping when it is pushed against the receptacle.

"When the lamp-socket is out of the receptacle, the spring-contacts *B* automatically keep the circuit closed. When a lamp *I* is to be cut into the circuit, it is inserted into the socket *E*, whose springs *F* are then thrust in between the springs *B*, making firm contact therewith before the ends *b'* of the spring are separated. When the socket has been pushed home, the beads *b* lie in the beads *f*, and not only securely retain the socket in place, but make a good electrical connection between the line-terminals and the lamp-terminals, the ends *b'* of the spring *B* being widely separated, as shown in Fig. 5. The insulation *G* prevents any short-circuiting of the lamp.

"If the lamp-filament breaks or burns out the current breaks down the insulation *G* and closes the circuit between the springs *F*. When the lineman removes the socket to replace the insulation cut-out, the springs *B* come together before the springs *F* have separated from them, as indicated by the

dotted lines in Fig. 3, so that no dangerous arc can form, nor is the lineman in danger of getting a shock from the line. A further protection is afforded by the fact that the contacts are entirely hidden when the socket is in place. Moreover, since the socket must be completely removed before the cut-out G can be renewed, all liability of a short circuit through the lineman is avoided."

Fig. 3

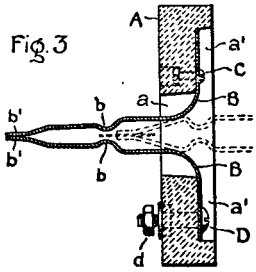


Fig. 4.

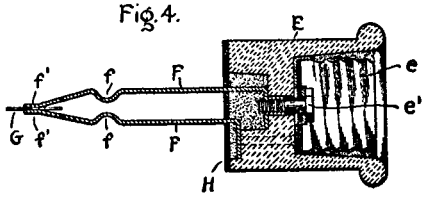
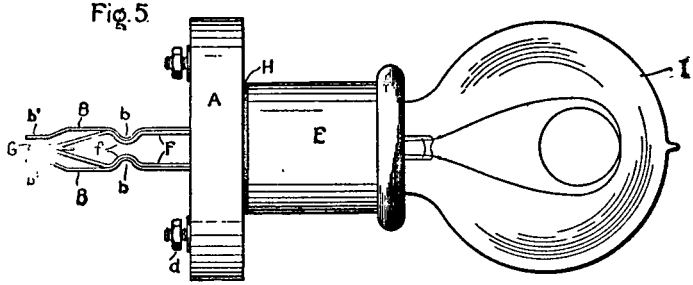


Fig. 5.



Only one of the eight claims is in issue:

"In series incandescent lighting, a receptacle having automatic line-closing contacts, and a lamp-socket adapted to receive an ordinary incandescent lamp therein and carrying co-operating contacts normally separated by insulation of low dielectric value."

This claims broadly a three-part device, namely: (1) An ordinary incandescent bulb; (2) a member containing a line-closer; and (3) a member containing a cut-out. It is the breadth of this claim that is objectionable, and in view of Wirt, we think it cannot be sustained. Indeed, the indebtedness of Jones to the older patents lies on the surface. He is indebted to Wightman and Lemp for the excellent, beaded, prong-like springs, used in his line-closer, and also in his cut-out. His socket is an ordinary Edison socket with screw shell and center-contacts, and is held in place by the Wightman prongs. The socket-piece is thrust into the third or receptacle piece by a straight push inward just as a lamp is thrust into the Wightman socket; and a bulb is screwed into the shell of the Jones socket just as an Edison bulb is always inserted. His line-closer is where Thomson put it; he arranges it as Wightman and Giovanni suggested; his third member comes from Wirt, and contains the cut-out; and he makes the whole device comparatively safe by the free use of porcelain as an insulating material. We refrain from going into the particular device, and we intimate no opinion concerning

the other seven claims. All we are called upon to decide is that the first claim is too broad to be sustained, and must therefore be declared invalid.

We have had some difficulty in following the arguments, owing to the different, and sometimes the confusing, meanings that have been given to the terms "socket," "receptacle," and "intermediate part"; and for this reason we have avoided the use of "receptacle," and have tried always to apply the same word to the same part.

The decree is affirmed.

KEUFFEL & ESSER CO. v. EUGENE DIETZGEN CO.

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

No. 172.

PATENTS ⟸328—VALIDITY AND INFRINGEMENT—FOUNTAIN LETTERING PEN. The Payzant patent, No. 758,381, for a fountain lettering pen, claim 2, *held* valid and infringed.

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

Suit in equity by the Keuffel & Esser Company against the Eugene Dietzgen Company. Decree for complainant, and defendant appeals. Affirmed.

This cause comes here upon appeal from a decree in favor of complainant. The suit is the usual one in equity for infringement of patent. The patent sued on is No. 758,381 granted April 26, 1904, to Octave Payzant for a fountain lettering pen. The only claim involved in this appeal is the second which reads:

"A pen with rigid nibs which terminate in a circular plane marking surface, said circular plane marking surface being beveled to an angle of 45 degrees with the longitudinal axis of the pen."

The opinion of Judge Augustus N. Hand in the District Court is as follows:

This is a suit for infringement of United States letters patent No. 758,381. Complainant's invention is a very simple one and relates to lettering or marking pens. The claims under consideration are the following:

"1. A pen with nibs which are each semi-circular in shape on its transverse section at the point, the said nibs terminating in a marking surface which is a circular plane.

"2. A pen with rigid nibs which terminate in a circular plane marking surface, said circular plane marking surface being beveled to an angle of 45 degrees with the longitudinal axis of the pen."

The pen described in the foregoing claims is designed to hold a large volume of ink and to make wide lines of uniform width in any direction. The pen described in each of the foregoing claims contains a new and useful combination of elements which I do not find disclosed in the prior art. In the references presented by the defendant I see nowhere a pen with nibs terminating in a marking surface "which is a circular plane." I think the complainant's device shows invention and it has evidently met with some commercial success. I am doubtful whether claim 1 is not so broad that it should be properly limited to the pen described in detail in the specification. If this were done, claim 1 as so limited would be practically identical with claim 2. It is, however, unimportant for me to decide this, as I am of the opinion that claim 2 shows a valid combination and is infringed by all of defendant's devices. Defendant's devices all consist of a pen with rigid nibs which terminate in a

circular plane marking surface, which plane marking surface is at an angle of substantially 45 degrees with the longitudinal axis of the pen.

The defendant's argument that the marking surface cannot be circular because there is a separation of the nibs to allow the ink to flow is too technical to be supported. Only the slightest space is necessary to permit the passage of ink, and the marking surface appears to be circular, and is substantially, even if not theoretically, so. The defendant's device may not be strictly beveled, but the defendant has employed an equivalent of beveling by changing the angle of the shank of which the marking surface of its pens form the extremity.

My decision is that the patent is valid as to claim 2 and all of defendant's devices which were put in evidence infringe it as to such claim. A decree should follow for an injunction and accounting.

H. S. Mackaye, of New York City, for appellant.

Baird, Cox, Kent & Campbell, of New York City (Clarence G. Campbell, of New York City, of counsel), for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. The art is a crowded one, but we think Judge Hand was correct in holding that it does not contain, prior to Payzant, the combination of the three elements specified in the second claim, viz.: (1) Nibs which are rigid, (2) and which terminate in a circular plane, (3) which plane is beveled to an angle of 45 degrees with the axis of the pen. One or more of these may be found in earlier patents, but no earlier patent shows all three.

The evidence introduced to show commercial success does not indicate very large sales; but evidently the pen is of use only to draughtsmen and approval by its user would be evidenced by a smaller number of total sales than if it were, like the ordinary fountain or stylographic pen, an article in common use. Enough sales are proved to show that draughtsmen in considerable numbers buy and use it.

Infringement by the exhibit marked in evidence and concededly of defendant's manufacture seems to us quite plain.

The decree is affirmed, with costs.

SHERMAN et al. v. H. P. MARINELLI, Limited, et al.

(District Court, S. D. New York. April 22, 1916.)

No. 12-397.

PATENTS ⇐328—VALIDITY AND INFRINGEMENT—THEATRICAL APPLIANCE.

The Sherman & Sherman patent, No. 700,381, for a theatrical appliance for producing dissolving views and transformation scenes on the stage, was not anticipated, discloses invention, and is not limited to the precise features and arrangement shown in the drawings, but is entitled to a reasonably broad construction. Claims 1 and 2 *held* infringed.

In Equity. Suit by John W. Sherman, and Julia Louise Sherman against H. P. Marinelli, Limited, the United Booking Offices of America, and L. Auerbach. On final hearing. Decree for complainants.

Samuel E. Darby, of New York City, for complainants.

Munn & Munn, of New York City (T. Hart Anderson, of New York City, of counsel), for defendants.

HAZEL, District Judge. This is a bill in equity for infringement of letters patent No. 700,381, granted to John W. Sherman and Julia Louise Sherman, May 20, 1902, for improvements in theatrical appliances for producing the combination of an optical and an illusory effect on the stage. The object of the patentee was to provide an appliance—

"whereby dissolving views, transformation scenes, and other spectacular displays and illusions may be presented upon the stage in connection with or separately from suitable theatrical performances, representations, or pantomines."

The elements of the invention are a reflecting screen used in connection with a compartment or cabinet at the side of the stage to disclose to the audience objects or images within the cabinet or compartment thus producing an illusory effect, and a transparent screen used in connection with lights positioned and controlled in such a way as to disclose to the audience persons or objects behind the screen, thus producing an optical effect. Claims 1, 2, and 5 are alleged to be infringed, but it will suffice to set forth the first and second.

"1. In a theatrical appliance of the class described, a transparent reflecting screen arranged upon the stage at an angle with the plane of the front of the stage, said transparent reflecting screen being provided with a foraminous backing, a compartment arranged at one side of said screen, lighting means for said compartment, lighting means arranged rearwardly of said screen, and controlling means whereby the lighting means for said compartment and the lighting means rearwardly of said screen may be varied in relative power.

"2. In a theatrical appliance of the class described, a transparent screen arranged vertically upon the stage at an angle with the plane of the front of the stage, said screen being provided with a foraminous backing, lighting means arranged rearwardly of said screen, and controlling means whereby said lighting means forwardly of said screen and said lighting means rearwardly of said screen may be varied in relative power."

The validity of the patent is uncontroverted, the defendants contending that the claims are narrow and limited to specific features for achieving the result, and that infringement is not proven.

The patentees, however, did not limit themselves as to details of construction, and, indeed, expressly reserved the right to vary or modify them and their arrangement in combination. The prior art makes no disclosures requiring this court to restrict or limit the patent in suit to the precise features and arrangement shown in the drawings attached to the specification. It is true that optical and illusory effects had previously been produced on the stage by means of apparatus and appliances, but I think the evidence shows that the claims in suit disclose a new and novel combination for obtaining such results.

The patent to Bruce, No. 15,192, dated 1886, specifies means for working dissolving view effects. It required two screens, one on the stage, and one underneath the stage, with an opening in the stage floor; the picture or image first appearing on the screen below the stage and then being reflected by means of a glass sheet to the other screen placed at a certain angle to create the appearance of the picture in relief. Such adaptation was considered objectionable, because of the necessity of placing one of the screens under the stage, and also be-

cause the opening in the stage floor was visible to spectators in the gallery.

In the patent to Pepper & Walker, No. 221,605, dated 1879, the illusion was produced by automatically sliding a mirror diagonally across the cabinet, thus shutting one image or object from view and reflecting another. The invention centered around an improved graduated mirror having on its back a series of etched vertical lines, which enabled revealing or obscuring an object gradually, instead of abruptly, as was the case where the mirror was ungraduated. Such adaptation manifestly is wholly unlike complainants' and fails to achieve its result.

Neither of the specified patents are anticipatory of the patent in suit. They do not embody all the elements entering into the combination, nor do they come close enough to require limiting the patent to its precise features. Hence the patentees are entitled to a reasonable construction, and one that will fairly protect them from unlawful appropriations.

As to infringement: In defendants' production the various elements of the combination in suit are, I think, used to perform the same function in substantially the same way as in complainants'. The precise arrangement of the material elements, it is true, is not followed, but the same result is achieved by the use of similar elements. The rule announced by the Supreme Court of the United States in Machine Co. v. Murphy, 97 U. S. 120, 24 L. Ed. 935, would seem to apply to the facts under discussion:

"In determining the question of infringement, the court or jury, as the case may be, are not to judge about similarities or differences by the names of things, but are to look at the machines or their several devices or elements in the light of what they do, or what office or function they perform, and how they perform it, and to find that one thing is substantially the same as another, if it performs substantially the same function in substantially the same way to obtain the same result, always bearing in mind that devices in a patented machine are different in the sense of the patent law, when they perform different functions or in a different way, or produce a substantially different result."

In their adaptation defendants use a reflecting screen arranged on the stage at an angle to the plane of the front of the stage, and though such arrangement is at a different angle from patentees', as the purpose was the same, that is, to reflect an object placed out of sight of the audience, I think said arrangement comes within the scope of the claims. Nor does the cotton screen used by defendants perform a different function from the foraminous backing of the patent in suit; both being used either to increase the reflective power of the transparent screen and prevent the audience from observing the back of the stage, or, if desired, to increase its transparency in order to disclose objects behind it. Moreover, the space in the flies or wings above or at one side of the reflecting medium, and containing a bright light to illuminate the object reflected, and not visible to the audience, is, I doubt not, the equivalent of complainant's compartment or cabinet. The scenic panel above the transparent screen, with the drop and curtain abutting the screen, easily constitute an arrangement corre-

sponding to the compartment or cabinet in question, and perform the same function. So, also, I think that the spot light used by defendants, with the assistance of a moving picture machine to reflect an object or figure on the screen, obliterating wholly or in part the reflection from the scenic panel, is merely another way of controlling the illumination and bringing into view the objects or images back of the screen.

Upon careful review of the evidence, it is my opinion that the several elements used by the defendants are substantially the same as those used by complainants, and are positioned in a similar way, and therefore their adaptation constitutes an unlawful appropriation.

I sustain the first and second claims, and complainant may enter a decree, with costs.

TOWLE v. GREAT SHOSHONE & TWIN FALLS WATER POWER CO.

(District Court, D. Idaho, S. D. May 1, 1916.)

1. CORPORATIONS ⟸566(1)—INSOLVENCY—PREFERRED CLAIMS—RIGHTS OF SURETY.

A surety on the supersedeas bond of a public service corporation, having been held liable, is not generally to be deemed a preferred creditor in event of insolvency of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2283; Dec. Dig. ⟸566(1).]

2. CORPORATIONS ⟸566(1)—INSOLVENCY—PREFERRED CLAIM—APPEAL BOND.

Where, at the time judgment was recovered against a public service corporation, it was apparently solvent and might have satisfied the same, a surety on a supersedeas bond, which enabled the corporation to appeal without execution being levied on its property is not, on subsequent insolvency, entitled to be preferred to other creditors, on the theory that the giving of the bond enabled the corporation to continue as a going concern.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2283; Dec. Dig. ⟸566(1).]

3. CORPORATIONS ⟸566(1)—PREFERRED CLAIMS—RIGHT OF SURETY—PREFERENCE.

Defendant purchased from another public service corporation an electric line, which, owing to negligent methods of construction, ignited a barn. The contract of purchase provided for payment of part cash, and the balance from month to month out of the income. After the fire, defendant desiring to appeal from an adverse judgment, petitioner became surety on its supersedeas bond. Judgment against defendant being affirmed, petitioner was compelled to satisfy the same. Rev. Codes Idaho, § 2769, as amended in 1909 (Laws 1909, p. 163) gives corporations the power to hold such real and personal estate as may be required for their corporate purposes and to sell, assign, transfer, mortgage, etc., real or personal property of the corporation. Const. Idaho, art. 11, § 15, declares that the Legislature shall not pass any law permitting the leasing or alienation of any franchise, so as to relieve the franchise or property held thereunder from any of the liabilities of the lessor or grantor, lessee or grantee, contracted or incurred in the operation or use of the franchise or its privilege. After the fire and including the period of receivership, defendant's income from the system purchased aggregated considerably more than the amount petitioner was compelled to pay. *Held* that, as the owner of the burned barn might have proceeded against the public

service corporation which sold the property, it is inequitable that other creditors of defendant have the benefit of income received from the property without paying the amount of such judgment; hence, there being proceeds of property acquired from the first public service corporation in the hands of a receiver, petitioner is entitled to priority therein.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2283; Dec. Dig. ⟸566(1).]

In Equity. Suit by Guy I. Towle against the Great Shoshone & Twin Falls Water Power Company, in which the Boise Title & Trust Company petitioned for allowance of a preferred claim. Petition granted.

S. H. Hays, of Boise, Idaho, for petitioner.

Wyman & Wyman, of Boise, Idaho, for certain creditors.

DIETRICH, District Judge. A petition is presented by the Boise Title & Trust Company in a creditors' suit brought against the judgment debtor for the purpose of administering its insolvent estate and applying the proceeds thereof to the payment of its debts. Concurrently with the creditors' suit a foreclosure suit has been prosecuted by the trustee for the bondholders, and under the decree therein all of the property of the judgment debtor has been forclosed upon and sold, but final distribution of the proceeds of the sale has not yet been made. The petitioner is an Idaho corporation, having, among other powers, that of becoming surety for litigants upon appeal and supersedeas bonds. Upon April 24, 1914, in one of the state courts, a judgment was entered against the defendant company in favor of one Newman for $1,079.80 as damages for the destruction of certain property as the result of faulty construction of an electric transmission line. The line had been installed by a company known as the Shoshone Light & Water Company, but at the time of the fire it was being operated by the defendant under a contract by which it was given possession of, and was to purchase, the system of which the line was a part. Newman having threatened to issue execution, the defendant sued out an appeal to the Supreme Court of the state, and in that connection the applicant, upon the request of the defendant, and presumably for a valuable consideration, executed an appeal and supersedeas bond. The judgment has been affirmed, and the applicant now prays that the receiver be required to satisfy it. The prayer is opposed by the receiver and certain creditors of the estate, secured and unsecured.

The disposition of the petition involves two questions: (1) Is there a rule or principle by which a surety for a public service corporation is generally to be deemed to be a preferred creditor in case of its insolvency? And (2) if there is no such general rule, are the circumstances here exceptional and of such character as to warrant the relief prayed for?

[1] The first question it is thought must be answered in the negative. While in the few and conflicting cases upon the subject some support may be found for the affirmative, the weight of both authority and reason is in my judgment against such a rule. In what the petitioner puts forth as the leading case upon the subject, Union Trust Co. v. Morrison, 125 U. S. 591, 8 Sup. Ct. 1004, 31 L. Ed. 825, the

conclusion reached was the result of what were deemed to be exceptional circumstances widely differing from those here involved. In Jones v. Central Trust Co., 73 Fed. 568, 19 C. C. A. 569 (6th C. C. A.), the syllabus fairly states the facts:

"Certain property of the railroad company, which was covered by mortgages, was attached by a creditor who had secured a judgment against the company. Thereupon, in order to preserve the unity of the property and keep the railroad a going concern, the trustee in the mortgages caused such property to be replevined and bonds to be given, with sureties, for the return of the property, or for the payment of its value, if adjudged to be subject to the attachment. The property was ultimately adjudged to be so subject, but, in consequence of its having been taken into possession by a receiver appointed in a foreclosure suit instituted by the trustee, it was impossible for the sureties on the replevin bonds to return the property, and executions were directed to issue against them for its value."

Under these circumstances it was held that it was proper to direct the receiver to pay the claim in preference to the mortgage lien. The facts were not closely analogous to those in the instant case, and in the light of the later decision of the same court in Whiteley v. Central Trust Company of New York, 76 Fed. 74, 22 C. C. A. 67, 34 L. R. A. 303, manifestly the inference cannot properly be drawn that the court intended to establish or recognize the general rule under consideration. In the Whiteley Case Judge Lurton analyzes the Morrison Case, and, after considering the question at length, reaches the conclusion that a surety upon a supersedeas bond given by a railroad company while apparently solvent and not in default, if compelled, after the insolvency of the company, to pay the judgment appealed from, is not entitled to be repaid from the proceeds of the property of the company in preference to the mortgagee thereof. This conclusion is clearly supported by the decision of Justice Brewer while sitting as Circuit Judge in the case of Blair v. Railroad Co. (C. C.) 23 Fed. 522, and by the more elaborate opinion of Judge Jenkins in Farmers' Loan & Trust Co. v. N. P. R. Co. (C. C.) 68 Fed. 36.

The decision rendered by Judge Hanford of the Washington district in the Farmers' Loan & Trust Company Case (C. C.) 71 Fed. 245, strongly tends to support the petitioner's contention, but the ultimate conclusion there largely, if not entirely, rests upon the assumption that the primary obligation, the enforcement of which was stayed by the bond under consideration, was of a preferential character, and I entertain no doubt that, if the primary obligation is of such character, a surety who pays the same may claim preference under the principle of subrogation. Judge Hanford's view was that a claim for personal injury arising out of the operation of a railroad is of a preferential character, and while I have very strong sympathy with that view, the established rule in this jurisdiction is to the contrary. In Farmers' Loan & Trust Co. v. Watts, Intervener (C. C.) 74 Fed. 431, there is an expression of dissent by Judge Gilbert from Judge Hanford's reasoning, followed with the suggestion that his conclusion could be sustained upon other grounds. The question here under consideration was not before Judge Gilbert, and the remark referred to was made merely for the purpose of distinguishing Judge Hanford's decision. While

an extract quoted in petitioner's brief from Gay v. Hudson River Co. (C. C.) 182 Fed. 904, tends in a general way to support its view, the preference sought in that case was denied, and the substantial reasoning of the opinion militates strongly against the petitioner. The reasoning is so pertinent to the facts here that I quote somewhat at length:

"When the bond was executed and delivered, the Hudson River Electric Power Company, so far as appears, was doing business in the usual way and was apparently solvent. No execution had been issued, and no property had been levied upon, and the corporation was not in default in the payment of its interest or current expenses so far as appears. The mortgage bondholders had no right to possess themselves of the mortgaged property or to interfere with the operations of the corporation at that time. It is probably true that an execution would have been issued and a levy made if the judgment had not been paid or the bond given; but, as already stated, it is not charged that the corporation did not at the time have money properly applicable thereto with which to pay the judgment, which was for damages for negligence, and not an ordinary operating expense. Of course, the negligence was in operating the business and gave rise to the cause of action, and in such sense was an operating liability. But still there is no allegation that current earnings, which should or which might have been used to pay this liability, were diverted to the purchase of property which has gone under the lien of the mortgage, or to the permanent improvement of such property, or in reduction of the bonded debt. Suppose the claim sued upon had been for property purchased and used in the business of the corporation generally, for repairs, changes, and operation, and defense had been made, judgment rendered against the corporation, and a bond given to stay execution on appeal, and the judgment affirmed and payment made by the sureties. Would the sureties be entitled to a preference over the mortgage bondholders? I think not. There would be no more equity in such case than in most cases where litigation is had, judgment obtained, and bonds given to stay execution, which judgments the sureties are compelled to pay if the principal does not."

Of like import is the case of Pennsylvania Steel Co. v. New York City R. R. Co., etc. (C. C.) 165 Fed. 485. I quote from the syllabus:

"The surety on supersedeas bonds given by a street railroad company on appeals from judgments against it, which has been compelled to pay such judgments on their affirmance after the insolvency of the company, is not entitled to rank as a preferred creditor in the insolvency proceedings against the company with creditors having claims for supplies furnished to keep the road in operation."

No other cases have been called to my attention. It would be an extremely dangerous doctrine, and would render the securities of public service corporations most precarious, if the mortgagor could, by permitting suit to be brought and judgment obtained against it, and then taking an appeal and furnishing a supersedeas bond, give priority over the bonds to an indebtedness which otherwise has no substantial features of a preferential claim.

[2] Are the circumstances such as to make the claim exceptional and to warrant its payment in preference to other claims? The petitioner lays great stress upon the contention that the bond was given to protect and preserve the property of the company and to enable it to continue as a going concern. But as pointed out by Judge Ray in the Gay Case, the company here was apparently solvent at the time the judgment was entered, and could, if it saw fit so to do, have paid the claim. The assistance of the petitioner was therefore not neces-

sary to enable it to preserve the unity of its property, or to continue as a going concern, or to perform its obligations to the public. Apparently it was doing business in the usual way and was solvent. No execution had been issued, and no property had been levied on, and it was not in default in the payment of its interest or current expenses. It is altogether probable that an execution would have been issued and a levy made, had the company failed to pay the judgment or give a supersedeas bond; but that fact establishes no strong equities in favor of the petitioner. In the argument it was stated, and not denied, that the petitioner was in the business of furnishing bonds for a consideration, and therefore it is to be assumed that it was paid the ordinary charge for such a bond. Suppose that, instead of taking an appeal and furnishing a supersedeas bond, the judgment debtor had applied to a bank for a loan, and with the money thus secured had satisfied the judgment, the substantial equities in favor of the bank would, to say the least, be quite as strong as those in favor of the petitioner here, but in no view of the law could it for such reason alone be recognized as a preferred creditor.

[3] In another aspect of the case, however, the petitioner's claim is quite distinctive. As already suggested, the electric line by which the fire was caused was constructed by the Shoshone Light & Water Company. It appears that the line passed diagonally across block 40 in the village of Shoshone, and across Newman's property, and that, instead of erecting suitable poles, the company, in violation of Newman's rights and without his knowledge or permission, attached the wires to his corrugated iron barn, and in such a manner that as they swayed back and forth they came into contact with the iron, and as a result combustible material in the barn was ignited. As further suggested, at the time of the fire the judgment debtor had possession of the system by permission of the Shoshone Light & Water Company under a contract to purchase. By the terms of that contract it paid a certain amount in cash and the balance was to be paid from month to month out of the income arising from the operation of the system. Among other things it is stipulated:

"That the property of said Shoshone Light & Water Company was acquired by the Great Shoshone & Twin Falls Water Power Company out of the income from said property, payments being made each month, an amount in excess of the claim of the petitioner having been paid in this way prior to the execution of said bond, and a large amount in excess of petitioner's claim having been paid subsequent to the execution of said bond and before the appointment of a receiver herein, and that since the receivership herein the receiver has paid out of the income of said property on account of the purchase price therefor a sum in excess of $7,000."

Now it is clear, I think, that under the averments of Newman's complaint he had a right of action against the Shoshone Light & Water Company, as well as against the Great Shoshone & Twin Falls Water Power Company. He charged both the negligent construction and the negligent operation of the system, and for the negligent construction the Shoshone Light & Water Company alone was responsible. Whether under a more or less generally recognized principle, whereby

the lessor of a public utility is held responsible to the public for the negligent operation thereof by its lessee, the Shoshone Light & Water Company is legally chargeable with the negligence of the Great Shoshone Company in operating the system, it is unnecessary to inquire. Certain it is that there is a very close connection between the two companies in their relation to the accident, for substantially the only negligence charged against the Great Shoshone Company is the continued maintenance and operation of the line in the improper condition in which it was constructed.

Section 2769 of the Revised Codes of Idaho, as amended in 1909 (Session Laws 1909, p. 163), purports to confer upon corporations the power—

"to purchase and hold such real and personal estate as the purposes of the corporation may require, not exceeding the amount limited by this title, and to sell, lease, assign, transfer, mortgage, or convey, any rights, privileges, franchises, real or personal property of the corporation, other than its franchises of being a corporation; and to purchase, own, vote, sell or hypothecate the stock and bonds of other corporations."

But this provision must be read in the light of the limitations contained in section 15 of article 11 of the Constitution of the state, which declares that:

"The Legislature shall not pass any law permitting the leasing or alienation of any franchise so as to release or relieve the franchise or property held thereunder from any of the liabilities of the lessor or grantor, or lessee or grantee, contracted or incurred in the operation, or use or enjoyment of the franchise or any of its privileges."

Now it is by virtue only of the "after-acquired property" clause of the trust deed which has been foreclosed that the trustee and the bondholders acquired any lien upon the system thus purchased from the Shoshone Light & Water Company, and it is elementary that under such a mortgage provision the lien of the mortgagee attaches, subject to all valid claims against the property at the time the title thereto passes to the mortgagor. If, as he had a right to do, Newman had sued the Shoshone Light & Water Company alone, or had joined it with the Great Shoshone Company as codefendant, and had secured judgment against it, manifestly it could not, by transferring its property, have put it beyond his reach; he could have pursued it and insisted upon its application to the payment of his judgment. In so far as the Great Shoshone Company is concerned, doubtless the claim must be regarded as in every real sense an expense incident to the operation of the system. Certainly, in determining the net result of operation and in computing the net income, expenses of this character must be deducted from the gross income. But here we find that, instead of applying the income to the payment of this claim, a large part thereof has been devoted to the purchase price of the property, and now the property thus acquired and paid for has been sold for the purpose of discharging the bonds. As against Newman, and, for that reason alone, as against the petitioner here also, it would seem to be highly inequitable that the bondholders should thus receive the

proceeds of the property without first paying an obligation incurred by the mortgagor in operating it, for the purpose of procuring the very funds by which it was to be acquired and made available to the bondholders. In view of these considerations, I think that, even if the court were not legally bound, it would be strongly constrained by the equities, to recognize this claim as being superior to that of the bondholders, in so far as the proceeds of the sale of this property is concerned. But, however that may be, the execution and the placing in escrow of the deed by the Light & Water Company after it had negligently constructed the line, and the delivery of such deed to the Great Shoshone Company after the accident, could not, in the face of the constitutional provision above quoted, operate to defeat Newman's right to pursue the property conveyed and require that it first be devoted to the satisfaction of his claim. Seymour v. Boise R. Co., 24 Idaho, 7, 132 Pac. 427.

In giving the concrete relief warranted by this view, some difficulty is encountered by reason of the fact that the property thus acquired was sold, together with all other properties belonging to the judgment debtor, as a unit, and hence there is no way of ascertaining the amount which it brought. However, a part of the property purchased from the Shoshone Light & Water Company was the village water system, and this was later resold to the village by the Great Shoshone Company; the sale having been fully consummated since the appointment of the receiver. The receiver has now been paid in full by the village on account of the purchase price, and he now holds an amount greatly in excess of the claim. I see no reason why it should not be paid out of this fund.

Counsel for the petitioner may prepare an order directing the receiver to pay the full amount of the Newman judgment out of the funds in his hands received from the village of Shoshone.

WILLIAMS v. BRADY et al.

(District Court, D. New Jersey. April 7, 1916.)

1. BANKS AND BANKING ⟸253—NATIONAL BANKS—LIABILITY OF DIRECTORS.
There is a liability on the part of national bank directors for failure to perform the duties which the general principles of the law cast upon them when they become directors, distinct from and in addition to the duties and liabilities expressly imposed by the statutes.
[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 944–949; Dec. Dig. ⟸253.]

2. BANKS AND BANKING ⟸253—NATIONAL BANKS—SUIT AGAINST DIRECTORS.
The directors of a national bank are severally liable for the failure to perform their official duties, and a suit by a receiver may be brought against one, all, or any number of them.
[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 944–949; Dec. Dig. ⟸253.]

3. ABATEMENT AND REVIVAL ⟸52—ACTION AGAINST DIRECTOR OF NATIONAL BANK—SURVIVAL.
An action against a national bank director, whether based on the common law or Rev. St. § 5239 (Comp. St. 1913, § 9831), survives against his personal representatives.
[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 248–254; Dec. Dig. ⟸52.]

4. BANKS AND BANKING ⟸254—NATIONAL BANKS—SUIT AGAINST DIRECTORS —SUFFICIENCY OF BILL.
The bill in a suit by the receiver of a national bank against its directors *held* to sufficiently charge a breach of their common-law duty on the part of certain defendants by setting out their continued failure and refusal to attend meetings of the directors at which action was taken resulting in losses to the bank.
[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 950–957; Dec. Dig. ⟸254.]

In Equity. Suit by Christopher L. Williams, as receiver of the First National Bank of Bayonne, against Bernard Brady and others. On motions to dismiss amended bill, for bill of particulars, and to stay the suit. Motions denied.

Stuart G. Gibboney and George M. Burditt, both of New York City, for plaintiff.

McCarter & English, of Newark, N. J., for defendants Donahoe, Zabriskie, Bennett, and Grover.

Robert S. Hudspeth, of Jersey City, N. J., for defendant Brady.

Elmer W. Demarest, of Jersey City, N. J., for defendant Elsworth.

Merritt Lane, of Jersey City, N. J., for defendants Lazarus and Young.

Pierre P. Garven, of Jersey City, N. J., for defendants Vreeland, Gifford, Ryer, and Eggleston.

Gaede & Gaede, of Hoboken, N. J., for defendant Coward.

John H. Palmer, of Suffolk, Va., for defendant Fuller.

HAIGHT, District Judge. These are motions to dismiss the amended bill of complaint, for a bill of particulars, and to stay the suit. The same motions, addressed to the original bill and based on substantially

the same grounds, were heretofore heard by Judge Hunt. After exhaustive argument and careful consideration he denied them, but determined that the original bill was insufficient in two respects, and struck out those portions. 221 Fed. 118. He, however, granted the plaintiff the privilege of amending. As I stated at the argument, I consider the rulings of Judge Hunt, in so far as applicable to the present motions, binding upon me, at least at this time. I shall therefore consider only such questions as apparently were not passed upon by Judge Hunt, and those which relate to the matters which he considered insufficiently charged in the original bill. The motion to strike out the entire bill, upon the grounds that it is prematurely brought, does not state a cause of action, is vague and uncertain, and is multifarious, will be denied, as will also the motion for a stay and a bill of particulars, the latter without prejudice, because all of the questions thus presented were passed upon by Judge Hunt.

[1] 1. It is now urged, apparently for the first time, that the defendants are liable only by virtue of section 5239 of the Revised Statutes (Comp. St. 1913, § 9831); in other words, that there is no common-law liability of a director of a national bank, and that consequently all portions of the bill which seek to charge the defendants with liability for acts or omissions which are not specific violations of the provisions of the statutes relating to national banks, must be stricken out. This question is probably covered by Judge Hunt's ruling, because the original bill contained many averments of dereliction of duty which were not violations of such statutes. However, as it does not appear to have been specifically presented to or decided by him, I will consider it. The proposition seems to be based upon counsel's conception of what was held and said by the Supreme Court in Yates v. Jones National Bank, 206 U. S. 158, 27 Sup. Ct. 638, 51 L. Ed. 1002. I cannot gather anything from the opinion in that case which would warrant such a construction, but, on the other hand, it appears to me very clear that the court recognized that there is a liability on the part of national bank directors for failure to perform the duty which the general principles of the law cast upon them when they become directors, distinct from and in addition to the duties and liabilities imposed by the statutes. It was said by Chief Justice White (206 U. S. 178, 27 Sup. Ct. 645, 51 L. Ed. 1002):

"In other words, as the statute does not relieve the directors from the common-law duty to be honest and diligent, the oath exacted responds to such requirements."

That case simply decided that the National Bank Act (Act June 3, 1864, c. 106, 13 Stat. 99) imposes upon directors of national banks duties which did not rest upon them at common law, and that section 5239 affords the exclusive rule by which to measure the right to recover damages, based upon a loss resulting solely from the violation of such duties. The same question as is here presented was raised in Allen v. Luke, 163 Fed. 1018 (C. C. Mass.), and was decided adversely to defendants' contention; Judge Lowell entertaining the same view of Yates v. Jones National as is here expressed. That there exists a

liability on the part of national bank directors for failure to perform the duty imposed upon them by the general principles of the law, irrespective of the statute, is, I think, also clear from Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662, where the measure of such duty is defined. See, also, Rankin v. Cooper, 149 Fed. 1010 (C. C. W. D. Ark.).

[2] 2. It is also urged that there is a fatal nonjoinder, because the personal representatives of one who is alleged in the bill to have been a director, and who has since died, is not made a party. The argument in support of this contention is that, as the plaintiff has attempted to charge the directors collectively and has elected to sue all together instead of separately, his failure to join one of the directors takes from the others their right of contribution from him, should they be held liable. No authority is cited, nor is the reasoning convincing. The plaintiff was at liberty to sue one, all, or any number of the directors that he saw fit, for, as I understand it, each is liable for all losses due to his dereliction, although others may be also involved and likewise liable for the same losses, and without regard to the degree of dereliction of which he is guilty. Cooper v. Hill, 94 Fed. 582, 36 C. C. A. 402 (C. C. A. 8th Cir.); Williams v. McKay, 46 N. J. Eq. 25, 18 Atl. 824. Moreover, if a defendant is entitled to contribution from his codirectors, I fail to see how the failure to join any codirector in this suit would preclude him from securing it. In Yates v. Jones National Bank, supra, the suit was not prosecuted against some of the directors.

[3] 3. It is further contended that an action such as this does not survive against the representatives of a deceased director. It has been quite uniformly decided that both the action which is given by the common law and that which is based upon section 5239 of the Revised Statutes does survive, and I think the law may be considered as so settled. Stephens v. Overstolz, 43 Fed. 465 (C. C. E. D. Miss., Justice Miller); Boyd v. Schneider, 131 Fed. 223, 65 C. C. A. 209 (C. C. A. 7th Cir.); Allen v. Luke, 141 Fed. 694 (C. C. Mass.); s. c., 163 Fed. 1018. In Yates v. Jones National Bank and Briggs v. Spaulding, supra, the actions proceeded against the representatives of some of the deceased directors. See, also, Rankin v. Cooper, supra, 149 Fed. 1018; Cockrill v. Cooper, 86 Fed. 7, 15, 29 C. C. A. 529 (C. C. A. 8th Cir.).

4. I find that the points regarding the nonliability of the defendants for losses which occurred as the result of the taking over of certain of the debts due to the Bayonne Bank (the state bank) were embraced in the notice of motion to dismiss the original bill, and the same were undoubtedly considered by Judge Hunt. Defendants' argument in this respect proceeds upon the erroneous assumption that their liability arises only by virtue of section 5239 of the Revised Statutes. Moreover, I do not understand the bill to seek to charge the defendants for losses because of the acquisition of the debts of the original Bayonne Bank, but rather in loaning individuals and corporations moneys in addition to those which they owed the state bank, whereby the amount of moneys loaned to such individuals and corporations by the insolvent bank exceeded the amount which it was authorized by law to loan to any one individual or corporation.

5. It was sought in the original bill, as it is in this, to hold the defendants liable for retaining in office certain officers whom the bill alleges were incompetent and unfit to be intrusted with the authority which was reposed in them. Judge Hunt held that the allegation of the original bill in this respect was not specific enough, and that the respects in which they were unfit must be set forth. A very careful reading of the amended bill has not convinced me that it has supplied the deficiencies of the original bill. The allegations are substantially the same. I think, therefore, that the averments of the amended bill in this respect must be stricken out. They are contained in paragraph 12, and extend from folio 28 to folio 30, inclusive. The remaining part of paragraph 12 charges, generally, the duty of the defendants, both under the general principles of the law and by virtue of the acts of Congress, theretofore referred to, and then alleges generally their failure to perform those duties. I think all of such general allegations of failure, with the exception of those regarding the retaining in office of certain officers, are supported by specific allegations thereinafter made, and that part of the bill will therefore not be stricken out.

[4] 6. The averments of the original bill by which it was sought to charge those directors who did not actually participate in the meetings of the board when the actions were taken, which it is claimed caused certain of the losses, were that they approved of such actions "by their unreasonable neglect and failure to attend" the meetings. The defendants Brady, Coward, Donahoe, and Bennett were then generally charged with a failure to diligently and honestly administer the affairs of the bank. It was held by Judge Hunt that these averments were insufficient, as they were mere conclusions of the pleader, and that facts must be set forth showing what constituted the "unreasonable neglect and failure to attend the meetings," so that the court could judge whether or not the conclusion of the pleader was well founded. In the amended bill there is a charge (paragraph 13) that Brady, although he was a director from January 8, 1907, until the receiver was appointed in December, 1913, "steadfastly and willfully neglected and refused to acquaint himself with the affairs of such association, * * * and * * * willfully, negligently, and steadfastly refused and neglected to attend any meetings of the board," except one; that the defendants Bennett and Donahoe did likewise, and did not attend any meeting, although the former was a director from May, 1910, to January, 1912, and the latter from the time the bank was organized until it suspended. The same applies to the defendants Young and Zabriskie, except that the latter did not attend 25 meetings out of 47. It is further averred that all of the loans and investments from which losses occurred, and which are subsequently set forth with great detail, were passed upon at meetings from which these defendants were absent, and that by reason of their absence and failure to attend to their duties the insolvent bank suffered losses. The bill gives the names of the directors who attended and those who were absent from the various meetings. There are other averments that the directors who absented themselves failed in their duty in certain particulars set forth, and that, had they done those things which their duty required them to do, and which are set

forth, they would have discovered a condition of affairs which, if remedied, as was their duty to do, would have prevented the losses. There are also averments of failure to heed the warnings and follow the instructions of the Comptroller of the Currency, from which losses resulted.

I fail to see how the facts, upon which it is sought to base liability under the common law against those directors who persistently failed to attend meetings, could be more specifically set forth. It is not open to doubt, I think, that a willful and continued failure on the part of a director to attend meetings of the board at which the business of the bank is conducted, and to familiarize himself, to some extent, with the bank's affairs, is a violation of the duty which the common law imposes upon directors, and, if loss results therefrom, that he is liable, because such action is, in itself, a failure to exercise the ordinary care and prudence in the administration of affairs of the bank which the law imposes upon directors. Of course, a director is not required to attend every meeting, and it may be that some of the losses which were the result of actions which were not violations of any statute, taken at meetings at which some of the directors, who were occasionally absent, were not present, and who did not thereafter approve, expressly or substantially, such actions of the board, cannot be held liable for those losses. But quite a different situation is presented by a willful and continued failure, during the whole course of one's directorship, to attend meetings of the board and give to the board the benefit of his judgment and advice. This, coupled with a charge that the losses resulted therefrom, sets forth a cause of action. I think, therefore, that the amended bill has overcome the objections, respecting the absent directors, which Judge Hunt entertained to the original bill.

However, whether the directors, who never actually participated in or assented to the actions of other directors which were in violation of the provisions of the National Bank Act, can be held liable for losses resulting from such actions is a radically different question, and one which does not seem to have been passed upon by Judge Hunt. As before stated, the Yates Case decided that section 5239 affords the exclusive rule as to the recovery of losses resulting solely from the violation of statutory provisions. That section makes a director liable only when he has knowingly participated in or assented to the violation. As I construe Thomas v. Taylor, 224 U. S. 73, 32 Sup. Ct. 403, 56 L. Ed. 673, one who has participated in or assented to a violation cannot be heard to say that he did not knowingly or intentionally do so, when he had deliberately refused to examine that which it was his duty to examine. But this, it would seem, is far from holding that one can be held liable for a violation of the statute when he did not either participate in or assent to such violation. The only allegations of the bill, so far as I can find, to charge the habitually absent directors with violation of the statutes, except the violation of their oath of office (which is nothing more than a concrete statement of their common-law and statutory duty), and those which are charged in paragraph 14, are that they "de-

liberately failed and refused to examine" into the condition of prior loans, where they are sought to be charged for loaning more to any one individual or corporation than the statute permits, etc. The question then arises whether a director, who does not actually participate or assent to a statutory violation, but who is sought to be charged therefor simply because he refused to examine into the affairs of the bank, to ascertain whether violations were being committed or not, can be held liable for losses resulting from such violation under section 5239. For the reasons above indicated I have very serious doubt as to his liability.

I do not find it necessary, however (and think it would be unwise), to attempt to settle this question on this motion. If such directors are not so liable, the allegations of the bill charging them with deliberately failing and refusing to examine may be treated as surplusage, so far as being the basis for liability under the statute is concerned. As before found, the bill does charge such directors with violation of their common-law duty, and as respects the allegations of section 14, in some instances, it would seem properly charges them with violation of their statutory duty. Judge Hunt has held that the allegations of the bill charging those who were present at meetings at which action was taken, which violated the statute, are sufficient. No advantage, therefore, could come from striking out of the respective paragraphs, which charge common-law and statutory violations on the part of both absent and participating directors, such portions as are the basis for a statutory liability on the part of the absent directors, even though not sufficient for that purpose. The question may be more properly dealt with on final hearing. If the only liability of the absent defendants was based on a violation of a statute, the situation would be quite different, and it would then be necessary to determine, on a motion of this kind, whether or not the allegations of the bill were sufficient to charge them with such liability, for, if they were not, such defendants should be relieved of defending the suit. But in a case of this kind—where the averments of the bill do set forth a cause of action in other respects against such defendants, so that they will have to defend the suit at any rate—I think that the better course to pursue is not to decide the question in advance of a final hearing, where it can be more properly decided, and from which decision an appeal may be taken. An appellate court will then have before it all of the facts, and can determine whether or not the action of the trial judge was proper, and can mold its decree without the necessity of ordering a partial new trial.

7. Paragraphs 42 and 43 are new. 42 I think is too uncertain and indefinite to warrant any recovery thereon; but I take it that 43 is a specification of the general allegations of 42. I do not think that any liability can be predicated upon the averments of these paragraphs against the defendants who are not named therein. But Carrigan, one of the defendants, is named, and the paragraphs set forth a cause of action as against him. The mere fact, therefore, that these paragraphs do not set forth a cause of action against the other defendants, is not a sufficient reason for striking them out, when they do set forth a cause of action against one defendant.

In conclusion, it should be observed that many of the objections now made to different parts of the bill by some of the defendants, who are differently situated than others, may be properly urged upon the trial as reasons why they should not be held liable for certain losses; but they are not available on this motion—for instance, the charges contained in paragraphs 42 and 43. This consideration might be, and undoubtedly was, urged before Judge Hunt, as a reason why the bill is multifarious; but that question, as before stated, has been decided, and may not be considered on this motion.

My conclusion is that all of the motions made on behalf of the defendants should be denied, with the exception of that to strike out the averments of the bill which seek to predicate liability against all of the defendants on the retention in office of unfit officers. The plaintiff may, however, amend his bill in this respect, if he desires to do so, provided that such an amendment is filed within 5 days after entry of an order based on these conclusions. It will be manifestly impossible for the defendants to file answers within the time limited by Supreme Court rule 29. The defendants may therefore have 35 days after the date of entry of the order in which to file their answers, if the plaintiff does not file an amendment, as above authorized. If the plaintiff does file such an amendment, the defendants must answer the bill, as amended, within 30 days from the date of filing such amendment; or, if they determine to move to strike out the amendment, they must make a motion to that effect, returnable within 10 days from the date of filing.

The order may be settled on 2 days' notice, unless counsel can agree upon the form of the same.

DESTRUCTOR CO. v. CITY OF ATLANTA.

(District Court, N. D. Georgia. April 20, 1916.)

No. 53.

1. MUNICIPAL CORPORATIONS ⊂=254—ENFORCEMENT OF CONTRACTS.

According to the allegations of the bill, where a contract for the construction of a refuse-burning plant for a city contained warranties of capacity and performance of the plant, to be determined by tests before payment of a balance due on the contract, also provisions for arbitrators to make such tests in case of disagreement, and the city refused to co-operate in good faith in the making of the tests, but left the contractor in possession, and the latter conducted the plant for a year, consuming all of the city's garbage and other refuse, equity has jurisdiction of a suit by the contractor to enjoin the city from taking possession, to enforce specific performance of the contract, to establish a lien for the balance due, and to obtain a settlement for the service rendered.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 696–700; Dec. Dig. ⊂=254.]

2. MUNICIPAL CORPORATIONS ⊂=253—CONTRACT FOR CONSTRUCTION OF REFUSE INCINERATOR—CONSTRUCTION AND PERFORMANCE.

A contract for the construction of a refuse-burning plant for a city construed, and the plant as built *held*, on the evidence, to fully comply with

the requirements and warranties of the contract, with the exception of a single defective appliance, which could be replaced, and which was not sufficient to justify the city in refusing to accept the plant.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 695; Dec. Dig. ⊂⊃253.]

3. MUNICIPAL CORPORATIONS ⊂⊃253—PERFORMANCE OF CONTRACT—DAMAGES FOR DELAY IN COMPLETION OF PLANT.

Under a provision of a contract with a city for the building of a refuse-burning plant, that for each day's delay after a specified date in the completion of the plant ready for useful operation the contractor should pay a stated sum as damages, the city is not entitled to recover such damages, where the plant went into use on substantially the date named, and thereafter consumed all the refuse delivered to it, although certain alterations were required, and were thereafter made to make the plant fully comply with all of the warranties in the contract.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 695; Dec. Dig. ⊂⊃253.]

4. EQUITY ⊂⊃401—SUIT TO ENFORCE CONTRACT—PERFORMANCE—POWER OF COURT TO MAKE TESTS.

Where the question at issue in a suit in equity was as to whether a refuse-burning plant built for a city fulfilled the requirements and warranties of the contract, which by its terms was to be determined by tests, and the contractor alleged that the city refused to co-operate in making such tests, it was within the power of the court to appoint a disinterested commission to make the tests and report the results bearing on all questions in dispute.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 869–873; Dec. Dig. ⊂⊃401.]

In Equity. Suit by the Destructor Company against the city of Atlanta. On exceptions to master's report. Exceptions overruled.

The report of the commissioners for making test as to completion of the plant, referred to in the opinion, is as follows:

Pursuant to an order from Judge Wm. T. Newman, of the District Court of the United States, Northern District of Georgia, dated May 14, 1915, for us to make an observation, test, etc., of the refuse destructor supplied by the New York Destructor Company for the city of Atlanta, for the week beginning May 24, 1915, and on one day of that week to make a special 24-hour test of the operation of the destructor when dealing with the refuse mixture as stated in the contract for said destructor, we respectfully beg to inform you that, to the best of our ability, we have endeavored to carry out the instructions of the court.

As our instructions were to make observation for the entire week, you will understand this has involved the collection of a large amount of data, the careful working up of which will require considerable time. Since it seems desirable that you should have in your hands the results of such data, observations, etc., as are pertinent to the issues involved as soon as possible, we beg to inform you that this report is preliminary to our final report, involving the whole week. Said final report will in no wise alter or modify in any way the statements, data, results, etc., as given in this preliminary report. In this report, when we refer to the city of Atlanta, we shall mean those officers, employés, or other persons authorized to speak for or represent the interests of said city. When we speak of the Destructor Company, we shall mean those officers, employés, or other persons authorized to speak for or represent the interests of said Destructor Company.

In order to get an intelligent understanding of the question at issue between

the city of Atlanta and the Destructor Company, we at first held joint conferences with representatives of the interested parties. We soon discovered that this would not do, as there was an inevitable tendency to "try the case" before us. So we held conferences with each side separately, and later talked freely with representatives of each side, getting in this way as clear an idea as we could of the contentions of each. Some of the questions in dispute are involved in the results of the test of the plant. These contentions will be discussed when we come to speak of the results of said tests. Other contentions relate to subjects which may be discussed from an observation of the plant. We will take up these latter first.

We do not understand that we are to give an opinion as to the wisdom, or otherwise, of the city of Atlanta entering into a contract with the Destructor Company for the construction of the plant. We understand our business to be to help you in an advisory way in deciding as to whether the city of Atlanta should accept the Destructor plant as it stands and pay the balance due the same.

One of the contentions of the city was that the plant could not run a week without breaking down. We beg to advise you that we have found such contention not true. We have been at the plant ourselves, or had trustworthy representatives there, night and day throughout the week specified in the court order, and no breakdown has occurred, and during much of that time the plant was disposing of the city's refuse at a rate far in excess of that specified in the contract.

A specific contention of the city was that the trolley hoists operating the grab buckets which hoist the refuse from the garbage pit and dump it into the furnace hoppers frequently break down, and thus cause delay, trouble, and needless expense. It is needless to state that these hoists operate under very trying conditions. They must be dust and heat proof. If these hoists are not the very best that can be procured, the Destructor Company should be required to furnish them. In our opinion the city should require the Destructor Company to provide for these hoists completely inclosed motors with waste-packed bearings.

Another contention by the city is that the building is not properly ventilated; that, as a consequence, the upper portion, about the charging platform, is very dusty and very hot. It is our opinion that no system of ventilation could remove this dust and take it to the chimney. As to the quantity of dust present, if the entire roof of the building were removed, and every particle allowed to escape freely to the atmosphere, it could not possibly create one-tenth the nuisance that is now created by a plant immediately to the eastward, or by a certain other (manufacturing) plant not far to the westward. Please go and look for yourself. But, in our opinion, if humidifiers were installed in the peak of the roof, they could largely settle the dust that stands there, and thus make it more endurable, or less unendurable, than it now is for the men who operate the charging hoppers.

As to the heat, great heat cannot help being hot. The contract calls for the liberation and bringing into evidence about 1,850,000,000 British units of heat every 24 hours, and the generation of over 750,000 pounds of high pressure steam. In the nature of things the place is bound to be hot.

Another contention of the city is that the furnaces have been changed since they were originally constructed, and that they now contain features not embraced in the contract, and that, therefore, the city is not getting what it contracted for. The contract explicitly states that the builders shall have the right to make such changes as they shall find necessary to the successful working of the plant. We are unable to see that the city has just ground for complaint in this respect.

Specifically, complaint is made that air is admitted at the sides of the cooling chambers, as well as through the grate on which the clinker rests while being cooled, instead of solely through the bottom grate, as originally constructed, and that this change has rendered the furnaces less efficient as a refuse destructor. As we have been able to observe the plant only as it now is, we cannot give positive evidence on this point. The presumption would be,

however, that since this plant has not yet been accepted by the city, and the Destructor Company is trying to get the city to accept it, self-interest would prevent the city's claims.

The question has been raised as to when the plant was completed. This, perhaps, admits of argument. It might be claimed that it was completed when it began to consume, to destroy, the city's refuse; or it might be claimed that the plant was completed when all changes and additions had been made, substantially as it presented itself to us on May 24, 1915. Mechanically, of course, this would be true; but there are also ethical and legal questions involved. We may presume to discuss the ethics of the case. Suppose the litigation should go on and on, with no decision, until, in the very necessities of the case, the plant were worn out. On that basis it never would have been completed. This would obviously be grossly unfair to the Destructor Company. In our opinion the Destructor Company should be credited with having completed the plant mechanically on that date, which the records can show, when it stood structurally and mechanically as it did May 24, 1915, at which time a test would, in our opinion, have shown the same results as that held May 26, 1915.

A reasonable cost of supervision should be allowed the Destructor Company from such date as the plant could have been accepted by the city up to the time the city assumes operation of same; this over and above the 25 cents per ton labor charge. The Destructor Company state that they were ready for a test in December, 1913, and called on the city for a test at that time, which the city refused to give. The Destructor Company claim that, therefore, the plant was completed at that time. We respectfully submit this nice point in morals to you to decide. It is not a mechanical question. It is a question of law and ethics. Perhaps a decision which would leave both parties dissatisfied would be most nearly equitable.

It is contended by the city that the rate of combustion on the grates, as specified in the bid, 115 pounds of refuse burned per square foot of grate per hour, is too high a rate for a reasonable life to the grates. This is equivalent to the liberation of about 425,000 British thermal units per hour per square foot of grate. In steam boilers fired with coal this would be equivalent to about 30 pounds of coal per hour per square foot of grate. While such a rate for coal is high, it is by no means excessive. But the burning of coal is a very different operation from the burning of refuse. The burning of refuse, in so far as character of the combustion and the manner of the liberation of heat are concerned, is almost identical with the burning of bagasse. As to the burning of bagasse, see Louisiana Bulletin No. 117, Louisiana State University Agricultural Experiment Station, by Prof. E. W. Kerr. As the result of numerous experiments of burning bagasse, Prof. Kerr places the lowest economical limit at 100 pounds per square foot of grate per hour. He gives experiments as high as 197 pounds per square foot of grate per hour, with no adverse comment. This latter would represent a liberation of heat at a rate of over 700,000 units of heat per hour per square foot of grate.

The Babcock & Wilcox Company, who have supplied a very large number of boilers to sugar mills, and hence have had wide experience in the burning of bagasse, state that a rate of burning of 300 pounds bagasse per hour per square foot of grate is, in their experience, the most economical, although they state that a rate of 450 pounds can easily be obtained. The 300-pound rate, at 4,000 British thermal units per pound, calls for a liberation of heat at the rate of 1,200,000 British units per hour per square foot of grate. The 450-pound rate calls for 1,800,000 British thermal units per hour, per square foot of grate. This latter rate is more than four times the rate specified in the contract.

Bagasse and refuse are similar as to physical and chemical properties, and both are very unlike coal. Both are high in water content, low in fixed carbon, and high in volatile matter. A study of the literature on the burning of bagasse is conclusive as to the prodigious rate at which fuels of the character of bagasse and refuse can be economically made to liberate heat for

the generation of steam in boilers. As you are perhaps aware, very little fuel save bagasse is used about a sugar mill for the generation of the large quantity of steam required in the manufacture of sugar.

As we see it, the only difference between the burning of bagasse and the burning of city refuse, is in the residue—the ash, the clinkers. The ash in bagasse is small. In refuse it is large. We went inside the furnaces and combustion chambers on Sunday, May 30th, after the week of our observation of the working of the plant, and carefully inspected them. The combustion chambers become thickly coated with the residue, a foot thick on the sides, and thicker in the bottom. If the temperature were carried too high, say as high as 2,000° F., this would form a glazed mass so hard it would have to be removed with chisels and drills. If the temperature is not carried so high, the deposit is less dense, and can be removed with picks. This deposit has to be removed every Sunday, or the chambers would choke. The density of the deposit is entirely within the control of the furnace operator. He controls it by admitting more or less air, as the case requires. It is necessary to have this deposit as a protection to the furnace lining. In short, we do not find that the city's contention is sustained.

We have thought best not to burden you with any fine-spun theoretical discussion on combustion, as likely you have an ample supply to draw on in the testimony you have had submitted to you. We have preferred to present to you the simple, practical conditions as we see them. As to the condition of the residue, the clinker, as it is withdrawn from the cooling chambers, we had a man whose sole duty it was to carefully inspect the residue throughout the week of our observations on the plant. We have had many interviews with that man, and have gone over carefully the notes he took during the week, and give you the summary of those observations. We will give only one day, that of Friday, following the test. This was by far the worst day for unconsumed organic matter, as revealed by his observation. He states that the total quantity of unconsumed organic matter he observed on that day was about 30 pounds. It consisted of potatoes, tomatoes, potato peelings, a bunch of feathers, a chicken carcass, and kitchen refuse. How these objects could pass through that inferno of heat we do not attempt to explain. They did. On that day the destructor burned about 300 tons of refuse. Thirty pounds is about .005 of 1 per cent. of the refuse burned, or say .025 of 1 per cent. of the clinker.

The city contends that this clinker is not a good road-making material. How does the city know? Where has the city attempted to make a road of it? We know of no such effort. On Sunday, May 30th, we walked over Emett, Vine, and several other streets in that section of the city, where the clinker had been deposited in the streets; but we saw no place where any effort whatever had been made to make a road of it, much less a street. The clinker had apparently been left just as it was dumped from the carts. To our personal knowledge, clinker is a first-class road-making material. To our personal knowledge, the finest road in a certain county in New York state, where so many millions have been spent for good roads, was, two years ago, a clinker road, and nothing else. It would be a simple matter to rake the sheet metal and wire off the broken clinker, and it seems unfair that no attempt has been made to construct a road from this material.

The foregoing are the principal contentions that have been presented to us; but, after careful investigation, we find that they are not supported by the facts.

We now come to the results of the test. In order to obtain the refuse mixture called for in the contract, viz., 45 per cent. garbage, 15 per cent. ashes, 5 per cent. manure, and 35 per cent. rubbish, it was necessary for Chief John Jentzen, of the sanitary department, to save up the garbage for several days prior to the test, and even then he was not able to secure enough to run a 24-hour test, as called for in the contract. The weather was dry and hot, and, when the test began, Wednesday at 1 p. m., May 26th, the garbage heap, about 90 tons, had become a reeking, seething mass of literally tons of maggots. Whether the calorific value of this garbage, in such a condition, had

been increased or diminished, we do not know. It is certain that a good deal of water had drained out of it.

Date of test, May 26–27, 1915.

Test began at 1 p. m., May 26, and closed at 6:10 a. m., May 27, 1915.

Total Quantities.

1.	Refuse fed into furnaces, pounds	391,085
	(Of proportions specified in the contract.)	
2.	Dry clinker withdrawn, pounds	112,300
3.	Per cent. of water in clinker	13.45%
4.	Clinker, per cent of refuse	28.80%
5.	Refuse, less clinker, pounds	278,785
6.	Water evaporated, pounds	530,258
7.	Furnace hours	51.5
8.	Duration of run	17 hr. 10 min.

Average Quantities.

9.	Steam pressure, pounds per square inch, abs	190.05
10.	Steam temperature, degrees F	515.22
11.	Superheat, degrees F.	137.62
12.	Feed water, before passing through feed water heater	78° F.
13.	Feed water, after passing through feed water heater	190.31° F.

Factors of Evaporation.

14.	Boiler only	1.0706
15.	Boiler and superheater	1.1508
16.	Boiler and feed water heater	1.186
17.	Boiler, superheater, and feed water heater	1.266

Rates.

18.	Pounds of water evaporated per pound material fired	1.3558
	Equivalent evaporation, from and at 212° F. per pound of material (refuse) fed into furnaces.	
19.	Boiler only, pounds	1.4509
20.	Boiler and superheater, pounds	1.5594
21.	Boiler and feed water heater, pounds	1.6082
22.	Boiler, superheater, and feed water heater, pounds	1.7167
23.	Pounds water evaporated per pound refuse fed to furnaces, less clinker, observed	1.905
	Equivalent evaporation from and at 212° F. per pound of refuse fired, less clinker.	
24.	Boiler only, pounds	2.038
25.	Boiler and superheater, pounds	2.190
26.	Boiler and feed water heater, pounds	2.26
27.	Boiler, superheater, and feed water heater	2.41

Capacity per 24 Hours.

28.	Based on 72 furnace hours, tons	273.5
29.	Average temperature of charging floor	121.5° F.
30.	" " out doors	75.7° F.
31.	" difference	45.8° F.

The contract calls for the plant to "be capable of destroying in normal operation 250 tons of refuse per 24 hours." The test gave a rate of 273.5. The contract rate is thus exceeded by about 9.4 per cent. If the Destructor Company had chosen to do so, they could have burned up all the refuse over an hour before they did, thus raising its capacity, on the specified mixture, to about 293 tons per 24 hours. They delayed the rate of combustion in order to raise the rate of evaporation. They consulted us as to whether they would be permitted to do this and we consented to it. This was at about 4 a. m.

There has been a great deal of contention over the feed water heater. The contract states that "the rate of evaporation in the boilers, from and at 212° F. per pound of refuse consumed, shall not be less than 1.96 pounds." By ref-

erence to line 25 in results of test, it will be seen that the rate of evaporation in the boilers, including the superheater (about which latter there has been no contention), per pound of refuse fed into the furnace, less the clinker, is 2.19 pounds, thus exceeding the contract guaranty. See note at close of report.

This interpretation of the wording of the guaranty thus eliminates all contention as to whether the heat of the feed water heater should or should not be credited to the boiler. We do not admit that the heat of a feed water heater should be credited to the evaporative performance of a boiler. The performance of a boiler, its evaporating ability should be reckoned on the boiler only. The contract states that the temperature of the combustion chambers must not drop below 1,250° F. At no time during any of the runs did we observe its temperature as low as this. During the special mixture test the average temperature was 1,615° F. As previously stated, the temperature of these chambers is within the control of the furnace operatives.

If the refuse be credited with an available heat value of 3,700 British Thermal Units per pound, the efficiency of the boiler alone, with steam at 190.05 pounds, abs., feed water at 190.3°, and an evaporation of 1.3558 pounds water per pound of refuse fired, efficiency of boiler equal 38 per cent. Including the superheater, efficiency of boiler and superheater equals 40.6 per cent. Now the efficiency of these boilers is a good deal higher than above figures. The conclusion is, therefore, inevitable that the available heat value of one pound of the refuse fired during the test is much below 3,700 British Thermal Units. This accounts for the comparatively low evaporation per pound of refuse fired.

The question has been asked us apparently in good faith, as to whether the steam now flowing to waste into the atmosphere has any commercial value. That seems to us an odd question. If we allow that the plant auxiliaries use 15 per cent. of the steam generated (which is too high an allowance if the steam were properly utilized by the city), there flowed to waste in the atmosphere, during the 17.16 hours of the special mixture test, 450,000 pounds of high pressure highly superheated steam which, at a valuation of 3 cents per 100 pounds, was worth $135. This corresponds also to a valuation rate for electric current of one-half a cent per kilowatt hour. Counting 300 days to the year, this amounts to $40,000 per year, absolutely thrown away. With the plant working 24 hours per day at contract capacity, it amounts to $52,000 per year.

We are not aware that our duties call upon us to make any suggestions as to the use which could be commercially made of this steam. We may state, however, that we know of no adequate reason why the citizens of Atlanta should not receive the money value of this steam now flowing to waste. There are ways of accomplishing this without doing injustice to men who have invested their money in the public utilities and industrial enterprises of the city. If such ways cannot be found, then we say: Let it flow to waste.

Finally, we do not know, we have been unable to discover, no adequate reasons have, in our judgment, been presented to us, why the city of Atlanta should not accept the destructor plant on such equitable legal and ethical basis of settlement as you shall determine. In making this statement at least two of us are aware that we are going counter to the wishes of very dear friends, men whom we have loved and respected, and whose friendship we have highly valued for a quarter of a century.

In closing, we beg to extend to the chief, John Jentzen, and his staff, of the sanitary department, to the officials and employés of the New York Destructor Company, to the officials of the city of Atlanta, and to Prof. E. T. McCarthy and his corps of students from Georgia Tech., and Mr. Rapp, of the water department, our sincere thanks for their hearty co-operation and invaluable assistance throughout the work of our observations and test.

Supplement.

In deciding upon the rate of evaporation with which the boilers should be credited, we have construed the words "refuse consumed" to mean refuse fed into the furnaces, less clinker taken out. The contract explicitly states that all clinker and refuse shall be weighed. There cannot be any possible object in weighing the clinker and refuse, unless this interpretation be accepted. In no other place in the contract is the word "consumed" used.

We protest against the wording of the contract in this manner. It is unscientific, inexact, and leaves a chance for differences of opinion, where none should exist. It is not in accordance with standard engineering practice.

Frazer & Spier, of New York City, and Evins, Spence & Moore, of Atlanta, Ga., for plaintiff.

James L. Mayson, City Atty., and W. D. Ellis, Jr., Asst. City Atty., both of Atlanta, Ga., for defendant.

NEWMAN, District Judge. On August 19, 1914, the Destructor Company filed its bill in equity against the city of Atlanta. The allegations of the bill are shown substantially in the opinion filed by this court on October 15, 1914, which appears in 219 Fed. 996. The substance of the bill was: That, on July 9, 1913, the Destructor Company made a contract with the city of Atlanta for the erection by the company of a plant for the destruction of the city's refuse. That about a year before this contract was made the company had made a previous contract with the city providing for the erection by the company of substantially the same plant and an electric generating plant for the utilization of the steam produced. That this contract had been made with a previous city administration, and had been based upon a practice which had been current in the city of Atlanta for many years, under which one city administration, in making contracts for important public works, pledged the moral obligation of the city to fulfill them in part during the succeeding administrations. That a suit was instituted against the city and the Destructor Company, in the superior court of Fulton county, to have this contract declared illegal and invalid. That the superior court held the contract to be legal, and the case was taken to the Supreme Court of the state, which reversed the decision of the lower court, and declared the contract illegal, as being beyond the power of the city government. When this decision was announced, the Destructor Company had done a large part of the work of erecting the plant under the first contract, and on the city's land, relying in good faith on the advice of counsel of both the city and the company that the contract was legal and that the city would fulfill the moral obligation to perform it, and had expended large sums in such performance, but had received no payments from the city. That in this situation the present contract was made. It differed from the previous contract mainly in cutting out the electric generating plant, and thus making no provision for the utilization of the surplus steam produced in the operation of the plant, reducing the contract price, which was $274,759, plus about $8,000 for extras allowed for excavation and foundation, by over $22,000, to the sum of $260,000, and providing that this reduced price be paid, $125,000 cash upon the execution of the new contract, and the balance of $135,000 when the plant was completed and proved by tests as prescribed in the specifications to meet all requirements. That the $125,000 was paid by the city to the company under the present contract. That upon signing the contract the company entered upon the work of completing the plant, and in accordance with the terms of the contract it was completed and ready for useful operation by August 15, 1913, and the company notified the city that the plant was ready. That the city, a few days later, began regular delivery of refuse at the plant, and the company has been

operating the plant ever since, and has kept it in continuous operation, and destroyed all of the city's refuse that has been brought to the plant, with a few unimportant exceptions.

It is alleged that the contract contains certain guaranties of performance in the matter of capacity, steam production, etc., and provides that the fulfillment of these guaranties shall be determined by tests of 24 hours' duration, with a refuse mixture of certain specified proportions. The contract provides that the first test shall be made at a time fixed by the company, and the second at a time to be agreed upon between the city and the company, within six months after the plant was ready for useful operation. Reference is then made to certain clauses of the contract, which relate to the right of the company to make changes in the incinerator if by doing so it may be made to satisfactorily fulfill the requirements of the guaranty, and with reference to the character of the work that it must be done to the satisfaction of the city, and it is then alleged that the company, on finding the actual conditions were different from those represented by the city and specified in the contract, and to meet which the plant had been designed, did not lie back and claim that it was only required to burn refuse in the proportions specified, but that it, in substance, did try to meet actual conditions.

It is alleged that at the time the bill was filed it had fulfilled its contract, and that on August 8, 1914, the plant had fulfilled all guaranties and requirements of the contract, but the city still refused to pay the balance due. Certain applications for tests made by the company to the city are then referred to, and after certain failures to have a test it is alleged: That on March 14, 1914, a test was run. That on this test the crematory satisfactorily destroyed all the refuse, but fell 10 per cent. short in the amount destroyed in 24 hours; that is, the contract provided for the destruction of 250 tons in 24 hours, and the plant destroyed 225 tons. That the company then, as allowed by the contract, made certain changes to meet the full requirements of the contract, although it had great difficulty in making such changes and keeping the plant in operation. Reference is then made to a test attempted to be made on August 8, 1914, as to which, while the refuse furnished was not what it should have been, the report of Gabriel R. Solomon, an unbiased engineer who ran the test, showed compliance with all guaranties and requirements of the contract.

In an amendment to this bill it is alleged that on the date the bill was filed the company had fulfilled its contract with the city of Atlanta and that on the test of the crematory plant held on August 8, 1914, the plant complied with the guaranties and requirements of the contract. The substance of the allegation is that, while on March 14, 1914, the plant lacked 10 per cent. of destroying the amount of refuse required by the contract, the changes thereafter made brought the plant up to the required capacity. It is then alleged that, the plant having been completed in accordance with the contract, the company asks for a test.

The prayers of the bill are for an injunction restraining the city from taking possession of the plant until they have paid the amount due under the contract; for a receiver to take charge of the plant, and op-

erate it; that the receiver be instructed to afford the company every reasonable opportunity to install at its own expense such improvements as it may deem necessary to increase the efficiency of the plant; that the plaintiff's interest in or lien upon the plant be declared, protected, and enforced by foreclosure of the lien or otherwise; that the court may determine the amount due the plaintiff for building the plant, and decide by running a test whether plaintiff has complied with its contract, and, if not, give it reasonable opportunity to make such improvements and run such further tests as shall show that the plant complies with all the guaranties of the contract and that the contract be specifically enforced in this respect; that the provisions of the contract for the settlement of all disputes by arbitration be enforced by the running of a fair test by arbitrators under the court's supervision; that an accounting be had as to the amount due the company from the city for the building and operation of the plant and the extra expenditures caused the company, for which the city is responsible; that the final amount due from the city having been determined, and the amount realized by the foreclosure of the company's lien having been applied thereon, a judgment for the deficiency be given against the city.

In the opinion referred to, passing upon a motion to dismiss the bill, this is stated:

"Summing up, the whole case is this: The Destructor Company contracted with the city of Atlanta to build a plant for the destruction of its refuse. The plant, it is alleged, has been built according to the contract, and is now ready to destroy, and is destroying, the refuse of the city, as contemplated and as provided for in the contract. The city was to pay the company $260,000 for this plant. It has paid $125,000, and still owes $135,000. The latter amount ($135,000) was to be paid when the plant was completed in accordance with the contract, and the same, after being subjected to the tests provided, is shown to be satisfactory. The company says it has completed the plant and the city refuses to have the test which would show this compliance. Clearly, if this be true, the company is entitled to relief against the city in some way. Whether this can be shown, if the city denies these allegations, will appear from the proof submitted. The case of Castle Creek Water Co. v. City of Aspen, 146 Fed. 8, 76 C. C. A. 516, 8 Ann. Cas. 660, is more like the case at bar than any case cited by counsel, or of which I have any knowledge, and seems to me an excellent authority for the retention of this case in a court of equity. So I think the peculiar situation and the peculiar facts surrounding the matter make it a case cognizable in equity."

The motion to strike is then overruled, except that there were certain paragraphs in the bill, and certain parts of paragraphs relating to the action of the mayor, and as to these the court sustained the motion to strike. In reference to this ruling, this was said in the opinion:

"It is almost impossible to separate those acts which are charged against the city and those which are charged personally against the mayor and are alleged to have been done on account of the mayor's personal feeling of hostility to the company and to the plant. So far as they relate to the acts of the mayor, which are claimed to have been done by him by reason of his personal feeling, they could not be charged against the city, unless ratified by the governing body of the city, the mayor and general council."

After the court had passed on the motion to strike, certain language of the bill was stricken by an amendment offered by the plaintiff, and the amendment was allowed by the court. An answer was

then filed by the city, and the case was referred for hearing and report to the standing master of the court. Before the reference of the case, and in a few instances after the reference, it was brought to the attention of the court as to matters which it will not be necessary to mention now. The master had numerous hearings, running through several months, and the testimony taken, which was voluminous, was filed with his report on September 4, 1915. The master's report was in favor of the plaintiff, the Destructor Company, and to this report numerous exceptions were filed by the city. It is on these exceptions that the present hearing was had, and whether or not these exceptions, of any of them, should be sustained, is the matter which, after lengthy argument and very complete and ably prepared briefs by counsel for both sides, must now be determined.

[1] The first question for determination is whether it is a case cognizable in equity. I determined this question on the motion to dismiss in favor of the right to maintain the bill, and subsequent developments have strengthened my belief that it is a case which could only be disposed of properly in a court of equity. In the first place there are 3,882 pages of the testimony offered at the hearing, and in the second place the objections made to the plant and the reasons given why it does not come up to the contract are many, and the questions all of such character that it would be impossible to dispose of them satisfactorily in a trial at law before a jury. Besides this, it is a bill in which application was made for a receiver, and in which an injunction was prayed and granted. There was also an application for a test in accordance with the contract, which it is alleged the city refused, and as to which there was a prayer that the court should provide such a test; also there was a prayer for an accounting as to what expense the plaintiff had been put to in operating the plant after it was ready for use.

Section 267 of the Judicial Code, formerly Section 723 of the Revised Statutes of the United States (Comp. St. 1913, § 1244), is as follows:

"Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law."

In Simkins' A Federal Equity Suit, in discussing this section, he says:

"First. It is not enough that there be a remedy at law, but it must, in the discretion of the chancellor, be as plain, practical, efficient, and speedy as the remedy in equity, in order to decline jurisdiction in equity."

The author then cites, among a number of other cases, Tyler v. Savage, 143 U. S. 95, 12 Sup. Ct. 345, 36 L. Ed. 82, and in the opinion in that case there is this paragraph:

"Under section 723 of the Revised Statutes, the remedy at law, in order to exclude equity, must be as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity [citing authorities]."

Mr. Simkins proceeds:

"Second. That the legal remedy, both in respect to the final relief and the mode of obtaining it, must be as efficient in law as in equity [citing, among a

number of others, the case of Walla Walla v. Walla Walla Water Co., 172 U. S. 12, 19 Sup. Ct. 82, 43 L. Ed. 341]."

In the opinion in that case this is said:

"This court has repeatedly declared in affirmance of the generally accepted proposition that the remedy at law, in order to exclude a concurrent remedy at equity, must be as complete, as practical, and as efficient to the ends of justice and its prompt administration, as the remedy in equity [citing the authorities]."

Tested by the rule thus laid down, there can be no question, I think, that this is a case cognizable in equity.

[2] There is a provision in the contract as follows:

"All work under this contract shall be done to the satisfaction of the city of Atlanta, or its representatives, who shall determine all questions as to the meaning of the specifications, or the fitness of any work or material, and their decision shall be final, except in the event of a dispute arising between the contractor and the city of Atlanta regarding the execution of this contract, or for the acceptance of the plant. They shall each appoint a representative, and these two shall appoint a third. These three representatives shall make a thorough investigation sufficient to determine the question in doubt, and their decision shall be final. The expense of these representatives shall be paid jointly by the contractor and the city, each party one-half."

It is alleged in the bill that the city had refused, when the plant was finally completed, to appoint a representative to act with the representative appointed by the Destructor Company, in accordance with this provision of the contract, and a prayer of the original bill was:

"That, if necessary, the provision of the contract for the settlement of all disputes by arbitration be specifically enforced by the running of a fair test by arbitrators under the court's supervision, so that the court may accept as final an award by arbitrators after a test so run."

Application was made to the court for the appointment of three gentlemen to run this test during the hearing before the master, and the court appointed three gentlemen, Dr. J. S. Coon, Professor of Mechanical Engineering at the Georgia School of Technology, Atlanta, Ga., Mr. J. E. Sirrine, of Greenville, S. C., an expert in machinery, and Mr. J. K. Orr, a manufacturer and wholesale merchant of Atlanta, as the arbitrators. The order provided for these gentlemen to observe the operation of the plant for one week and to make a special test on one day, for which preparation should be made. These three gentlemen accepted the duty imposed upon them by the court, and the test was run as directed. The report of these gentlemen was made to the master and submitted by him with his report, and has since been verified and entered as a part of the record in the case.

In the master's report, after referring to the previous contract between the parties and this contract, he states:

"On signing the present contract the company entered upon the work of completing the plant in accordance with it. In August, 1913, the month after the contract was signed, the structure of the plant and the furnaces and operating equipment were finished, and the furnaces dried out and ready for useful operation. The construction work of the plant, including the chimney, is admitted by every one to be very fine. Accordingly, on August 15, 1913, the date provided in the contract for putting the plant into useful operation, the company sent written notice to the city, addressed to the board of health, that the plant was so completed and ready for useful operation. The board of health is composed of the mayor of the city, the chairman of the sanitary

committee of the general council, and ten other members elected by the general council, one from each ward, and, under the city charter, has supervision over the sanitary department of the city and appoints the chief of the sanitary department. It is the sanitary department that collects the city's refuse. The contract between the parties, in sections 1, 12, and 18, recognizes the board of health as the authorized agency of the city government under the contract.

"The board of health, on August 15, 1913, the date of receiving notice from the company that the plant was ready for useful operation, answered, acknowledging receipt of such notice from the company, and stated that the delivery of city refuse at the plant would be begun on the succeeding Monday, August 18, 1913. In this letter of August 15, 1913, the clerk of the board of health stated: 'I am further directed to state that the board will pay for all garbage burned in the plant at the rate of 25 cents per ton, with the understanding that this amount shall be payment in full for all expenses connected with burning same, labor, fuel, or other expense of whatever nature.' The company did not reply to this letter, so far as the evidence discloses."

Referring to the company's operation of the plant and the tonnage burned, the master reports as follows:

"The city began about Monday, August 18, 1913, regularly delivering the city's refuse at the plant, and has continued to do so ever since; that is to say, for over 20 months. (The only exceptions are two half days, September 15 and October 11, 1913, on each of which two days the plant was partially shut down for half a day because of accidents to the electric machinery, and on these two half-days the city dumped its refuse elsewhere instead of delivering it at the plant.) With the exception of these two half weekdays and some Sundays, the company has kept the plant in continuous operation for more than 20 months, and has destroyed all of the city's refuse which has been brought to the plant during that time. This finding does not mean to say that every bit brought to the plant in a day has been destroyed within the 24 hours after it was brought. Very often that was not the case, but the refuse would accumulate at times until it was piled quite high in the pit, and a few times it had to be placed on the outside temporarily. However, in the long run, all of the refuse has been destroyed. The following figures give a good idea of the practical accomplishment of the plant over a period of over a year and a half in the matter of disposing of the city's refuse:

"In the 20 complete months that the plant has been in operation (September 1, 1913, to April 30, 1915, inclusive) the city has delivered and the plant has burned 112,798 tons of refuse. In that period there have been 519 weekdays and 85 Sundays. In the ordinary operation of the plant it is necessary to shut down the furnaces, let them cool off, and clean them out about once a week. Usually this cleaning is to be done on Sundays, but on some Sundays, when there has been an accumulation of refuse in the previous week, or the previous Saturday, the plant has burned refuse on Sundays. Thus the plant burned on 21.02 of the 85 Sundays in this 20 months period. On the other hand, the furnaces have sometimes been shut down on weekdays, instead of on Sundays, to be cleaned out, as well as because of breaks, especially in the transporting machinery. Thus the furnaces have been shut down for cleaning out only on 21.58 weekdays in this 20-months period. The time in which the plant was burning refuse on Sundays has thus almost exactly balanced the time when the furnaces have been shut down on weekdays to clean out; and in this 20-months period, containing 519 weekdays, the plant has burned refuse for 518.44 days, which, for convenience, I call 'burning days.' The 112,798 tons burned during this 20-months period (containing 518.44 burning days) averages 217 tons per burning day, and the same per weekday. As the city had entire control over the delivery of refuse at the plant, the amount of refuse burned has necessarily been dependent upon the amount the city has delivered. On many burning days the company has cleaned up the refuse on hand considerably before the end of the day, and it has had to lie practically idle until the next day's deliveries of refuse began. At other times it has not burned all that was delivered, and it has accumulated. In months when the city's delivery of refuse at the plant was greater, the average amount burned per burning day for the month was greater. Thus the average number of

tons burned per burning day in December, 1913, was 231 tons a day. In July, 1914, it was 239 tons a day. In August, 1914, it was 243 tons a day, besides coal and wood used, and in January, 1915, it was 245 tons a day. On a large number of days the plant has considerably exceeded the rate of 250 tons a day, and burned at as high a rate as 290 tons on December 30, 1913, 281 tons on April 6, 1914, 306 tons on April 21, 1914, 285 tons on July 15, 1914, and 293 tons on October 2, 1914, besides more than 270 tons on a good many other days. The 'log' of the plant's operation, which was submitted on the trial and proved by evidence, is as follows:

Log of Atlanta Destructor Showing Plant Performance, August, 1913, to April, 1915.

Month.	Tons Delivered and Burned.	Weekdays.	Sundays.	Sundays Burned.	Weekdays Shut Down for Cleaning Only.	Burning Days.	Tons per Burning Day.	Remarks.
1913								
Aug.	2110							
Sept.	5054.7	26	4	.35		26.35	215	
Oct.	4977.3	27	4	1.50		28.50	175	Trouble with clinker and dirt stopping air supply.
Nov.	5133.0	25	5	2.02	2.02	25.00	205	Trouble with clinker and dirt stopping air supply.
Dec.	6210.2	26	4	1.71	.79	26.92	231	Overheating of grates.
1914								
Jan.	6227.0	27	4	1.83	1.02	27.81	223	" " "
Feb.	5360.8	24	4	1.03	.82	24.21	221	Changing grates.
Mar.	5739.4	26	4	2.35	.35	28.00	205	" "
Apr.	5712.2	26	4	1.00		27.00	212	Ordered shut down Sundays, April to July.
May	5217.2	26	5		1.90	24.10	217	Ordered shut down Sundays, April to July.
June	5294.7	26	4		1.22	24.78	218	Using extra ash and coal makes daily tonnage 245.
July	6964.4	27	4	2.45	.23	29.22	239	One weekday out cleaning for test.
Aug.	6105.6	25	5	1.83	1.68	25.15	243	
Sept.	5466	26	4	.31	1.17	25.14	217	
Oct.	5733.5	27	4	.58	1.18	26.40	217	Induced draft fan put in.
Nov.	5389.7	25	5	.90	1.35	24.55	219	
Dec.	5696.3	27	4	.54	1.69	25.85	220	
1915								
Jan.	6440.6	26	5	1.52	1.22	26.30	245	
Feb.	5009.4	24	4	.56	1.06	23.10	220	
Mar.	5481.3	27	4	.86	.99	26.87	204	
Apr.	4994.7	26	4	.08	2.89	23.19	216	
	112798.0	519	85	21.02	21.58	518.44		

Average number of tons destroyed per month..... 5639.9
Average number of tons destroyed per burning day..... 217.6

All material delivered was destroyed. As fires were often banked, if more material had been delivered, more would have been destroyed.

Adding extra fuel burned in July and August, and water used to wet dry refuse in December, January, and February, makes daily tonnage destroyed during those months 246 tons.

Altogether this shows what the plant was able to do between the dates mentioned, August, 1913, to April, 1915.

The master then proceeds with what he calls the "Contract Guaranties, Allowance for Wear and Tear, Provisions for Tests and Changes," and a part of his report is as follows:

"The contract contains certain guaranties of performance in the matter of capacity, steam production, etc., and provides that the fulfillment of these guaranties shall be determined by tests of 24 hours' duration, with a refuse mixture of certain specified proportions. The exact wording of these guaranties is given below in the findings discussing the plant's fulfillment of them on the test held August 8, 1914. The contract also provides that allowance shall be made for ordinary wear and tear in determining the fulfillment of the guaranties. The language to this effect, immediately following the guaranties, says: 'It is understood, however, that in operating said plant to conform to the operating conditions above set forth, and also as provided in the city's specifications, allowance shall be made for ordinary wear and tear.'"

The first question in the case, and one of the most important questions, is whether or not this plant will destroy the quantity of refuse named in the contract. This was to be ascertained by tests, as has been stated. The provision of the contract with reference to tests is this:

"Sec. 9. Two tests to determine the capacity and other guaranties made by the contractor will be made as follows: The first test shall be made at such time as the contractor states that he is ready, but it shall not be made until sufficient time has been given to thoroughly dry out the furnaces to prevent any cracks in the brickwork. The second test to be made at a time mutually agreed upon between the city and the contractor within six months after the plant has been put in useful operation. The contractor shall supply the workmen for these tests, and the city shall pay the contractor therefor at the rates of wages hereinbefore prescribed. The contractor shall have control of the operation of the plant during the tests, but representatives of the city shall be permitted to be present throughout. Each test shall last at least 24 hours, with a running start. All refuse and residual shall be weighed. All water shall be measured by meter or tanks, and the necessary temperature to be taken with electric pyrometers. If in the tests the plant does not come up to requirements, or does not fulfill each and every one of the guaranties and specifications, the city may refuse to accept the plant. However, every reasonable opportunity shall be given the contractor to make changes in the incinerator, if by so doing it may be made to satisfactorily fulfill the requirements and guaranties. The contractor shall make these changes at his expense, in a thoroughly workmanlike manner, and shall then conduct further tests as is described above, but at his own expense, to demonstrate to the city or its representatives that the changes made have sufficiently raised the efficiency of the plant. But such demonstration shall not debar either the contractor or the city from demanding a test conducted by three representatives and paid for as specified in section 2 of the agreement."

Section 2, here referred to, is the provision for an arbitration, if there was a difference between the parties as to whether the plant came up to the guaranties of the contract, and has already been referred to.

The specifications prepared by the board of health of the city con-

tain a clause with reference to the composition of the refuse to be destroyed, which was as follows:

"Sec. 5. Refuse consists of garbage, rubbish, ashes, etc., as collected from domestic dwellings, stores, schoolhouses, churches, hotels, stables, etc., and is represented by the city to consist of approximately the following proportions, on which proportions the tests and guaranties hereinafter provided for shall be based:

Garbage	45 per cent.
Stable manure	5 per cent.
Ashes	15 per cent.
Rubbish	35 per cent."

The master then says:

"These proportions, so represented, are about the average for the year in Atlanta, and a plant designed to dispose of refuse of these approximate proportions would be best suited for disposing of Atlanta's refuse and thoroughly practical. The company's representative, Mr. Dowd, came to Atlanta previous to the letting of the contract and visited the various dumps in the city, as well as the old crematory, where a portion of the refuse of the city was burned, and had that opportunity to see what the composition of the refuse was in Atlanta. It is in evidence, further, that he made suggestions to the board of health while they were preparing the specifications, and did furnish them with certain suggestions in written form, notably as to the composition of the refuse. The testimony shows that in engineering practice guaranties of the precise performance of a plant or engine necessarily have to be based on a fuel distinctly specified as a standard, and that, as the fuel used varies from the specified standard, so will the performance of the plant, or engine, vary somewhat from the performance guarantied on the fuel specified as the standard."

In reference to the material delivered to the plant, the master says:

"The Destructor Company claims that it relied on these representations by the city as to the approximate composition of the city's refuse, and so designed this plant that it would properly burn refuse of substantially those proportions, with reasonable variations one way or the other. The gas passages through the furnaces, the combustion chambers and boilers, the air draft, preheater, and so into the chimney stack, were carefully designed to accommodate the gases which would be produced in burning refuse of the composition and approximate proportions so stated, with reasonable variations one way and the other. The Destructor Company found, after putting the plant into operation, that the seasonal variation of refuse in Atlanta is extreme. The proportions of rubbish and stable manure remain reasonably constant throughout the year, but in winter the proportion of garbage falls off from the 45 per cent. represented to approximately 10 per cent. and the proportion of ashes rises from the 15 per cent. represented to approximately 50 per cent. The effect of this excessive proportion of ashes in the fall and winter months was to cause excessive heat in the furnaces. The company corrected this only in part by wetting down the refuse in the pit. On the other hand, in the summer, the proportion of ashes actually delivered by the city at the plant has fallen from the 15 per cent. represented to almost nothing, and the proportion of garbage has risen from the 45 per cent. represented to probably sometimes as high as 70 per cent., and is very wet, consisting largely of watermelons and watermelon rinds, and soaks the paper and other rubbish, making it wet, so that the whole mixture does not contain enough heat-producing element to burn itself and evaporate the excessive moisture. The city could prevent this extreme seasonal variation by storing the excess of ashes in the winter time and using it to mix with the excess of wet garbage in the summer time, when ashes are deficient. Even without storing ashes from winter, the city could have procured ashes in the summer time and delivered them at the plant. This is shown by the fact that the company itself did this when the city did not. The city did so after the court's injunction order was granted in August, 1914. Proper cooperation between the collection department and the incineration department

is absolutely necessary for the full success of the plant's operation, and this has been sadly lacking."

With reference to the delivery at the plant of street sweepings with dirt, sand, and mud, the master says:

"Besides these variations in the proportions of refuse actually delivered at the plant, the refuse very often contained considerable amounts of material not specified in the contract at all, and not suited for burning in the furnaces, such as street sweepings and mud taken from sewer inlets, consisting of dirt and sand."

Coming to the question of tests, the master says:

"After putting the plant into operation in August, 1913, the Destructor Company made certain changes, as, for instance, substituting flat grate bars for the two-ridged grate bars in each furnace grate; by changing the size of the grab buckets which move the refuse from the pit to the hoppers above the furnaces; by changing the shape of the hoppers; by installing window glass in the plant and otherwise preparing the plant for the test. From the evidence, it is customary with plants of this kind to operate a number of months before running an official test. The board of health of the city, on August 30, 1913, about two weeks after the plant had been put into operation, suggested that the first test be held soon after that date; the claim being that it would be difficult to get a sufficient amount of garbage if the test was delayed to any extent beyond that time. Under authority of a resolution of the general council, passed in August, 1913, the mayor appointed Mr. Lederle, an engineer, to represent the city on the test. The contract provides that 'The first test shall be made at such time as the contractor (the Destructor Company) states that he is ready,' and the company did not elect to state that it was ready for the first test until December, 1913. On December 20, 1913, the Destructor Company wrote the city (addressing it through the board of health, that being the department of the city in charge of the collection of refuse, and the department mentioned in several places in the contract as the city's agent), giving notice that the company would be 'ready for the official test during the early part of the week commencing December 29, 1913,' and requesting that the city would make arrangements accordingly to deliver at that time refuse of the quantity and character called for by the contract for the test.

"The board of health considered this request for a test at its meeting held December 26, 1913, and refused it, and the same date sent notice to the company in the following terms: 'The board of health, by motion of the mayor and Mr. Brandon, decline to accept the official test of the plant at this time, owing to the fact that the present run of refuse does not contain sufficient garbage, nor nearly so, to run a 45 per cent. garbage test, and the city cannot produce enough of this class of refuse now, and, further, owing to the fact that the chairman of the sanitary committee and the chief of the sanitary department show that the plant is not in such physical condition that the board could accept an official test at this time.' A representative of the Destructor Company thereupon explained to the members of the board of health that the company claimed that the contract expressly gave the company the right to have the test run whenever the company stated it was ready, and that enough garbage could be accumulated in a few days by laying aside the garbage in each day's delivery. The board of health, however, refused to change its position in the matter of the test, but, instead, referred the Destructor Company to the general council. The general council had passed on the contract before it was signed. The contract so passed on provided that 'the first test shall be made at such time as the contractor states that he is ready.' The city had already appointed an engineer to represent the city on the test. The board of health had control of the delivery of refuse, and, though it might have been difficult, yet in the course of several days it could have accumulated enough garbage for the test, as, indeed, it did two or three months later, when the proportion of garbage was about the same.

"The second ground given by the board of health for refusing to permit the tests, viz., that certain city officials asserted that the plant was not in physical

condition for a test, was one of the very things which the contract said should be determined by test. Such adverse prejudgment was then in fact advanced as a reason for refusing the company its right to a test. If, on the other hand, by 'physical condition' the board of health meant to refer, not to conditions affecting operation, which were to be determined by test, but to claimed defects in construction, not affecting operation, then such defects in construction, if any such were claimed, were not a good reason for refusing to test, since the result of a test would not have affected the city's rights based on any such structural defects. It is a fact that the transporting machinery in the company's plant had not, during the fall, been working satisfactorily. The cranes especially had given considerable trouble and had had frequent breakdowns, which would put usually one of them out of commission from a few minutes up to as much as two days. Many of these breakdowns were of a very minor nature, some more serious, but doubtless caused to a great extent by the intense heat in the building, that resulting from the burning of a large percentage of ashes which had been delivered to the company during the fall and winter. As the city had sole control of the collection of refuse, no official test could be run unless the city supplied the refuse for it.

"I conclude, therefore, that the city was properly notified of the Destructor Company's desire to run a test early in the week commencing December 29, 1913, and that the city positively, arbitrarily, and unnecessarily refused. I find that the plant was in proper condition at this time to be tested. The company contends that, if a test had been run at this time, the plant would have complied with all the guaranties of the contract. This is testified to by the company's chief engineer, an expert witness, and the company claims that this testimony is supported by the results of certain preliminary unofficial tests run by him in November, 1913, and by the fact that on December 31, 1913, the plant burned all the tonnage delivered at the rate of 300 tons in 24 hours, and on December 30, 1913, burned in 20½ hours all the 249 tons of refuse delivered. This was at the rate of 290 tons in 24 hours. It is very difficult to say what the plant would have done, had this test been run. I am therefore not prepared to make a finding on this point."

The master then says that on December 31, 1913, Councilman Ashley, chairman of the sanitary committee of council and a member of the board of health, wrote specifying certain things which he insisted should be done to the plant, all of which was done by the company, except the burning of dead dogs on the grates, and, as to that, Mr. Ashley acknowledged he was wrong. The report proceeds: That throughout the pendency of this contract the company has shown constant desire to overcome the mechanical difficulties which have developed and to make the plant work well, without regard to who was responsible for the difficulties. With this in view, it has installed at its own expense many improvements to the plant.

The Destructor Company, then, according to the master, after failing to get a test through the board of health, on January 5, 1914, wrote the mayor and general council requesting that material be supplied for a test. The letter to the mayor and general council is then quoted. On January 15, 1914, council passed a resolution to the effect that, Mr. Frank Lederle having been employed to represent the city, he represent the city in a test, and expressed it as the sense of the council that the company should communicate with the mayor of the city when they were ready for the test, giving the mayor five days to have the proper mixture of garbage and rubbish for the test. Since the passing of this resolution Mayor Woodward, whether expressly authorized by it or not, has assumed to represent the city government in all dealings with the company as to the testing of the plant and the carrying out of the contract.

Immediately after the passage of this resolution Mr. Dowd, the representative of the company, went to Mayor Woodward and requested that material for a test be supplied by the city at the earliest possible moment. The mayor insisted that the plant was not completed, and should first burn 250 tons of refuse a day for two weeks before running a test, and insisted that the test, when fixed, should be on Saturday; but he agreed that the city would supply the material for a test beginning Saturday, February 14, 1914. The Destructor Company, accordingly, on February 5, 1914, sent Mayor Woodward notice in writing of its readiness to run a test on February 14th, and requested that the city have the proper mixture of refuse collected for that date. By Friday, February 13th, the day before the date set for the test, the city had collected at the plant a pile of garbage containing about 80 tons, as compared with 112½ tons necessary for the test. The chief of the sanitary department intended to complete, on the 14th, the collection of the rest of the garbage necessary for the test, as well as 137½ tons of rubbish, ashes, and stable manure, and also to deliver into the pit the ordinary run of refuse in sufficient quantities to keep the plant running up to the beginning of the test.

According to the report there was rain on Thursday, and on Friday, about the middle of the day, this rain turned to sleet. The temperature fell to freezing, and the rain froze on the streets, and made them quite slippery, and hauling was difficult, as was shown by the fact that horses and mules fell down in the streets. There was a consultation then between Mr. Dowd and Chief Jentzen of the sanitary department about the collection of refuse for the test the next day, as well as refuse to keep the plant running in the meantime. Chief Jentzen, Mr. Dowd claims, said it would be impossible to collect such refuse. After such consultation Mr. Dowd interviewed Mayor Woodward and suggested that, because of the difficulties of collection, the test be postponed until Tuesday, February 17th. The mayor said he did not care whether the test was held or not. Later that day another meeting between Mayor Woodward, Mr. Dowd, Councilman Ashley, chairman of the sanitary committee of council, and Chief Jentzen, was held in Chief Jentzen's office, and Chief Jentzen reiterated that it would be impossible to collect the amount of refuse needed, and, in Mr. Dowd's hearing, sent instructions by telephone to the city stables that the collection carts should not go out on Friday afternoon.

The master says, if there was no explicit agreement to postpone the test from Saturday, February 14th, to Tuesday, February 17th, there was no refusal by the city of Mr. Dowd's suggestion to that effect, and Mr. Dowd left the conference with the understanding that there was to be such a postponement. In accordance with this understanding, the company's engineers, who were to run the test, did not go to the plant early on the morning of Saturday, February 14th. Mayor Woodward, however, instructed Councilman Ashley and Mr. Lederle to go to the plant on Saturday morning. They accordingly appeared at the plant Saturday morning about 7 o'clock. Mr. McEwen, the company's plant superintendent, was there and saw them. They did not speak to him and soon went away. They made no attempt to notify Mr. Primrose, the company's engineer, by telephone

or otherwise, of their readiness to run a test. Even if the company's engineer had been at the plant ready to run a test that day, the test could not have been run, because the city did not have enough material ready to run a test. The city had only a pile of garbage containing about 80 tons, and lacked the remaining garbage required to make up the 112½ tons, and also the 137½ tons of ashes, rubbish, and stable manure. Furthermore, the city did not have ready at the plant on Saturday morning the empty carts needed to transfer the garbage pile into the pit for test. The icy condition of the streets continued during Friday afternoon and night and Saturday morning, so that on Friday the city was able to deliver into the pit only 117 tons of the regular run of refuse, which was all burned by 4 o'clock Saturday morning. On Saturday only 108 tons were delivered.

As to this he finds: That it was through no fault of the Destructor Company that the test was not run on Saturday, February 14, 1914, but it was because of unusual weather conditions, which made it practically impossible for the city to deliver the required mixture of refuse for the test. The plant apparently was in good running order and could have been tested on that day. That Mayor Woodward announced to the newspaper reporters on February 14th that "the company had thrown down the test," and, in substance, stated that this action took away the last legal grounds on which the company might claim payment of the final $135,000 due on the plant. Then it is stated that on Monday, February 16th, Mr. Dowd, the company's representative, called on Mayor Woodward and requested that a test be held next day, or at any time within the next few days, using for that purpose the garbage which had been collected for the intended test on February 14th, which was still on hand. This the mayor positively refused, and ordered the garbage dumped into the pit. After stating some other facts about conferences, the master says: That the mayor at last consented that a test be run on Saturday, March 7th, and gave Chief Jentzen instructions to collect refuse needed for the test. That the city did not have the necessary amount collected by the 7th of March, and the company, in its letter to the mayor of that date, requested that the test be held as soon as possible, between then and March 14th. That Mayor Woodward consented for the test to be held beginning Saturday morning, March 14th. That before this test the mayor gave instructions that 250 tons of refuse each day be delivered at the plant. The company claims that on the preceding Sunday it had been necessary to operate the plant burning refuse, and that they had not been able to shut down the plant on that day to clean out the furnaces. The company requested Mayor Woodward March 12th that there be a light delivery of refuse into the pit on the day preceding the test, so that there might be no doubt of its all being burned up and the pit clean by the morning of the test. Mayor Woodward acceded to this request, but "solely upon condition that you shut down no furnace, but keep them all in service." This letter set the time for beginning the test at 9 o'clock in the morning. By observing this condition imposed by the mayor, the company was unable to shut down or clean out the furnaces and gas passages, and had

to begin the test with whatever of dirt, slag, and dust had accumulated in the furnaces and the passages during the two weeks preceding.

The master then finds that the company should have had an opportunity to clean out the furnaces before the test, as that is the usual custom prevailing in testing all kinds of plants. The company further claims that the plant suffered in this test under a second difficulty, for which, however, the city was in no way responsible. The refuse which was delivered to the plant on the day before the test was all burned by 4 o'clock in the morning of the day of the test and the fires then had to be banked. This prevented the beginning of the test with a running start, as the contract provides.

The report says: That a test of 24 hours was run, beginning Saturday, March 14, 1914, about 9 o'clock a. m., and that on this test the plant burned 225 tons of refuse, thus falling short 10 per cent. of the 250 tons guaranteed. That on this test the plant's steam production, as claimed by the company, was 2.47 pounds of steam per pound of refuse consumed, as compared with 1.96 pounds mentioned in the guaranty, but, as claimed by the city, was only 1.76 pounds of steam per pound of refuse. The difference between the parties on this point depends on the proper interpretation of the contract, as will be explained in discussing the August test. The finding is that the delay in running the test from December 29th to March 14th was the fault of the city, that throughout this time the company was persistently endeavoring to induce the city to supply the refuse required for a test, and that the plant was in suitable condition to be tested during that period.

The master's report then refers to the fact that certain changes were made by the company after this March, 1914, test. The master says: That before the March test Mr. Primrose, the company's chief engineer, went over the drawings showing the contemplated changes with Councilman Ashley, chairman of the sanitary committee of general council of Atlanta, and, himself an engineer. Mr. Ashley made no objections to the proposed changes. That in its letter of March 16, 1914, the company notified the city that it would at once set about making these changes, and in doing so would shut down the furnaces one at a time, keeping the other two furnaces in operation to dispose of the city's refuse. That the changes would take about four weeks, and it would then ask for another test. While the changes were being made in accordance with this letter of March 16th, one furnace was shut down at a time to permit the changes, and the other furnaces were kept running night and day, including Sundays, to burn the refuse. That the city did nothing to let up on the delivery of refuse at the plant, and it accumulated there faster than the two operating furnaces could burn it.

Mayor Woodward wrote on March 24th and 25th, complaining of this condition. The company wrote the mayor on March 24th and April 8th, fully explaining the situation, but before the changes had been made on the third furnace, Mayor Woodward sent orders by Chief Jentzen to the company's superintendent at the plant that no further work should be done on Sundays, and that the police had been

instructed to enforce these orders. Accordingly, after Sunday, April 12, 1914, the company did not do any work at the plant on Sundays for three months, until Sunday, July 12, 1914, except to keep the furnaces banked over Sunday, and did not even clean out the furnaces on Sunday. The company, in its letter to Mayor Woodward of April 8, 1914, stated that it had completed the changes in two of the furnaces, and again stated that, as soon as the changes should be made in the last one, the company would notify the city that it was prepared to run a second test. To this Mayor Woodward replied under date of April 17, 1914, saying, among other things:

"I claim that you have no standing whatever to demand tests, only such as the city of Atlanta may agree to, and that all such tests, in the future, if any should be made, will be entirely as the city directs."

On April 18th the company wrote that the changes in the furnaces were completed, and they would be ready to run a test on April 30th, and asked the city to prepare the proper mixture of refuse and have its representatives present on that date. On April 20th the mayor wrote that the city was not ready for a test at that time, and neither was the plant; that "the pit of the plant has not been clear of garbage since the 16th of March." The mayor in that letter complains about the shutting down of the furnaces, one at a time, following the making of the changes, "in order to drill or hammer the slag out, of which there is about 50 tons in the chamber." The master finds that the city, through Mayor Woodward, thus again refused to test at the time requested by the company, and that such refusal was arbitrary and unnecessary. The report then says that the work at this plant is clearly a work of necessity for the protection of the public health, as is, in substance, alleged in the bill of complaint, paragraphs 57 and 67, and, in substance, admitted by the city's answer, paragraphs 57, 59 and 67, and as is testified by Councilman Ashley, chairman of the sanitary committee of the general council and member of the board of health.

According to the report, on April 30, 1914, the date on which the company had requested and Mayor Woodward refused that a test be run, the plant was in proper condition to be tested; that on that date it burned 263 tons of the city's ordinary refuse. A letter was written by the company to Mayor Woodward on April 27th, in answer to his letter of April 20th, in which he refused to hold a test on April 30th, and in acceptance of Mayor Woodward's insistence that the plant should be run for some time before testing, the company, in this letter, suggested that the plant be run up until May 25, 1914, and requested that Mayor Woodward agree to a test within a fortnight following that date. Getting no answer to this request, the company wrote Mayor Woodward again on May 7, 1914, renewing this request, and under date of May 14, 1914, the mayor replies as follows:

"Your letters of April 27th and May 7th received. Taking the general condition of your plant into consideration, and its inability to perform what the contract and specifications call for, I have considered it unnecessary to give any thought as to the time when a test shall be run. The type of furnace that has been placed there now is entirely different from any heretofore attempted to be used, and is entirely different from what your contract and specifications call for. As I stated to you in my former letter, the city of At-

lanta is in position to decline to take your plant at all. It never has fulfilled the contract and, as regards to your stating or calling for a test on May 25th, I am satisfied that the plant will be in no condition to go into a test. At the present time we are not furnishing 45 per cent. of the garbage, nor nothing like that amount, and until such time as we can furnish the regular amount of garbage, and when you get your plant in useful operation, possibly within the next 60 or 90 days, there need be no talk of setting a day for a test."

The master says:

"Here again, the city, through Mayor Woodward, positively, and in my opinion arbitrarily and unnecessarily, refused the company's request for a test in the fortnight following May 25, 1914."

He says the plant was then in condition to be tested, as all the changes had been made. The report says that Mayor Woodward's letter of May 14, 1914, was the first objection received by the company from the city making the claim that the changes the company had made after the March test altered the type of the furnaces, so that they no longer conformed to the contract and specifications, but that from this date, this claim has been the main reason put forward by Mayor Woodward for refusing the test, and, when the plant was again tested, in August, 1914, for refusing to recognize that as an official test binding on the city. The master says it is therefore important that the nature of these changes be described. He says that the Destructor Company, as its justification for these changes, relies on the clause in the contract which reads as follows:

"If in the tests the plant does not come up to requirements, or does not fulfill each and every one of the guarantees and specifications, the city may refuse to accept the plant; however, every reasonable opportunity shall be given the contractor to make changes in the incinerator if, by so doing, it may be made to satisfactorily fulfill the requirements and guarantees."

The master then gives this description of the changes made and his opinion as to the changes:

"The grates of the furnaces where the refuse is burned are supplied with a forced draft of air blown through holes in the bottoms of the burning grates, thus supplying with such air draft the oxygen which is essential for the combustion of the refuse. To further facilitate such combustion, the air for this forced draft is heated in a device known as the 'forced draft air preheater' before being supplied through the burning grates of the furnaces. The heat for the forced draft air preheater comes from the waste gases after they have passed through the boilers, which operate the plant. These gases have performed their full work in making steam in the boilers and are of no other economic value. Directly below the burning grate in each furnace is a chamber known as 'the clinker cooling chamber.' When the refuse on the burning grate has been sufficiently burned out and reduced to clinker and ash, the burning grate is drawn back, and the hot clinker and ash fall upon the clinker grate at the bottom of the clinker cooling chamber. The clinker cooling chamber is tightly inclosed. It comes between the forced draft air heater and the burning grate, so that the air for the forced draft, after being preheated in the preheater, passes through the clinker cooling chamber, where it acquires additional heat from the hot clinker and ash, and then passes through the bottom of the burning grate into the burning refuse.

"The change made after the March test, which is now objected to by the city, is wholly in the clinker cooling chamber. Before the change, the forced draft, after leaving the preheater, had to pass through holes in the bottom of the clinker cooling grate and through the clinker and ash lying on this grate. The company found, in the fall and winter months, when the refuse

to be burned was dry and contained large amounts of ashes, besides dirt and sand in the street sweepings, that the resulting clinker, which was dumped from the burning grate to the clinker cooling grate below, was very dense and often almost molten, like lava, so that it spread out over the clinker cooling grate like a pancake, and stopped up the holes in the bottom of the clinker cooling grate, and would not let enough of the forced draft air through to properly supply the fires on the burning grate above. The change was made to remedy this difficulty. The change consisted in chipping out the brickwork in the walls of the clinker cooling chamber for a few inches in depth and inserting cast iron boxes or ducts from a point below the clinker cooling grate to several feet up on the walls of the clinker cooling chamber. These ducts have holes near the top a couple of feet above the clinker cooling grate, and below the burning grate.

"After the installation of these ducts, the air from the forced draft air preheater passes into the same place as before, viz. the clinker cooling chamber, but now passes only partly through the old holes in the bottom of the clinker cooling grate and partly through the ducts around the clinker cooling grate. These ducts, being of cast iron, absorb heat by radiation from the hot clinker and act on the clinker cooling grate and the air which passes through the ducts absorbs this heat. Practically as much heat from the clinker and ash on the clinker cooling grate is conveyed to the burning grate above as before. The very practical advantage is gained by this change that, however dense and molten the clinker may be now, the air draft is not checked, and the burning grate gets at all times a sufficient air supply. This change does not alter the Heenan type of furnace called for in the contract and specifications. This change would not have been required, if the refuse delivered by the city would always be approximately the test mixture.

"It is true that the ducts around the clinker cooling grate, introduced by this change, are not shown on the blue print which was referred to in the contract signed by the parties, nor are they described in the paper entitled 'Description of Proposed Refuse Destructor Plant for City of Atlanta,' which is one of the papers physically attached to the contract. That description describes the clinker cooling grate and its operation as originally constructed and before the ducts had been introduced by the change made after March test. The furnaces in the Atlanta plant work better since the change has been made, and the city's objection to it seems to me captious."

The master then refers to the city's requirement that the plant burn dead horses in this way:

"In April or May the city began delivering dead horses and mules at the plant and demanded that the company burn them. The company gave in to this demand and burned all such large animals delivered. The weight of these animals was included in the tonnage burned, but, except for such weight at 25 cents a ton, nothing extra was allowed for the extra expense of burning these animals. Such burning required extra labor in jacking the carcasses into the combustion chamber, and required the shutting down of the furnace while the carcass was being put in. The delivery of such carcasses continued about three or four months, until after this court's injunction order was granted in August, 1914, and during this time about 134 large carcasses were delivered by the city at the plant and burned by the company. This interfered materially with the operation of the plant."

The master says the only clause in the contract on this subject is on page 2 of the "Specifications by Contractor," which reads as follows:

"Openings sufficiently large for placing carcasses in the combustion chamber will be provided for, and closed by means of an airtight, brick-lined door."

The master then says that on June 26, 1914, the mayor wrote, setting August 1, 1914, as the time limit beyond which he forbade the doing of any work on the plant, and notice to the same effect was

reiterated in his letter of July 25, 1914. On June 29, 1914, the company wrote the mayor saying:

"We wish to get a test on July 15th, and would ask that you agree to have the material ready on that day."

On July 1st the mayor replied, positively refusing this request, on the ground that the plant, because of the changes made, did not, as he claimed, conform to the contract. The master holds that Mayor Woodward's refusal to test on July 15, 1914, as requested by the company, was, in his opinion arbitrary and unnecessary; that the plant was in condition to test on that day. After some correspondence and some personal interviews, Mayor Woodward, on July 25th, said that the company could run a test on August 7th or 8th, for its own satisfaction, but that the city would not recognize it as an official test, or of any value or binding effect. In this letter the mayor reiterated his notice that no work on the plant would be permitted beyond the 1st of August. The company answered July 29, 1914, assenting that the test be held August 7th or 8th, and it was subsequently fixed to begin on Saturday morning, August 8, 1914. It is then said that for some time preceding the test a decidedly acrimonious correspondence had been passing between the company and the mayor, in which the company complained of his repeated refusals to test, of his shutting down the plant on Sundays and sending in many dead horses to be burned, the delivery of wet garbage without ashes, and other things which the company deemed unfair; and Mayor Woodward complained that the company was using wood, coal, and ashes of its own to mix with the garbage, and demanded that the pit be cleaned up each night, and complained that unburned material was passing through the furnaces.

The master then says: That on Friday, August 7, 1914, the day before the test, the city dumped into the pit between 280 and 284 tons of very wet refuse. At 7 o'clock Friday morning there was already about 20 tons in the bottom of the pit, carried over from the previous day. That the stuff was so wet that the company had to add to it, to make it burn, about 30 tons of ashes which the company itself had collected. That this made about 334 tons of material, about 304 tons of it being wet material delivered by the city, to be burned by Saturday morning in order to clean the pit for the reception of the test material. That at the normal rating of the plant, a little over 10 tons an hour, to burn this would have taken about 32 hours, or until about 3 o'clock Saturday afternoon. That during Friday morning the company ran the plant slowly, so as not to run out of fuel before the beginning of the test, as it had done on the March test. That the city's deliveries on Friday were considerably heavier in the afternoon than in the morning, and that the company, from then on, ran the plant at its utmost capacity, in an effort to dispose of the stuff by Saturday morning. That the city's representatives, Councilman Ashley and Mr. Lederle, and the company's engineer, came to the plant on Saturday morning to run the test. That the time of beginning was then postponed by the city, with Mayor Woodward's consent, until 11 o'clock Saturday morning.

About that time he came to the plant. That there was then between 50 and 60 tons of refuse in the pit. The company's engineers complained of the heavy deliveries on Friday. Mayor Woodward complained of the stuff remaining in the pit and refused to wait any longer, and about 11:30, over the protest of the company's representatives, he directed Chief Jentzen to dump into the pit, on top of the tonnage which was already there, the garbage which had been collected for the test. Mayor Woodward, Councilman Ashley, and Mr. Lederle then refused to take any part in running the test that day and went away. The master says:

"I find that the company was not responsible for the extra quantities of wet refuse which were delivered on the day before the test."

Then it is said: That soon after Mayor Woodward, Councilman Ashley, and Mr. Lederle left the plant on Saturday morning, August 8, 1914, Chief Jentzen, under Mayor Woodward's orders, began dumping into the pit the garbage which had been collected for the test. That the amount of garbage in the bottom of the pit when this dumping began was measured in feet, sampled, and estimated in weight at about 53 tons of wet, soggy stuff. That at 11:50 Saturday morning, August 8, 1914, the company began to run the 24-hour test, and ended the test at 11:50 on Sunday morning. The test was run, and the readings of the various instruments taken by and under the direction of Gabriel R. Solomon, Esq., of the Solomon-Norcross Company, engineers, of Atlanta; he having been retained by the company just before the test as an impartial engineer to run it. That Mr. Solomon made a report on the performance of the plant on this test, to the correctness of which he testified on the trial. As to this report the master says:

"I find that it is true, and correctly sets forth the performance of the plant on the test. Mr. Solomon's report contains a few matters which he learned from others, and to these parts objection was made by the city, and they were not received as evidence. The truth of these parts was, however, proved by other witnesses."

The master, as shown by the foregoing, evidently thought that the company was diligent in requesting tests of the plant, and that the city was at fault in refusing them. I have examined the parts of the evidence most material on this question, and I am satisfied that the evidence is sufficient to justify the master's finding.

Section 5 of the specifications, which states of what the refuse would consist, and the proportions, has been quoted above. I think this means exactly what it says—that the city represented that approximately the refuse would consist of those proportions. Of course, this must be taken in connection with the common sense of the matter, and this is that these proportions would necessarily vary somewhat with the seasons. As the master says in his report, these proportions of refuse vary widely between summer and winter, and somewhat all the time, but finds that the proportions stated are about the average of the year in Atlanta. If practically these proportions were used in the tests which were to be run to determine the efficiency of the plant, I do not think it was meant that the city must furnish close to these proportions at all times. This could not have been true, and allowed for the com-

mon sense and ordinary knowledge of the persons entering into the contract. Of course, it follows that, if the plant stood the tests on a mixture approximating what is stated in the specifications, then, as to this feature, the company would have complied with its contract.

We come naturally and in order now to the next question of importance involved in this case, and that is: Did the plant comply with the provisions of the contract that it should destroy 250 tons of refuse in 24 hours? On the first test, made in March, 1914, it appears that the plant failed in this respect, and destroyed only 225 tons, falling short 25 tons of the requirements of the contract. The master says that immediately after this test of March, 1914, the company notified the city in its letter of March 16th that it would at once set about making certain changes in the plant, and would shut down one furnace at a time, etc. On May 14, 1914, the mayor wrote, objecting to these changes and claiming that the plant no longer conformed to the contract and specifications, and since that time the mayor has put this forward as a reason for refusing to regard the tests made as official tests. The character of changes made has been referred to above, and the master says that the changes made did not alter the Heenan type of furnace called for by the specifications. The master concludes that:

"The furnaces in the Atlanta plant work better since the change has been made, and the city's objection to it seems to me to be captious."

I was wholly unable to see during the argument, and I am unable to see now, how this change in the furnaces could be called such a substantial and radical change, under all the circumstances, as to give the city the right to repudiate its obligation under the contract. Certainly this is so if the effect of it was to make the plant work better and destroy the amount of tonnage per day required by the contract. On the subject of the plant's capacity to destroy the refuse, the master finds this: He quotes from the contract:

"That the plant shall be capable of destroying in normal operation 250 tons of refuse per 24 hours without the use of additional fuel."

And then he proceeds:

"I find that on the 24-hour test of August 8, 1914, the plant destroyed 278.89 tons of refuse without the use of additional fuel. This was 11.55 per cent. more than the 250 tons mentioned in this guaranty."

I shall refer hereafter to a test run in May, 1915, by the gentlemen appointed by the court to make such a test; but my conclusion is, from what the master finds and from the evidence on which he acted, that the plant is capable of destroying 250 tons of refuse in 24 hours without the use of additional fuel. The plant is not called upon to do this usually, and probably not very often; but it must be concluded from the evidence that it can do it when necessary and when required.

In reference to the guaranty in the contract, as follows:

"That the number of pounds of refuse burned per hour, per square foot of that grate area upon which final combustion takes place in the proposed plant, shall not be less than 115 pounds"

—the master finds that:

"The grate area of the three furnaces is 180 square feet. That being so, this guaranty in different language covers substantially the same ground as the first guaranty, viz., the capacity of the furnaces. The 115 pounds per square foot of grate area, multiplied by 180, the number of square feet of grate area, gives 20,700 pounds of refuse to be burned per hour. Multiplying this by 24, the number of hours in a day, gives 496,800 pounds as the number of pounds of refuse to be burned per day. This is almost the same as the 500,000 pounds of refuse, or the 250 tons per day, covered by the first guaranty."

The master then finds that:

"On the 24-hour test of August 8, 1914, there were burned 278.89 tons, which is 557,780 pounds of refuse. This is 23,240 pounds per hour, and for the 180 square feet of grate area is 129 pounds per square foot of grate area, as compared with the 115 pounds mentioned in this guaranty."

In other words, if the finding as to the 250 tons per day is correct, it covers this guaranty as well.

There is a guaranty in the contract that:

"No nuisance offensive to persons outside of the plant shall be created in the ordinary operation of the plant; that the combustion shall be completed—i. e., that all combustible gases shall be fixed by oxygen, and that no dust, odors, or noxious gases shall escape from the chimney or the building, so that the plant shall be practically smokeless in operation."

On this subject, in the report of the Solomon-Norcross Company, engineers, of the test of August 8, 1914, this is said, first referring to the provision of the contract that no nuisance whatever shall be created, quoted above:

"In my judgment this condition is satisfactorily met by the plant operation. I observed carefully, at frequent intervals, the condition in the various parts of the plant. Only at rare intervals could smoke be seen coming from the chimney. On two occasions of about one minute duration, a black smoke issued from the chimney, but almost immediately disappeared in the air. Investigation indicated that this was caused by the simultaneous firing of the several furnaces, with charges containing a large amount of paper and rubbish, and not to the design of the furnace, and that the color was probably due to the presence in the chimney gases of carbon, small particles of burned and charred paper."

The master further finds that:

"Mayor Woodward, Councilman Ashley, and other of the city's witnesses testified to complaints being made by citizens at various times. The fact of making complaint, however, is only hearsay, and not proof that there was any justification for the complaint. I find that there were smells coming from the plant at times, and especially during August, 1914, when witnesses have testified that the plant was unable to get the pit completely empty for several weeks, and that the sour garbage in the bottom, when uncovered, smelled to heaven, and that the smell could be noticed several blocks away. Councilman Ashley testified that it was only the stuff in the pit that smelled, and that only when it had been in the pit a long time. There were a number of witnesses from the W. & A. roundhouse, just about 400 feet from the plant. They testified that the smell from the direction of the plant was very bad in summer of 1914, when the wind blew from that direction. This may have been the smell from the pit, in August, mentioned above. The most of the witnesses characterized the smell as like excrement or 'night soil.' There is a place near the plant where the city pumps 'night soil' into the sewer. There were also some witnesses who testified that, when the wind blew from the direction of the plant, they smelled, in the Austell Building and one or

two other places, smells which they thought came from the plant, several blocks away, which caused them to shut down their office windows. Some of these smells probably came from the plant; but they were only occasional, and not, apparently, of a serious nature. I find that at various times, for short periods of time, smoke was emitted from the chimney of the plant. This happened at long intervals, and I do not think that there has been any real nuisance in the operation of the plant. When the plant is properly operated, no offensive smells should come from the stack."

Counsel for the city differ with this, and earnestly claim that the plant was offensive while in operation, and that the smell was beyond anything allowed for by the contract. I do not think the evidence is such as to justify the court in differing with the master about this. He concludes that the plant, when properly operated, should produce no offensive smells, and I do not see why it should, if the refuse is delivered in the proper way and destroyed as delivered, or within a reasonable time after delivery, and I do not think that it is satisfactorily shown that the plant will create such odors.

Another provision of the contract is:

"That at no time during the normal operation of the plant, including charging, stoking, and clinkering, shall the temperature in the combustion chamber, due to defects in design or construction, and as ascertained from a continuous record of a Fery radiation pyrometer, fall below 1,250 degrees Fahr., and that an average temperature of at least 1,500 degrees Fahr., shall be maintained in the combustion chamber."

It is then found: That in the 24-hour test of August 8, 1914, at no time during the normal operation of the plant, including charging, stoking, and clinkering, did the temperature in the combustion chamber, due to defects in design or construction, fall below 1,250 degrees Fahr., and that an average temperature of 1,633 degrees Fahr. was maintained in the combustion chamber. Only once, and then only for a short period, and in only one of the three combustion chambers, did the temperature fall below 1,250 degrees Fahr. That at 4:45 p. m. the temperature in the combustion chamber of furnace No. 3 fell below 1,250 degrees and registered 1,100 degrees. This was not due to defects in design or construction. The reason was that at that time this furnace was being fed with wet garbage, because for several hours preceding this time only wet garbage, including rotten watermelons, had been dumped into the pit. "That the temperatures were not ascertained from a continuous record of a Fery radiation pyrometer, but by other good standard instruments, viz. a Foster fixed focus pyrometer and a thermo couple pyrometer, which determined the temperature as well." As I understand the testimony on this subject, the finding of the master is abundantly supported by the evidence.

Another provision of the contract is this:

"That the residual from the furnace shall be thoroughly burned, hard, innocuous clinker and ash, free from organic matter, suitable for concrete work, road foundation," etc.

As to this the master says:

"I find that on the 24-hour test of August 8, 1914, the residual from the furnace on this test was thoroughly burned, hard, innocuous clinker and

ash, substantially free from organic matter and suitable for concrete work, road foundation, etc. The furnaces burned 278.89 tons, which is 557,780 pounds of refuse, on that day. The clinker pile was thoroughly raked for unburned material in the residual, and only 235½ pounds of partly burned organic matter were found. This weight included the water absorbed by this material from the water put on the clinker pile by the city. This consisted chiefly of banana stalks, water melon rinds, and newspaper. This partly burned material, including the water absorbed by it in the wetting down of the clinker pile, is only one pound in 2,372 pounds burned, or .04 of 1 per cent. This small amount of partly burned material was negligible. Even this small portion of unburned material would, in all probability, have been burned up in the hot clinker pile, if the pile had not been wet down as the clinker was dumped on it."

This has been a serious subject of argument since this case commenced. Undoubtedly there were small particles of unburned material which came out with the clinker. It is perfectly clear, and the evidence all shows, however, that these particles would have been completely destroyed in the clinker pile if it had been left standing a little while on the yard; but water was immediately applied to it, for the purpose, as the city claims, of cooling it to enable the employés to haul it off. This does not seem to me to be a just objection to the efficiency of the plant, when, in fair operation, it certainly seems that with reasonable co-operation between the city and the Destructor Company this could have been largely, or even entirely, remedied by allowing the clinker to remain for a short time before removing it. How these little pieces of paper escape from the terrible heat to which they are subjected is a mystery to me, as it appears to have been to Dr. Coon, who was head of the commission appointed by the court to run a test, to which I will refer later.

It will be seen from the guaranty with reference to the residual that it must be suitable for concrete work, road foundations, etc. There was ample testimony to support the finding of the master that the clinker complied with this guaranty of the contract, supported, I think, by the testimony of Mr. Solomon, of the Solomon-Norcross Company, and also by that of Mr. Foster, the president of the Destructor Company, and of Dr. Rudolph Herring, the sanitary engineer, and Col. William L. Peel, of Atlanta. Col. Wm. L. Peel testified in reference to this clinker as follows:

"I think it is about as valuable as crushed stone, because it will bind, and stone will not. Q. Did the stuff that you saw out there, had it matted and bound together? A. Yes, sir; where it had been traveled on sufficiently, it had matted and packed down smooth. Q. Did you see any foreign matter in there, except hard, innocuous cinder? A. Not a particle. Q. To what extent have the streets in that section of the city been covered with it? A. A number of streets there have been made passable and very good streets. Q. How long a stretch would you say you saw? A. Well, one or two blocks in a piece, maybe three blocks, and several pieces of streets, quite a number of them. * * * This stuff is too valuable to be filling in people's property with. It ought to all be used on the impassable streets over there in that part of the town; it is so valuable it ought to be put on the streets, instead of putting it on private property. Q. Do you think it is as good stuff as chert? A. I think it is better than chert; chert will wash, and wash away, but this, I don't think it will. It binds. Q. What would you say its commercial value would be? Give us an idea. A. It looks to me like it is as valuable as crushed stone."

There was other testimony on this subject, some of which seems to be a contradiction of that of Col. Peel. Certain citizens living in the neighborhood where this cinder was dumped objected to it, and thought it contained a considerable quantity of unburned and offensive stuff. But, taking the whole of the testimony together, I do not think it can be said that the master's finding is not fairly supported.

There is a guaranty in the contract as to the flues, dust collectors, furnaces, and combustion chambers being so arranged that it shall not be necessary to shut down more than one unit of the plant, and that for not more than 48 hours, in order to remove thoroughly all dust and ashes. The master finds that this was complied with, and that it was not necessary to shut down the plant longer than was provided in the contract. I agree with him in his finding on this point.

The guaranty in the contract as to the steam production is a question which has been much discussed. This guaranty is that the number of pounds of steam generated in the boiler from and at 212 degrees Fahr. per pound of refuse consumed shall not be less than the amount stated in the bid, and that amount is 1.96 pounds. The master calls the dispute on this subject "the principal dispute before me concerning the test of August 8, 1914." Mr. Solomon, of the Solomon-Norcross Company, reports as to this:

"I find that the rate of evaporation during the test was 1.953, which is less than the guaranteed rate by .007 of a pound or .36 of 1 per cent. The calculations from which this rate was determined are shown in the appendix. It will be noted:

"(1) That while the rate of evaporation fell below that specified by .36 of 1 per cent., the plant produced 11.1 per cent more steam from the 278.89 tons of refuse incinerated than it would have produced from 250 tons, the guaranteed amount, at the guaranteed rate of 1.96. In other words, there was available for power purposes, from the plant, because of its increased capacity, 11.1 per cent. more steam than was required by the guarantee.

"(2) That the material burned was not in accordance with the proportions stated in the specifications.

"(3) That in that portion weighed there was an excess of material difficult to burn, over the percentage specified.

"(4) That between the hours of 3 p. m. and 5 p. m. on Saturday garbage only was dumped into the pit. This mixture, being difficult to burn, naturally reduced the rate of evaporation. I noted that, while this material was being placed in the furnaces, the production of steam was so reduced that the pop valve in the steam discharge line failed to work, and the amount of steam produced was greatly below that which prevailed during the other hours of the test.

"(5) That the amount of refuse remaining in the pit from Friday was estimated as 52.91 tons. This material, because it had been at the bottom of the pit for a number of days, contained an excess of moisture, and did not conform to test mixture, and its volume was based on an estimate determined by measuring the depth of the material in the pit, and weighing samples taken at random to determine the weight of the balance. I believe my estimate on the amount of material burned, but not weighed, is conservative, and less than the tonnage actually in the pit when the test mixture was added; but a small error in estimating this tonnage might increase the rate of evaporation to the guaranteed rate."

On this question the master says:

"The plant produces steam in two, and only two, places: Unusable steam is produced in the furnaces themselves from the water in the refuse. This un-

usable steam passes off up the chimney stack with the other gases of combustion. (2) Usable steam, all of which is produced in the boiler. The company claims that the expression 'steam generated in the boiler' is used to distinguish the usable steam from the unusuable steam.

"The company claims that the purpose of the steam production guaranty is to insure to the city the production by the plant as a whole of surplus steam which could be utilized for power purposes. The company claims, therefore, that the steam generated or evaporated in the boilers by the economical operation of the plant as a whole should be measured, and that it is entitled to credit for the operation of the feedwater heaters. These feedwater heaters themselves produce no steam. They are accessories of the boilers, and the city's specifications require such boiler accessories. They utilize the exhaust steam from the auxiliary machinery to raise the temperature of the water coming out of the city main from about 78.9 Fahr. to about 203 Fahr. before the water is fed into the boilers. The steam from the auxiliaries so utilized by the feedwater heaters has already fully served its purpose as steam in running the auxiliaries, and has no value except as the remaining heat in it is thus used in the feedwater heaters. This is the utilization of what would otherwise be a waste product, and is one of the economies in this plant's operation.

"The city claims, on the other hand, that under this guaranty no credit should be allowed the plant for the performance of the feedwater heaters, but that the temperature of the feedwater should be taken only as it goes into the boilers at about 203 degrees, after passing through the feedwater heaters, not at about 78.9 degrees, as it comes from the city main. The expert testimony shows that on tests of the efficiency of boilers only the temperature of the water going into the boiler is read as it goes into the boiler, and that no credit is allowed on a test of a boiler alone for the performance of the feedwater heater (an accessory of the boiler) in previously raising the temperature of the water to that point. But, on the other hand, on tests of the efficiency of an entire plant (an over-all test, as they are sometimes called), the temperature of the water is read on the other side of the feedwater heater, and credit is allowed for the operation of the feedwater heater in raising the temperature of the water before it is fed to the boiler. As this is a question of the interpretation of the contract, and all such questions were reserved by the court, I have not passed on the respective claims of the parties."

There is another dispute between the parties as to the meaning of this steam production guaranty; the company claiming that, the basis of this guaranty being the weight of the refuse "consumed," it would mean the weight of the refuse fed into the furnace, less the weight of the unconsumed portion coming out in the residual as clinker and ash. The city, on the other hand, disputes this claim, and contends that the words "refuse consumed" in this guaranty means "refuse fed into the furnaces."

According to the master's report, the testimony of Dr. Rudolph Herring, Mr. Solomon, Mr. Dowd, and Mr. Primrose was that the weight of the residual should be deducted from the amount of refuse in order to ascertain whether there was a compliance with this part of the contract, and Messrs. Pool, Ashley, and Lederle, on the other hand, testified on behalf of the city, and in their opinion the correct way to compute steam production is on the weight of the refuse fed into the furnaces, without taking any account of the residual.

The provision of the contract is "per pound of refuse consumed," and it seems to me that much importance should be attached to the use of this word "consumed," because the very meaning of the word "residual," or "residuum," is that there is something left unconsumed. So that I am disposed to agree with the gentlemen who testify that it should be deducted before making the calculation.

The master finds in reference to allowance for wear and tear:

"As stated above in another finding, the contract provides that allowance shall be made for 'ordinary wear and tear' in determining fulfillment of the guaranties. The test of August 8, 1914, was run about a year after the plant had been put into operation, and during that time it had been subjected to hard usage. The city's printed specifications, section 4, allow for the annual depreciation of the plant as a whole, and the testimony shows that the efficiency of the plant as to steam production depreciates about 10 per cent. the first year and about 5 per cent. the next year, and can thereafter be maintained at that efficiency with proper care and expenditure for upkeep. That is to say, at the end of one year's operation 10 per cent. should be allowed for wear and tear, and deducted from the 1.96 pounds of steam per pound of refuse consumed, as guaranteed at the beginning, making that guaranty, with allowance for wear and tear, 1.764. At the end of the second year's operation a further 5 per cent. should be allowed for wear and tear, making that guaranty, with allowance for wear and tear, 1.666."

What the master finds is: That on the test of 24 hours of August 8, 1914, the total weight of refuse fed into the furnaces and incinerated was 278.89 tons. That the weight of the residual was 53.88. Deducting the weight of the residual from the weight of the refuse fed into the furnaces and incinerated, leaves 225.01 tons, on which the company claims the steam production should be based. He says:

"If, as the company claims, this was a plant test, so that the plant should be credited with the operation of the feedwater heater, and if, as the company claims, the steam production is based on the tonnage of refuse incinerated, less the weight of the residual, then the number of pounds of steam generated in the boilers, from and at 212 degrees Fahr. per pound of refuse, was 1.953, as compared with the 1.96 guarantied, without any allowance for wear and tear. This is less than the guarantied rate, without allowance for wear and tear, by .007 of a pound, or .36 of 1 per cent. This very small deficiency would have been more than made good, had it not been for the 53 tons of wet garbage in the bottom of the pit, and had the plant not been fed wholly with the wet garbage for several hours on Sunday afternoon, including 3,500 pounds of rotten watermelons. It was during this very period that the steam production noticeably fell off. With any allowance for wear and tear, the guaranty on this construction of the contract was exceeded. Furthermore, while the rate of evaporation fell below that specified by .36 of 1 per cent., the plant produced 11.1 per cent. more steam from the 278.89 tons of refuse incinerated than it would have produced from 250 tons, the guaranteed amount, at the guaranteed rate of 1.96 per pound, without allowance for wear and tear. In other words, there was available for power purposes from the plant, because of this increased capacity, 11.1 per cent. more steam than was required by the guaranty.

"If, on the other hand, as the city claims, this was a boiler test, so that the plant should not be credited with the operation of the feedwater heater, and if, also, as the city claims, the steam production is to be based on the tonnage of refuse incinerated, without deducting the weight of the residual, then the number of pounds of steam generated in the boiler from and at 212 degrees Fahr. per pound of refuse incinerated was 1.56. If the plant was given credit, as the company claims, for the operation of the feedwater heater, but the company's claim about the weight of the residual is not allowed, then the number of pounds of steam generated in the boiler from and at 212 degrees Fahr. per pound of refuse incinerated was 1.59. If, according to the city's claim, the plant is not given credit for the operation of the feedwater heater, but, according to the company's claim, the deduction of the weight of the residual is allowed, then the number of pounds of steam generated in the boiler from and at 212 degrees Fahr. per pound of refuse was 1.87."

I am perfectly satisfied, after examining carefully the evidence on the subject, that this plant will produce, in fair operation, the amount

of steam guaranteed in the contract. The test of August 8, 1914, as I have quoted it above from Mr. Solomon's report, was clearly not a fair test of what the plant could do, under all the circumstances, and even then it lacked a very trifling per cent. of coming up to the guaranty. I should find this to be true, even without the added observations of Dr. Coon and his associates on their test in May, 1915.

As to the guaranty of labor cost to operate the plant, I think the record shows that the 25 cents per ton guaranteed was sufficient for the cost of labor engaged in operating the plant. That is the labor actually employed in the plant.

In order to increase the draft from the furnaces and to assist in the destruction, or perhaps the nonaccumulation, of slag, the company installed what it called an induced draft fan. This induced draft fan is spoken of by the master in this way:

"This fan may be operated or not, as the operator desires, which is a valuable feature. When operated, it uses, for power to drive it, a very small percentage of the surplus steam produced in the operation of the plant. When operated, it increases the draft up the stack and draws off more rapidly from the furnace the gases produced by combustion. Now, since the fan has been installed, even when the passages through which the gases pass from the furnace up to the base of the stack may become partly stopped up by dust or slag, the draft is sufficient to carry off all the gases. The back draft, which formerly occurred at times when such passages became partly clogged up, is now prevented, and the excessive temperature in the furnaces and passages, the formation of slag which formerly resulted from such partial stoppage of the passages, now never occur. The installation of the induced draft fan overcomes many of the difficulties growing out of the mixture not approximating the test mixture, and improves the operation of the plant. The induced draft fan is not needed when the furnaces are running on a mixture of refuse approximating that specified in the contract."

It seems that this induced draft fan has two purposes, if I understand it; at least it is claimed that it brings about two results. One is its beneficial effect as to the accumulation of slag, and the other is as to helping the ventilation of the plant by preventing back draft. I do not see any reason whatever why this induced draft fan does not result in a beneficial effect on the plant. The city was notified by the company of the installation of this induced draft fan about December 4, 1914, but according to the testimony of the defendant's own witnesses it was completed and put into operation October 27, 1914. So far as I can ascertain, the specifications do not require the installation of this induced draft fan; but it was added voluntarily by the Destructor Company for the purpose of aiding in the satisfactory working of the plant.

I have had some doubt as to whether or not the date of the installation of this induced draft fan was not the time at which the contract should be considered as finally completed; but, while I think this induced draft fan was beneficial to the working of the plant, I do not think this voluntary addition by the company, as it seems from the evidence in the case to have been, would be such a part of the construction of the plant as would make the plant incomplete without it. I think it must be held that the plant was in a condition for useful operation in accordance with the contract, and was doing the work required by the contract on August 8, 1914, as shown by the test made

at that time under the observation for the company of Mr. Solomon, of the Solomon-Norcross Company.

I have not noticed the contention of the city that the city had the right, under the contract, to judge as to whether the contract was satisfactorily completed. The provision of the contract upon which this contention is based has already been quoted in full on page 757 above. It is perfectly evident, I think, from reading this provision of the contract, what was meant; that is, as the work progressed the city had the right to object to the character of the material used, the brick, iron, etc., and to the manner, to some extent, at least, in which the work was being done. This right the city exercised, as I understand it, in a number of instances, as to the window frames, the glass used in the windows, as to the kind of doors put in, and perhaps in other particulars; but when the work went on until the building was completed, the machinery put in and adjusted, and the claim made by the contractor that the plant was complete and ready for useful operation, and the city was not satisfied, then the question of whether there had been a complete execution of the contract on the part of the contractor should be determined by the three persons, as indicated.

Numerous authorities are cited by counsel for the city to the effect that where, in a case of construction such as this, the question of the satisfactory character of the work is left to an engineer or representative to determine, his judgment is final and conclusive. I do not differ with these authorities at all. They are fully recognized, but in this case, I think, so far as the judgment of the engineer or city official is concerned, it was as to the material and the work as it progressed, and that, when the contractor claimed that the work was completed and the city was not satisfied, then, in that event, the matter was to be left for determination to three gentlemen, to be selected and to test the plant in accordance with the provisions of the contract.

There has been some discussion in the case about the trolley hoists, and with reference to their efficiency in accomplishing the purpose for which they were put into the plant. I think there is some objection to the trolley hoists, but I do not think it is sufficient to cause a rejection of the plant. The trolley hoists are an appendage to the plant, lifting the refuse from the pit, into which it is thrown from the carts, and placing it over and emptying it into the furnace hoppers.

I do not think, as just stated, that this is a ground for the rejection of the plant, because it is clear that the Destructor Company made diligent effort to get the best apparatus of the kind that could be obtained, and it works very well when in operation. The difficulty about it is it breaks down oftener than it should for the proper operation of the plant. I think the Destructor Company should be required to remedy this.

In Dr. Coon's report for the commission appointed by this court, he says this:

"A specific contention of the city was that the trolley hoists operating the grab buckets which hoist the refuse from the garbage pit and dump it into the furnace hoppers frequently break down, and thus cause delay, trouble, and needless expense. It is needless to state that these hoists operate under very trying conditions. They must be dust and heat proof. If these hoists

are not the very best that can be procured, the Destructor Company should be required to furnish them. In our opinion the city should require the Destructor Company to provide for these hoists completely inclosed motors with waste-packed bearings."

This is a matter that must be determined, however, in forming the decree. The trolley hoists now in use have enabled the company to destroy all of the refuse furnished by the city during the entire period they have been running it, but still I do not think they can be held to be entirely satisfactory as they are.

[3] There is a claim on the part of the defendant, in the printed argument by counsel, that the city is entitled to some recovery, under the provisions of the contract, against the Destructor Company for the nonfulfillment of its contract at the time specified in the contract. As I understand it, the contract was to have been completed and the plant ready for useful operation on August 15, 1913. As a matter of fact the city commenced to deliver refuse at the plant on August 18th, only three days after the time when, according to anybody's contention, the plant should have been completed. In view of this fact, I do not see how the city can justly make such claim. Of course, the purpose of making this provision for damages and agreeing upon the amount of damages per day for the noncompletion of the contract was the fact that the city would be deprived of the use of it, and where they went almost immediately into the use of the plant, by delivering the material there and having it disposed of, they ought not fairly to be allowed this claim. It is true that, to put the plant in a perfectly satisfactory condition, certain changes and additions were necessary, which prevented its final completion and compliance with all the guaranties of the contract until after the test made in August, 1914, which was supervised by Mr. Solomon, of the Solomon-Norcross Company, and it was then practically and substantially completed in accordance with the requirements of the contract.

So far as I can ascertain them, I have gone over the objections made by the defendant to the action of the master in admitting or rejecting testimony, and I am inclined to think that counsel for the Destructor Company are correct as to a great many of them, that there was no exception noted at the time that the master ruled, which would seem to affect them as much as it would objections made to testimony in court and the action of the court not excepted to and noted at the time. But this is immaterial, because I do not find that any of the testimony admitted or rejected is such that the master's action affected the result of the case. The testimony is, I think, abundant upon the main points in the case and which control it, and fully justified the master's conclusions. Consequently his admission of testimony or his rejection of testimony which would not have altered the result is immaterial on this hearing. The objection, for instance, to evidence in reference to the old contract, it seems to me, could not have affected this hearing in any way. The city wanted to introduce evidence, at one time, as to the cost of the building. This was objected to, but it is stated no exceptions were noted. Whether there were or not, the evidence would not change the result of this case, because the plaintiff

can recover only the contract price and such expense of operating the plant as may be found. The objection to Dr. Herring's qualification to testify as an expert, and evidence showing that he had been in the city's employment, I do not think is meritorious, because his testimony shows that he had had large experience, and so far as I have been able to examine his testimony, he testified to matters as to which he certainly had knowledge, information, and experience to justify his testimony. As I understand, it was also objected that he was allowed to testify that this plant was a substantial compliance with the contract. I think this testimony was competent; but, whether it was or not, the matters that I have determined show, I think, satisfactory and such compliance with the contract as justifies a recovery. All of these exceptions must be overruled.

[4] During the progress of the case, the court, upon a showing made by the company, claiming that the plant was completed, but that the city refused to act with the company in arranging for a test by appointing some one to represent it, I appointed three gentlemen to make this test, as has already been stated. I acted, as stated at the time, very largely on the authority of the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of Castle Creek Water Company v. City of Aspen, 146 Fed. 8, 76 C. C. A. 516, 8 Ann. Cas. 660; but it seems to me, under the facts of this case, and the situation of the parties, to be entirely within the scope and power of a court of equity to appoint such a board of commissioners. These gentlemen, as conceded by everybody interested, were entirely disinterested, all gentlemen of ability and of the highest standing. Their report is in the margin.[1] While I have reached my conclusions on this case from the report of the master and the evidence before him, the report of the test made by these commissioners is exceedingly valuable in determining the question raised as to the completion of this plant in accordance with the contract.

One of the main contentions in the case is as to the capacity of the plant to destroy 250 tons of refuse every 24 hours. As a result of their test the commission says:

"The contract calls for the plant to 'be capable of destroying in normal operation 250 tons of refuse per 24 hours.' The test gave a rate of 273.5. The contract is thus exceeded by about 9.5 per cent. If the Destructor Company had chosen to do so, they could have burned up all the refuse over an hour before they did, thus raising its capacity, on the specified mixture, to about 293 tons per 24 hours. They delayed the rate of combustion in order to raise the rate of evaporation. They consulted us as to whether they would be permitted to do this, and we consented to it."

On the question as to whether the refuse going into the incinerator was completely destroyed, they say that the amount of refuse not destroyed was ".005 of 1 per cent. of the refuse burned, or say .025 of 1 per cent. of the clinker." I think we may safely conclude that, when we have complete co-operation, even this small percentage of unburned material will be greatly reduced, if not entirely eliminated.

They also consider the clinker excellent for road making and con-

[1] See report as set forth just preceding the opinion of the court.

crete work. They find favorably to the company on the matter of combustion on the grates. They say, as to the changes in the furnaces, that they are "unable to see that the city has just ground for complaint in this respect." They state, as to the temperature of the combustion chambers, which under the contract must not drop below 1,250 degrees F.:

"At no time during the run did they observe the temperature as low as that. During the special mixture test the average temperature was 1,615 degrees F."

They state that, in their opinion, the clinker should be deducted from the refuse fed into the furnaces, in ascertaining whether or not the contract was complied with as to the production of steam.

They find that the time of the completion of the plant should be held to be "when it stood structurally and mechanically as it did May 24, 1915." That is the time at which the city should have accepted it, and from which time they should be required to pay interest, and any additional cost of operation, was when the plant was in the condition they found it when their test was made in May, 1915.

This report strengthens very materially the conclusions reached by the master from the testimony before him. I think the company is entitled to a decree that the plant was completed on August 8, 1914, in accordance with the contract; that at that time it was complete and ready for useful operation; consequently they are entitled to a decree against the city for $135,000 and interest from August 8, 1914.

They will also be entitled to recover for the cost of operation over and above the 25 cents from December 19, 1914; also for the cost of ordinary current repairs, such as the city would have made if they had been operating the plant, from the same date. This time is fixed as the date from and after which they should recover the extra cost of operation over the 25 cents, and the cost of usual and ordinary repairs, because, so far as I can ascertain from the record, the letter written by the Destructor Company on December 4, 1914, was the first notice the city had of any such requirement on the part of the company. In this letter the company says:

"Now that our contract is clearly completed, we notify you that if you wish us to continue operation after December 19, 1914, you must pay us from then the actual cost of operation, 53 cents a ton."

I do not mean to say that the company is entitled to recover 53 cents a ton, because it is not satisfactorily shown by the evidence here that it actually costs that much. These amounts should be determined at once by the court upon proper proof submitted, or by reference to the master at once, so as not to delay a decree in the case.

In reference to the claim of the city against the Destructor Company for $356.58, cost of collecting garbage for the February, 1914, test, the master finds in one place that the failure to run this test was due to the condition of the weather, and in another place that the failure to run a test from December to March was due to the fault of the city. I think it is clear from the evidence that the mas-

ter has found correctly that the failure to have the test in February, 1914, for which this charge for collecting refuse was made, was due to weather conditions, and no fault of the company, and that this is sufficient to prevent the city from recovering this amount against the Destructor Company. It will not, therefore, be deducted from the amount which the Destructor Company is entitled to recover against the city, when the same shall have been ascertained in the manner indicated.

There were certain charges made for water used at the plant, for which the city deducted certain amounts from the bills rendered by the Destructor Company for the 25 cents a ton for operation. This is held to be a necessary part of the operation of the plant over and above the 25 cents per ton for labor used in the plant, and the Destructor Company will be allowed to recover the amount thus deducted by the city from its bills as rendered.

I may add to all that has been said above that the manner in which this plant has destroyed the refuse of the city during the past year and a quarter seem to show clearly that the city must necessarily take it and pay for it; the only real question being as to what it should pay for the extra cost of operation from the time stated, and the matter of the satisfactory working of the hoisting apparatus to which I have referred. The trifling amount of refuse which is not completely destroyed, as has been discussed, is not sufficient to justify any serious objection to the working of the plant, and the steam production being satisfactory, although it is not used at all now, there is nothing left as to which there ought to be any reasonable discussion.

As soon as the amount which the plaintiff is entitled to recover, if anything, for excess cost of running the plant, and for usual and ordinary repairs, as indicated herein, is determined, a decree may be entered in accordance therewith.

YOUNG v. J. SAMUELS & BRO., Inc.

(District Court, D. Rhode Island. April 6, 1916.)

No. 39.

1. EQUITY ⟸359—VOLUNTARY DISMISSAL BEFORE HEARING—CONDITIONS.
The right of a complainant to dismiss without prejudice, at least before the case has reached a stage where the court could render a final decree on the merits, is not subject to the imposition of conditions other than the payment of costs.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 749–755; Dec. Dig. ⟸359.]

2. DEPOSITIONS ⟸99—ADMISSIBILITY—DEPOSITIONS TAKEN IN PRIOR SUIT.
A party is protected under the general rules of evidence in the right to use depositions taken in a former case between the same parties, where the testimony would not otherwise be procurable; but the rele-

vancy of such testimony must be determined in the case in which it is offered.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 288–296; Dec. Dig. ⇐99.]

In Equity. Suit by Samuel D. Young, trustee, against J. Samuels & Bro., Incorporated. On motion by complainant to discontinue. Granted.

Nathan Heard and Maurice M. Moore, both of Boston, Mass., for plaintiff.

Gifford & Bull, of New York City, for defendant.

BROWN, District Judge. [1] Upon the plaintiff's motion to discontinue his bill without prejudice on payment of costs, defendant contends that the motion should be granted only upon condition that plaintiff should stipulate that depositions of 13 witnesses taken by defendant may be used by the defendant in subsequent suits. He relies upon the following decisions from the Second circuit: Brush v. Condit (C. C.) 20 Fed. 826; American Zylonite Co. v. Celluloid Mfg. Co. (C. C.) 32 Fed. 809; American Steel & Wire Co. v. Mayer (C. C.) 123 Fed. 204.

The decisions in the First circuit, however, are to the contrary: Morton Trust Co. v. Keith (C. C.) 150 Fed. 606; Pennsylvania Globe Gaslight Co. v. Globe Gaslight Co. (C. C.) 121 Fed. 1015. In both of these cases the proofs had been completed. See also Houghton v. Whitin Machine Works (C. C.) 160 Fed. 227, and Tower v. Stimpson (C. C.) 175 Fed. 130, cases in the First circuit, and Connecticut & P. R. Co. v. Hendee (C. C.) 27 Fed. 678, in the Second circuit.

It may be questioned, however, whether the broad statement of the right of a plaintiff to discontinue, even after the proofs are closed and all the material is ready for a judgment on the merits, can be justified on principle. So broad a right to discontinue may enable a plaintiff to avoid a decision against him, when he has found that, upon the proofs taken and completed as required by the rules of court, a decision against him upon the merits is inevitable if the case proceeds. This, it seems to me, may work a substantial prejudice to a defendant, and amount to a substantial deprivation of his right to end the matter in the tribunal before which the plaintiff has brought him.

This is something more than subjecting him to the annoyance of subsequent litigation; it is a deprivation of his right to the fruits of the labor and expense which he has already been to in following the course prescribed by law and by the rules of court. In many cases this involves a very great expenditure of time and money, and any rule which ignores this seems unjust to a defendant.

In Folger v. Robert G. Shaw Co., Fed. Cas. No. 4,899, a case in the First circuit which deserves careful consideration, Justice Woodbury said:

"I have assumed as the guiding principle, it being the only one conceivable by me, that the precise stage in which the discontinuance should be allowed without a judgment on the merits, and as a matter of right if claimed by the prosecuting party, is any progress in the cause which has not yet furnished means to the court for a correct final decision. * * *

"Each party should have somewhat similar rights in respect to such a

subject; and the great inquiry is: When the plaintiff must be compelled to stop to exercise this power, as a right of withdrawing, without being barred from bringing another action? That is the precise question here: When that stage must be considered as reached? The rules of practice do not seem to be entirely uniform on this point, and have become more rigid in modern times than anciently. But I apprehend that the principle which must govern it is that before indicated, and which is that this act must be done at some period before the merits can be ascertained for a final judgment, or the plaintiff is not entitled to do it as a right. * * *

"Now it does not seem to me to be consistent with principle that a case, standing here with pleadings completed, evidence taken, and all things ready for argument and final decision, should, undecided on the merits, be abandoned by the payment of costs, without the consent of the defendant, when, after so much expense and delay, he asks a final judgment upon the merits. In such case the merits are likewise susceptible of being ascertained and settled, which is not the situation of things before pleadings are finished and evidence put in. In my view, then, a defendant, under such facts and in such a stage of the cause, has a right to object to a dismissal of the cause, or a discontinuance, unless by the judgment of the court on the merits, or perhaps a leave granted by it for a discontinuance for strong reasons."

The present case, however, so far as has been made to appear, has not reached the point where the material is present for a judgment on the merits; therefore, even under the narrower rules as stated by Justice Woodbury, the plaintiff may yet discontinue as matter of right.

In the modern English practice the subject of discontinuance appears to be governed by Order XXVI of "The Rules of the Supreme Court, 1883," as a complete code. See "Yearly Practice of the Supreme Court for 1912," Mackenzie & Chitty, pp. 322 et seq., 324. Under that order the right to discontinue is much restricted, and express provision is made for imposing terms as to any other action. Upon page 324 the following note appears:

"When the plaintiff in a patent action discovered after reply, in consequence of objection delivered by defendant, that he could not succeed without correcting his specification, leave to discontinue was refused, except upon the terms that the plaintiff paid all the costs and would not bring any fresh action in respect of any infringement alleged in the existing action." Robertson v. Purdey, [1906] 2 Ch. 615.

It seems to be desirable that the practice in the United States courts should be regulated by a definite rule analogous to Order XXVI, and that express provision should be made approving a practice such as is said to be the practice in the Second circuit. At present, however, I am of the opinion that, according to the practice established in the First circuit, and according to the weight of authority, the plaintiff's right to discontinue at the present stage of the case is not subject to the imposition of conditions other than the payment of costs.

[2] It does not follow that defendant will thereby be deprived in subsequent litigation of all benefit of depositions that have been taken and filed in the cause, and which, under equity rule 55 (198 Fed. xxxiii, 115 C. C. A. xxxiii), are "deemed published." The general rules of evidence as to the use of depositions taken in former causes between the same parties and their privies afford protection against the loss of testimony not procurable in subsequent litigation. Dover v. Greenwood (C. C.) 154 Fed. 854, Id. (C. C.) 177 Fed. 946, affirmed in Greenwood v. Dover, 194 Fed. 91, 94, 114 C. C. A. 169, as to questions

of evidence, though reversed on other points; West v. Louisiana, 194 U. S. 258, 24 Sup. Ct. 650, 48 L. Ed. 965.

While this may obviate the objection urged against dismissal, that the defendant may not again be able to procure his witnesses, it may not altogether relieve him from the hardship of retaking his testimony. Against unjust, vexatious, or unconscionable renewals of a suit once dropped, a defendant may ask protection in a subsequent litigation; and it seems probable that a plaintiff, seeking relief from a court of equity, may be subject to the imposition of conditions which will protect the defendant from being unduly and unnecessarily burdened.

The draft decree presented by the defendant presents a novel aspect of the question. The present suit is upon the Smith patent, No. 1,099,-132; a subsequent suit has been brought upon the Vanderveld patent, No. 1,157,651, issued after the filing of the bill in the present case. The request is that a condition be imposed permitting the use in the later suit upon the Vanderveld patent of the depositions taken in this suit in respect to the Smith patent. An affidavit is presented to show that these patents are related as generic and specific, and that the same evidence is applicable to each.

Even were it proper to impose conditions upon the discontinuance, it would be impractical now to go into the question of the relevancy of the testimony already taken to the issues of another case. The relevancy of former testimony must be determined in the case in which it is offered.

Plaintiff's counsel has made a comprehensive collection of the authorities, and it may be useful to make reference to them in this opinion: Veazie v. Wadleigh, 11 Pet. 55, 9 L. Ed. 630; Chicago & Alton R. R. Co. v. Union Rolling Mill Co., 109 U. S. 702, 3 Sup. Ct. 594, 27 L. Ed. 1081; Pullman Co. v. Transportation Co., 171 U. S. 138, 18 Sup. Ct. 808, 43 L. Ed. 108; Detroit v. Detroit City Ry. Co. (C. C.) 55 Fed. 569, 573; Electric Accumulator Co. v. Brush Electric Co. (C. C.) 44 Fed. 602; Hat-Sweat Mfg. Co. v. Waring (C. C.) 46 Fed. 87; Hershberger v. Blewett (C. C.) 55 Fed. 170; Callahan v. Hicks (C. C.) 90 Fed. 539; Small v. Peters (C. C.) 104 Fed. 401; McCabe v. Southern Ry. Co. (C. C.) 107 Fed. 213; Georgia Pine Turpentine Co. v. Bilfinger (C. C.) 129 Fed. 131; Gilmore v. Bort (C. C.) 134 Fed. 658; United States v. Reese (C. C.) 166 Fed. 347; Johnson v. Miller, 96 Fed. 271, 37 C. C. A. 471 (C. C. A. 4, 1889); Ebner v. Zimmerly, 118 Fed. 818, 55 C. C. A. 430 (C. C. A. 9, 1902); The Bainbridge, 199 Fed. 404, 118 C. C. A. 88 (C. C. A. 9, 1912); Harding v. Corn Products Refining Co., 168 Fed. 658, 94 C. C. A. 144 (C. C. A. 7). Other cases in the First circuit are Garner v. Second National Bank, 67 Fed. 833, 16 C. C. A. 86; Gregory v. Pike, 67 Fed. 837, 15 C. C. A. 33; American Bell Telephone Co. v. Western Union, 69 Fed. 666, 16 C. C. A. 367, reversing (C. C.) 50 Fed. 662; Fenno v. Primrose et al., 119 Fed. 801, 56 C. C. A. 313; United States v. United Shoe Mchry. Co. (D. C.) 198 Fed. 873.

The plaintiff's draft decree, which is in the usual form dismissing the bill without prejudice, and with costs taxed against the plaintiff, may be entered.

MOYER et al. v. BUTTE MINERS' UNION.

(District Court, D. Montana. May 13, 1916.)

No. 33.

1. TRADE UNIONS ⟸7—POWERS—FORMATION OF ASSOCIATION.

A miners' union, organized under Rev. St. Mont. 1879, div. 5, § 295, whose articles declared its objects to be to promote and protect the interest of its members, to hold property necessary to that end, and to establish branches subject to its rules and regulations, has no power to surrender these powers to an association of unions, and to subordinate itself to the control of the officers of such association, with a provision for forfeiture of its property in case of expulsion or withdrawal from the association.

[Ed. Note.—For other cases, see Trade Unions, Dec. Dig. ⟸7.]

2. TRADE UNIONS ⟸9—ACTIONS—EVIDENCE—SUFFICIENCY.

In an action by an association of miners' unions to compel specific performance of a provision for forfeiture of defendant union's property in case of withdrawal or suspension from the association, evidence *held* insufficient to show that the original charter issued to defendant by the association, which had been destroyed, contained such provision for forfeiture.

[Ed. Note.—For other cases, see Trade Unions, Cent. Dig. § 7; Dec. Dig. ⟸9.]

In Equity. Bill by Charles H. Moyer, as trustee for the Western Federation of Miners, and others, against the Butte Miners' Union, a corporation. Decree for defendant.

Canning & Geagan and E. P. Kelly, all of Butte, Mont., and O. N. Hilton, of Denver, Colo., for plaintiffs.

Peter Breen and A. C. McDaniel, both of Butte, Mont., for defendant.

BOURQUIN, District Judge. Plaintiffs sue in behalf of themselves and all other members of the Western Federation of Miners, an unincorporated association, to compel defendant, an incorporated labor union, to specifically perform a contract to transfer all its property to the Federation. Defendant denies the contract, pleads it is ultra vires, and seeks to quiet title. It appears defendant, the ordinary labor union, with incidents of dues and benefits, was incorporated in 1881 under laws of Montana permitting incorporation of churches, secret societies, granges, and like associations. R. S. Mont. 1879, div. 5, p. 463. These laws provided that articles setting out the association's business or objects and "the number of trustees to conduct the same" should be filed by the trustees, whereupon the association would become a body corporate, with power "to establish a constitution and by-laws and make all such rules and regulations as may be deemed expedient" for admission to and termination of membership and "for the management of its affairs, in accordance with law," and to hold and dispose of property. Defendant's articles declared its objects to be to promote and protect the interests of its members, to hold property necessary to that end, and to establish branches subject to defendant's rules and regu-

lations. The applicable laws were subsequently re-enacted, but the changes therein did not enlarge the powers conferred. See 8th Sess. Laws, p. 141.

In 1893 delegates from defendant and other labor unions organized the Federation, and for it adopted a constitution and by-laws providing for government over both unions and their members, with penalties, fines, and expulsion for any their violation. For instance, unions were forbidden to strike until ordered by a two-thirds vote taken with prior approval of Federation officers; unions could be ordered on sympathetic strike by Federation officers; when any union was in "trouble" Federation officers should be "summoned and given full charge in the direction of negotiations"; unions could not enter into wage agreements with employers, save for a specific time and with the approval of Federation officers; unions should try members who violate their obligation to the Federation, etc., final judgment being with the Federation, the latter also having power to try any union's members and to render final judgment; unions should permit members to withdraw and members from other unions to join; propositions could be settled by referendum to all members of the Federation; unions should administer to initiates the obligation of fidelity to the Federation by it prescribed, and should elect officers in accordance with Federation law; any union reduced to less than ten members "may be considered defunct, and surrender its charter and books to the Federation," the union's property by the Federation to be held in trust for one year, to be returned to the union, if reorganized, otherwise to become property of the Federation.

A form of charter to be issued to unions also was adopted, wherein it was provided that thereby the union was authorized and empowered to transact business and to initiate members in accordance with the Federation's laws and rules; that the union would conform to said laws and rules, in default of which the charter could be revoked and the union suspended; that, should the "union withdraw or be dissolved, suspended, or forfeit this charter, then all property, moneys, books, and papers shall become the property of the" Federation; and concluding that, in consideration of the union's compliance with Federation laws, the Federation would "sustain" the union "in the exercise of all rights, privileges and benefits as a local union under its protection."

In 1893 defendant received a charter from the Federation, but denies the allegation of the complaint that it contained that aforesaid termed "property forfeiture clause." In 1914 this charter was destroyed in the Butte riots, and defendant sought its reissuance. The Federation issued a charter, and after some delay defendant refused to accept it because of said forfeiture clause therein, and withdrew from the Federation. Thereupon this suit was commenced. The complaint ignores all prior to the 1914 charter, and alleges only it and its acceptance by defendant as the contract of which specific performance is sought.

The answer, however, sets out all the foregoing. It also pleads matter tending to show misconduct of Federation officers (fit subject for

internal discipline), and that defendant had made a poor bargain, all of no materiality to the issues. The plaintiffs' case would have failed, but for that the suit has been tried as though the complaint alleged the contract or arrangement between the Federation and defendant (the constitution, by-laws, and 1893 charter), instead of alleging only a copy (the 1914 charter) of part of it.

[1] It is observed that the situation is not that of a subordinate union association lawfully created by, deriving its powers from, and subject to the control of, a superior union organization, seceding therefrom, but it is that of an independent corporation, created by the state, with powers conferred and duties imposed upon it by the state, and subject to no control save its own and that of the state, repudiating an arrangement by which it had surrendered those powers and duties to an organization created by defendant, and assuming to exercise its powers and perform its duties itself.

With that in mind, the defense of ultra vires is made out. Defendant derived all its powers from the state, and could do nothing, enter into no contracts, not within the powers so granted. By the law of its incorporation and its articles, defendant was vested with certain powers. It was created an independent body, subordinate to none other, but with authority to establish branches subordinate, and not superior, to itself. All its powers were to be exercised by itself—by its members, officers, and trustees. Their judgment, discretion, and policy were to control in all that concerned defendant. No power was given it to abdicate the authority conferred upon it by the state, and to subordinate itself and its interests to any other persons or associations. It was given no power to relinquish self-control and management, and to bind itself to accept the judgment, discretion, and policy of others. Any contract or agreement assuming to do these latter would be beyond its powers, and so invalid.

It is apparent its contract or agreement with the Federation, hereinbefore set out, is of this character. Under it defendant was practically reduced to merely registering the Federation's will. Defendant could not even determine its own membership. It could be compelled to strikes and other acts, perhaps against its interests and will, when ordered by the Federation, on penalty of otherwise being expelled, and forfeiture of all its property. And not it, but the Federation, was to in effect perform the duties and obligations imposed upon defendant by the state when defendant was incorporated. The law forbids all this. Hence, if the stipulation by virtue of which plaintiffs assert a right in the Federation to defendant's property was in the 1893 charter, it is a nonseverable part of an entire and ultra vires contract or agreement, and so unenforceable. Somewhat analogous cases are Grand Court v. Court Cavour, 82 N. J. Eq. 89, 88 Atl. 191; Id., 83 N. J. Eq. 343, 91 Atl. 1068; Goodman v. Lodge No. 7, 67 Md. 117, 9 Atl. 13, 13 Atl. 627; Lodge No. 299 v. Ellsworth, 78 Cal. 166, 20 Pac. 399, 2 L. R. A. 841.

[2] To complete the case, however, it is found that the evidence is insufficient to establish that said stipulation was in the 1893 charter. Without reciting all the evidence, it is in conflict, and the preponder-

ance of it in quantity and quality, taken as a whole, is not with plaintiffs. The delegates forming the Federation met in defendant's hall, and the evidence is persuasive that after they adopted a form of charter, at a meeting of defendant the stipulation in question was objected to, and a form without it was printed by order of defendant and issued to it by the Federation. This is supported by testimony of both parties that the charter of 1893 was not a duplicate of other charters then issued, but contained an honor roll of certain of defendant's members, which differentiated it from the other charters, and of which the Aspen charter, issued amongst the first, is in evidence. Further support is found in the likelihood that defendant, the inspiration of the Federation, the only owner of property of consequence, probably of ability to stand alone, and always the mainstay of the Federation, would not hazard its property upon an experimental Federation, wherein it might be outnumbered, and that the other unions desirous of its alliance would yield the point.

This, too, might account for the fact that defendant's charter was of date May 15, 1893, though the first charters printed by the Federation were ordered May 20, 1893, and the price fixed and the unions given numbers apparently for charters on June 16, 1893, which is also the date of the Aspen charter, No. 6. And this might also account for the founding of plaintiffs' suit on the 1914 charter, instead of upon that of 1893. When, in defendant's judgment it was for its interests to withdraw from the Federation, it could of right do so, whether wise or unwise, and without forfeiture of its property.

Decree for defendant.

BOBBS-MERRILL CO. v. EQUITABLE MOTION PICTURES CORP. et al.

(District Court, S. D. New York. May 17, 1916.)

COPYRIGHTS ⊂=85—INFRINGEMENT—PRELIMINARY INJUNCTION.

Where neither complainants' novel nor defendant's photo play was strikingly original, and, although they each dealt with circus life, the themes were differently treated, and there was sufficient difference between defendant's photo play and complainant's novel to make it doubtful whether there had been a piracy, a preliminary injunction restraining a production of the photo play will not be granted; a dramatization of the novel not being produced.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 78; Dec. Dig. ⊂=85.]

In Equity. Suit by the Bobbs-Merrill Company against the Equitable Motion Pictures Corporation and another. On motion for preliminary injunction to restrain defendants from producing a motion picture photo-play. Motion denied.

John L. Lockwood, of New York City, for the motion.

Nathan Vidaver, of New York City, opposed.

MAYER, District Judge. Plaintiff has the exclusive publication and dramatic rights of a novel called "Fran." The novel and the dram-

atization, for the purposes of this discussion, are practically the same. The plot of the novel is banal, as is that of the photo-play, and both can be recommended as soporifics.

Fran, a whimsical, shrewd girl, suddenly appears at Littleburg and insists that Hamilton Gregory, church leader and philanthropist, shall take her in his home. She frightens Gregory into believing that she knows the hidden tale of his past life. That tale is the usual secret marriage of a millionaire's son, the desertion of the young wife, and the ignorance of the birth of a child.

Fran, of course, is Gregory's daughter; but this fact is not known until later on. With an ease customary in novels, Gregory represents Fran as the daughter of a friend of his youth, and unwillingly takes her into his household, now adorned by Mrs. Gregory No. 2, a sweet, patient woman, her mother, an invalid wheeled about in a chair, and Grace Noir, a designing secretary, with whom Gregory is in love, to add to his troubles.

Ashton, the young, colorless school superintendent, and Fran fall in love with each other in a perfectly routine way; it being necessary, for fiction purposes, that Fran fall in love with somebody.

Fran becomes devoted to Mrs. Gregory No. 2 and determines to drive Grace Noir out of the household. A stupid person named Clinton is in love with Grace, and when she thinks she is losing Gregory she dispatches Clinton off to look up Gregory's history, as the result of suspicions to which her keen and calculating mind has been directed.

Clinton returns with the secret, and it is so maneuvered, with the aid of Ashton, who is trying to save the situation from scandal, that Gregory, for fear of exposure, promises to dismiss and does dismiss Grace, so that Clinton can marry her.

Now, Fran was a circus girl, having been thus brought up because her deserted and now deceased mother was compelled to resort to the circus for her livelihood as a lion tamer, and Fran, in due course, became known as Fran Nonpareil, the famous child animal tamer. Therefore the circus opportunely arrives in Littleburg for purposes of the plot infra.

Just about this time Gregory finds that life without Grace Noir would be a wretched blank, wherefore they conclude to elope. This man of large affairs, with the best standing in town as a highly respected religious citizen, concludes to give up everything which men hold dear, to run away with his former secretary, being argued into that conclusion by Grace, who points out to him, inter alia, that because he married Mrs. Gregory No. 2 when Mrs. Gregory (of the circus) No. 1 was alive, therefore he really is not married to Mrs. Gregory No. 2 and is free to depart.

Having made this decision, they find that the train will not go for an hour, and therefore, in order thoroughly to conceal themselves, proceed to the circus, where the whole town is gathered.

Fran has been to see her old friends at the circus, and, finding that one of them has been injured, determines to fill her old role in the lions' cage and do a little lion taming. The lions, however, are very much annoyed, due probably to the fact that Fran wears a mask in order

to keep her identity from the populace of Littleburg. The lions behave so badly that they are disposed to eat up Fran; but, throwing off her mask, she, by her skill and will power, forces the lions into submission, much to the gratification of Littleburg, including father and Ashton.

While Fran was in her greatest danger, Grace Noir expresses her satisfaction to Gregory at Fran's impending destruction (for Fran had always been her bête noir), and thus Gregory sees Grace in her true light, declines to elope any further, has done with her, and is quite overjoyed that his daughter is alive and well.

Gregory presumably thereafter becomes a model husband, Grace and Clinton leave Littleburg to be married and live in Chicago, and Fran, of course, marries Ashton, remarking, with striking originality, after looking at the moon, at page 380, "The world is good enough for me." Finis.

There are, of course, some minor characters and numerous dialogues, which neither add to nor detract from this absorbing story.

In the photo play, Babette is the circus girl. She loves Pete, the acrobat, who dreams of the day when he will marry Babette and have a farm with chickens. She also had a deserted mother, a fortune teller in the circus, who had been secretly married, and, like Fran's mother, driven from home. The next stop of the circus is to be Middleboro, where Ezra Butterworth, president of the bank, is a pillar of the church, a leading citizen, and wears very good clothes. His wife is also a sweet, patient woman, as was Gregory's; but she, and not the mother-in-law, as in "Fran," is the invalid in the wheeled chair, for Butterworth has no visible mother-in-law.

The religious people of the town are opposed to the circus, but the mayor stands his ground and determines to let the circus go on.

Babette and her fortune-telling mother have an affectionate scene in the fortune teller's tent, wherein the mother makes the extraordinary observation, "This is the key to the box hidden in my trunk." Then, after Babette goes out, mother dreams the scenes of her past, thus giving opportunity for what I am told is called in the language of the photo-play a "throw back."

Mother now dies, Pete sees her marriage certificate, and so, of course, does Babette, and thereon it appears that Butterworth is the other contracting party. The circus reaches Middleboro. Babette reads Butterworth's name in a newspaper as the donor of $5,000 for the home for widows and orphans.

In due course Babette introduces herself to Butterworth as his daughter. Butterworth is a person good to his wife and not possessed of a female secretary. His main concern is not to shock his wife. He is kind to his daughter and installs her in his home. Babette is not popular with some of the church attendants, when it is discovered that she is a circus girl. Butterworth, toward the end of the fourth reel, tells his wife about his early marriage, and she, being a most agreeable person, immediately forgives him. Babette, however, yearns for the circus and Pete, and, leaving an affectionate note for Mrs. Butterworth, Arab-like silently steals away and returns to the circus.

As Babette, however, was not a lion tamer, she does not have Fran's exciting experience. Of course, father hunts her up, gives his approval to her marriage with Pete, and, taking out his check book, remarks "I'll give you the farm for a wedding present," thus enabling Pete to realize his dream. Then, as is customary with bank presidents, Butterworth permits and participates in a public wedding ceremony in the circus tent of Pete and his daughter.

The final scene is the chicken farm, with the new-born baby surrounded by Pete, Babette, and father, and inviting their affectionate and admiring observation. Thereupon the spectator looks at his watch and finds that he has spent about 1½ hours viewing this stirring picture drama. As is usual in so-called feature films, there are adjunctive characters, such as a very manly young preacher and the well-worn hypocritical stage deacon.

It will be noted that the novel and the photo-play are similar in the deserted wife theme and the circus girl as the daughter of the marriage. They are dissimilar in the portrayal of the characters of Gregory and Butterworth, although these two worthies are of the same kind, so far as concerns their past history and present standing in the same kind of a community. Further, the secretary love affair is absent in the photo-play. If there is any originality in Fran, it is in using a circus girl as the heroine and in the lion-taming incident.

If "Fran" was copied or pirated, the elimination of the Grace Noir theme would be unimportant; for it would then be evident that the valuable creation availed of by the moving picture was the circus idea. That idea would give defendants an opportunity to show circus scenes, as they did, and to use the story as the vehicle on which to carry the kind of pictorial representation which always amuses the young and has not failed to afford enjoyment to many older folks, who recall with pleasure the reminiscences of youthful days at the circus or the street fair.

But defendants vigorously insist that there is not originality in the novel, that the scenario and the final presentation of the picture were independent creations, and that the lion-taming scene is based upon a previous play.

The various persons having to do with the development and production of the picture have, by affidavit, denied copying or pirating. The details of these denials need not here be set forth, beyond what is related by Bettie T. Fitzgerald of Gadsden, Etowah county, Ala. Miss Fitzgerald confesses that she is the author of the scenario of the picture, and her affidavit is by far the most refreshing document in this controversy.

It seems that the play was originally called "Lunette of the Carnival," then "Babette of the Balley-hoo," and finally "A Circus Romance." Nearly all the characters were found in and the ideas based on life in Gadsden.

"Lunette," says Miss Fitzgerald, "was taken from a street fair which showed in this town. Lunette was a dancer—a butterfly dancer. The girl wore a full skirt with sticks in each side, and with these held out she simulated the motion of a butterfly. That is where I got the name Lunette and the heroine. Petey was the famous high diver traveling with the same

street fair. Aimee (as I wrote it) was the flying girl—who flew with wires in the upper part of the tent. Zaidee was the fortune teller, who told my fortune with cards in a tent at a small table. Ezra Butterworth—the name Ezra was used by chance; Butterfield was the first name used, but knowing some people by that name, and having heard of a Butterworth who writes poetry, I changed it to Butterworth instead. Naturally his wife would be Mrs. Butterworth. Ezra Butterworth I made senior warden in Christ Church, Episcopal. I am afraid we have him here—not by that name—however a banker. I was afraid, if the picture was produced in Gadsden, others would recognize him. The name Amos Grimes was given at the studio. I only called him the junior warden and a hypocrite. He is not a rare specimen, I now have two in mind—if people can be believed. Rev. Albert Martin, a name given at the studio—he was rector of Christ Church, unmarried; hence the 'sought for' by all women of marriageable age and some past. We had an unmarried rector recently. I knew how he was sought, and how many became ardent church workers. * * * The name Middleboro to me represented a small town—this was a small town story. In Alabama we have a number of small towns ending in 'boro,' such as Greensboro, Scottsboro, Hurtsboro, etc. The opposition to street fairs is constantly shown in this town. The mayor does not object, and the church people and merchants always enter a protest by petition or otherwise; however, the show exhibits. Secret marriages are constantly occurring here and in neighboring towns. One occurred here last fall between well-connected families under similar circumstances as this in Lunette of the Carnival. The reception of the little dancer in the small town was taken from the real instance of a little vaudeville dancer who married and came here to live. She had been hounded unmercifully by the church people of this town until her life has been torment. I knew how she was treated and felt for her. She has wanted to go back, and has at last left the town. Gypsy caravans are very common in this part of the country. Telling fortune by cards is the trade of the women folks. Town people flock to the tents to have their fortune told in cards. I myself know each card, and its meaning. * * * I used Petey's dream of a chicken farm, because every boy or man I know of here dreams of quitting his business and going to farm or raising chickens. Mrs. Butterworth was made an invalid to appeal to the better side of her husband, and to show that he was not all bad, and also that she might exert an influence over Lunette, who was so rebellious at his denial. * * * The incident of the girl finding her father I did get from a newspaper—some child in Pennsylvania had lost her mother, the father having deserted mother and baby. Another woman, at the mother's death, adopted the child, moved to Kansas. The child grew up, known by her foster parent's name. On her deathbed the foster parent told the girl her real name. A few months later she saw in a paper the name of her father in some town in Illinois. She wrote to him, and they were united. He had repented and tried to find her, but had failed. Instances like that in the South have been frequent, due to the failure of the men in the war being unable to find their families when released. Zaidee misunderstood, keeping silent and driven from home—nothing new in that. Nothing new in church workers trying to drive dancers (especially girls) from her home town. One man here defended the dancer. A minister in one of the churches befriended the unfortunate girl in town, tried to hold her up, and the whole town turned against them. I was asked to write something for Muriel Ostriche. I knew her capabilities, and knew that she was bright and could dance."

Miss Fitzgerald then points out that this is not the first time that her plot and that of somebody else coincided, and observes that, if "Lunette" is similar to any other book or play, it is a "happen so." She gives further instances from real life and concludes:

"As I view it, there is nothing new in the Circus Romance except the street fair atmosphere—everything is old stuff, done over in various forms dozen of times. I have for four years read in the moving picture world the synopsis of all the motion picture plays released by the different companies, and I am constantly seeing the old stuff that is in the Circus Romance. I have

many synopses, having sold New York Motion Picture Corporation, Majestic, Thanhouser, Famous Players, American, and others. This is the first time that it has ever been hinted to me that I had used another's materials, books, or plays in the construction of my work. The Dramatic Mirror critic, January 29, 1916, accuses me of stealing from 'Polly of the Circus' and notes the great similarity in 'A Romance of the Circus' and 'Polly of the Circus.' Mr. Herbert S. Baker in his affidavit accuses me of stealing from 'Fran.' I could not take from 'Polly of the Circus' and the book or play 'Fran,' as described by Herbert S. Baker in his affidavit, and have 'A Circus Romance' similar to 'Polly of the Circus' and the book or play 'Fran,' without accusing the author of the one with having stolen from the other, and this I would not do. If there be any similarity in 'A Circus Romance' and the book or play called 'Fran,' it is *only due to the fact that two minds far removed from each other, and without any kind of communication, thought as one.*"

"Polly of the Circus," copyrighted in 1906, referred to in Miss Fitzgerald's affidavit, contains (according to the affidavit of Sylvia Tabenhaus) a scene much in principle like Fran's return to the circus, except that Polly is a bareback rider.

There may be several questions in the case, but at the threshold is the issue of originality. London v. Biograph Co., 231 Fed. 696, — C. C. A. — (decided by the Circuit Court of Appeals for the Second Circuit, February 15, 1916). Bachman v. Belasco (D. C.) 224 Fed. 815, affirmed 224 Fed. 817, 140 C. C. A. 159. In Dam v. Kirk La Shelle Co., 175 Fed. 902, 907, 99 C. C. A. 392, 397 (20 Ann. Cas. 1173, 41 L. R. A. [N. S.] 1002) the court was satisfied, on the evidence, that the "playwright deliberately appropriated the story and dramatized it"; but Judge Noyes said:

"It is undoubtedly true, as claimed by the defendant, that an author cannot by a suggestion obtain exclusive control of a field of thought upon a particular subject. If the playwright in this case, without the use of the story and working independently, had constructed a play embracing its central idea, it may well be that he would not have infringed the copyright of the story."

While, in the case at bar, there are some marked similarities, the question of infringement is by no means clear, in view of the common sources; i. e., the theme of the deserted wife, etc., "Polly of the Circus," and the incidents at Gadsden (typical of a small town), in respect of which there is no reason to doubt the truth of Miss Fitzgerald's statements. In other words, whatever may be the ultimate result, the case is not one justifying a preliminary injunction. Especially is this view confirmed when there is nothing to show irreparable injury pendente lite. Plaintiff's play is not being produced, and the picture surely will not hurt the sale of the novel for the present.

Motion denied.

In re HARTMAN.

(District Court, N. D. Iowa, E. D. May 4, 1916.)

ALIENS ⊂=68—NATURALIZATION—EFFECT OF JUDGMENT IN PRIOR PROCEEDING —"CASE."

A proceeding for naturalization is a "case," within the meaning of article 3, § 2, of the Constitution of the United States, and the denial of the petition of an applicant on the ground that he is not a person of good moral character is an adjudication of that fact, binding upon him, and which bars a second application until he can prove that since that time he has been a person of good moral character for at least five years.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138–145; Dec. Dig. ⊂=68.

For other definitions, see Words and Phrases, First and Second Series, Case (in Practice).]

In the matter of the petition of Berek Hartman to be admitted as a citizen of the United States. On demurrer to answer of United States. Demurrer overruled, and petition dismissed.

M. C. Matthews, of Dubuque, Iowa, for petitioner.

F. A. O'Connor, U. S. Atty., of New Hampton, Iowa, and Seth Thomas, Asst. U. S. Atty., of Ft. Dodge, Iowa, for the United States.

REED, District Judge. The petition for naturalization is in due form, and states all essential facts, which, if proven, would entitle the petitioner to be admitted to citizenship. The United States, however, appears by its United States Attorney and Assistant United States Attorney, and files an answer to the petition as follows:

"Comes now F. A. O'Connor, United States Attorney for the Northern District of Iowa, and for and on behalf of said United States and at the suggestion of the Chief Naturalization Examiner of the Bureau of Naturalization of the Department of Labor, makes the following answer to the petition in the above cause, as follows:

"That in addition to the denial of the statements in the applicant's petition filed herein, implied by operation of law, the United States says that on the 2d day of November, 1914, said petitioner filed a petition in the district court of Iowa, in and for Dubuque county, to be naturalized, and that on the 27th day of May, 1915, said cause came on to be and was heard by said court upon said petition and proof, and that it then appeared that the said petitioner had failed to establish his good moral character as by law required, and his said petition was then and there denied by said court, and said petition was dismissed, and a decree in accordance therewith was entered, which decree has not been appealed from or set aside by said court.

"Wherefore the United States says that the matters and things contained in the present petition have heretofore been adjudicated by the said district court of Iowa, in and for Dubuque county, and are now res adjudicata as between the petitioner and the United States of America, they being the identical parties to both proceedings involving the same matters, and the United States relies upon and expressly pleads said adjudication as a bar to this petition, and as a bar to the relief sought thereunder."

To this answer the petitioner demurs upon the following grounds:

"That the facts stated and alleged therein are not an adjudication or bar to the petition of the petitioner herein. That the statutes of the United States in relation to the naturalization of aliens do not provide for any prohibition as to the number of petitions that may be filed or sought to be acted upon, and there is no provision in said statutes that prevents a petitioner for naturalization from filing more than one petition, or having more than one hearing upon a petition. That the denial of a petition for naturalization in the state court is not such an adjudication as would bar a subsequent application or petition in the District Court of the United States."

It is the contention of the petitioner that a proceeding under the statutes of the United States for the admission of an alien to citizenship is not a case, suit, or cause of action within the meaning of article 3, § 2, of the Constitution of the United States, and is not, therefore, such a proceeding that a denial of the petition for naturalization is an adjudication thereof that will bar another proceeding by the same petitioner upon the same facts upon which the former proceeding was denied; and he cites United States v. Dolla, 177 Fed. 101, 100 C. C. A. 521, 21 Ann. Cas. 665 (C. C. A. 5th Circuit) in support of this contention.

The government maintains the contrary, and that such such a proceeding is a case, or cause of action, within the meaning of the section of the Constitution above cited, and that a determination of the question involved in such a proceeding, whether favorable to or adverse to the petitioner, is an adjudication which determines the rights of the parties in such a proceeding, and until set aside on appeal or some other method of review, or by direct action to annul the same upon the ground of illegality or fraud in procuring the same, is a bar to another action upon the same facts determined in the prior proceedings; and it cites the following authorities: In re Centi (D. C.) 217 Fed. 833; In re Guliano (D. C.) 156 Fed. 420; In re Bodek (C. C.) 63 Fed. 813; In re Manning (D. C.) 209 Fed. 499, and other cases.

That a judgment or decree admitting an alien to citizenship may be reviewed upon appeal or writ of error from a District Court of the United States, at least, granting the same, is recognized by the Court of Appeals of this Circuit in the following cases: United States v. Ojala, 182 Fed. 51, 104 C. C. A. 491; United States v. Iver Engebretsen Ness, 230 Fed. 950, — C .C. A. —, affirming (D. C.) 217 Fed. 169; United States v. Christopher James Davis Deans, 230 Fed. 957, — C. C. A. —, affirming In re Deans (D. C.) 208 Fed. 1018.

United States v. Dolla, 177 Fed. 101, 100 C. C. A. 521, 21 Ann. Cas. 665, cited by the petitioner, seems to have been decided upon the ground that a naturalization proceeding is not a case, suit, cause, or controversy within the meaning of the section of the Constitution of the United States above referred to, which reads in this way:

"Sec. 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between a state

and citizens of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects." Article 3, § 2.

Upon the question as to what constitutes a case, cause of action, or controversy, within this article of the Constitution, Mr. Justice Field, in the case of In re Pacific Railway Company (C. C.) 32 Fed. 241, said at page 255:

"By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication."

In Smith v. Adams, 130 U. S. 167, 173, 9 Sup. Ct. 566, 568 (32 L. Ed. 895) Mr. Justice Field, speaking for that court, again said of the clause:

"Whenever the claim or contention of a party takes such a form that the judicial power is capable of acting upon it, then it has become a case or controversy within the meaning of [this section] of the Constitution."

In Osborn v. Bank of United States, 9 Wheat. 819, 6 L. Ed. 204, Chief Justice Marshall said of it:

"This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it, by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws, and treaties of the United States."

In Spratt v. Spratt, 4 Pet. 393, at page 408, 7 L. Ed. 897, Mr. Chief Justice Marshall said of a naturalization proceeding:

"The various acts upon the subject [of naturalization] submit the decision on the right of aliens to admission as citizens to courts of record. They are to receive testimony, to compare it with the law, and to judge on both law and fact. This judgment is entered of record as the judgment of the court. It seems to us, if it be in legal form, to close all inquiry, and, like every other judgment, to be complete evidence of its own validity."

The demurrer of the petitioner to the answer of the defendant admits the truth of that answer, and that answer shows that the petitioner presented his petition to the district court of Dubuque county, Iowa, November 2, 1914, and upon the hearing of said cause May 27, 1915, that court adjudged that the petitioner was not entitled to be admitted as a citizen, because it found as a fact from the testimony introduced before it, that he was not a man of good moral character at that time. That fact it was essential that the petitioner prove by competent evidence before he could be admitted as a citizen, and pre-

cludes him from being admitted as a citizen until such time as he can so prove.

In Southern Pacific Railroad v. United States, 168 U. S. 1, at page 48, 18 Sup. Ct. 18, at page 27 [42 L. Ed. 355], Mr. Justice Harlan, in delivering the opinion of that court, said:

"The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them."

Many cases are cited from that court, and others in which this rule has been held, and it has been approved in the case of Johannessen v. United States, 225 U. S. 227, 237, 238, 32 Sup. Ct. 613, 56 L. Ed. 1066, a case involving a naturalization certificate, and is conclusive upon all lower federal courts. I therefore reach the conclusion that the judgment of the district court of Dubuque county, denying the application of the petitioner in this case to be admitted as a citizen of the United States, is an adjudication of his right to be so admitted until such time as he can prove by competent evidence that he has been a person of good moral character for the period of at least five years before he shall be admitted to citizenship, as provided in section 4 of Naturalization Act.

The application of the petitioner is denied; and it is accordingly so ordered.

PURSEL et al. v. READING IRON CO.

(Circuit Court of Appeals, Third Circuit. June 7, 1916.)

No. 2092.

1. MINES AND MINERALS ⊜66—MINING LEASES—TERMINATION BY CONSENT.
By a contract of lease the lessee acquired the ore under a tract of land with the right to mine the same. The lease provided for the payment of a minimum annual royalty, that it might be terminated by either party at any time by a written notice, and that on payment of the royalty due on its termination the lessee should have the right to remove its plant, machinery, and other property from the premises. After operating the mine for a number of years it became unprofitable and was abandoned, the lessee paying the royalty due to that time, removing all its plant and machinery, and a railroad built to the mine; no objection being made by the lessors, who went into possession and afterward sold stone which had been used in construction of the railway. No rent or royalty was thereafter paid or demanded for 20 years, and until after the death of the original lessors and the dissolution or insolvency of the lessee corporation. *Held*, that it was a fair inference from the facts and conduct of the parties that the lease was terminated by mutual consent, and that there was no further liability for rentals.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 185, 186; Dec. Dig. ⊜66.]

2. WORDS AND PHRASES—"OUSTER"—"DISPOSSESSION."
The essential idea of "ouster" is "dispossession," which in turn means ejectment or exclusion of one from the realty, against his interest and without his consent.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Ouster.]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Action at law by Henry W. Pursel, Parker C. Pursel, Lina P. Sawyer, and Margaret A. Dawson against the Reading Iron Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

The following is the opinion of Dickinson, District Judge, on final hearing:

Our first duty is to make clear the status of this cause as a pending case. An attempt was made to agree on a case stated upon which the ruling of the court could be asked. The attempt failed because of the inability of the parties to agree upon all the facts. The case has now taken form or is heard as if it were an agreement for an amicable action, tried by the court under the provision of the Revised Statutes, without the intervention of a jury, with the added feature of a stipulation of all the facts, except those which are in controversy. The evidence consists of the admission of some of the facts and evidence and testimony bearing upon the facts in dispute.

The Character of the Controversy.

The case belongs to that large class of controversies the necessity of the intervention of the court in which would not be anticipated. The controversy is over the existence of the obligations of a contract which either party might have terminated practically at will. The obligation was born in 1862, and has shown no signs of life since 1889, except that an effort was made to galvanize it into life through an action in the state court. Had the contract not been made under the formality of a seal the statute of limitations would have given it its quietus three times over.

The History of the Case.

Part of the cost of this litigation is that any one interested in it will be obliged, or at least must be given the option, to read a somewhat lengthy historical narrative. The history of the case properly begins with the statement of the facts that in 1862 Daniel Pursel owned a tract of undeveloped ore lands, situate in Montour county, Pennsylvania, and Isaac S. Waterman and another were interested in the Pennsylvania Iron Company, which was the operator of certain furnaces for smelting ores. The furnaces were located near the Pursel lands, and were the only furnaces in that locality. Having thus a common business interest, the parties entered into the contract which is the basis of this action. For present purposes, it will suffice to say that under this agreement Waterman acquired whatever ore there was on the lands and undertook to mine it. It will be observed that the rights of the landowner thus became, like ancient Gaul, divided into three parts. Pursel retained what may be termed the surface rights. Waterman acquired all the mineral rights. Pursel in turn had the right to receive whatever became due under the contract. The interest not granted by Pursel was clearly a real estate interest. Whether the other interests were estates in land need not be decided. It is also to be noted as bearing upon one feature of the case that the Pennsylvania Iron Company was the owner and operator of the furnaces. An agreement in writing, under seal, and subsequently recorded, was entered into June 27, 1862. The owner of the furnaces was not a party to this agreement.

We will first find what the contract was and how it was subsequently modified, and will then endeavor to trace its life history, in the first instance, as if there had been no change in the original parties to it. An effort will be made to trace this history down to the commencement of this action if, as plaintiffs vigorously asseverate, it be still alive or will endeavor to learn the date of its demise and find the place of its interment if, as defendant asserts, it has long since been dead and buried. We will next follow the chain of title to these several interests and to the furnaces in order to show the relations of the parties, plaintiffs and defendant, to the original parties to the contract and to its subject-matter and how far they are privies in person or estate. We will finally give a number of minor facts as to which evidence has been produced or which counsel have discussed as having a bearing upon the questions involved in the case. Many of them, however, are of little and some of them of no evidential value.

The ores upon these lands were of three kinds or qualities. One of them is called the soft ore, another the hard—limestone—ore, and the other is undesignated. The hard ore is found at the lower levels. For convenience we call the parties to the contract lessor and lessees. The lessor granted to lessees, in addition to the ore and the right to mine it, the right to occupy and use parts of the property for the construction of its mining plant, and for railroads and other roads, and to take timber and other material required for mining operations. The lessees agreed to take out the ore through a slope, the construction of which was provided for, and to pay a fixed price by way of rental or royalty per ton for the ore taken out. There was a different price fixed for each kind of ore. There was a further minimum quantity of mine output requirement of 5,000 tons per annum for which they were to make advance payment at the highest price per ton. The contract was fairly and clearly drawn. There is nowhere in it a doubtful meaning. The parties had in contemplation three contingencies. The ores might become exhausted, or what was the same thing, could not be profitably worked. The lessees might not be able to have the ore smelted without shipping it a prohibitive distance. The lessees might default in payment. A like protection was given against any one or all of them by providing that the contract might be ended upon notice by either party. If the furnaces shut down, the minimum quantity requirement was proportionately reduced. If the mines were abandoned the lessees might reserve all of their property upon making full settlement to that date.

The contract was in such form as to be within the recording acts and was in fact promptly recorded. If, therefore, the lessees exercised their right of cancellation by anything short of a clear and unequivocal act, the recorded

deed might leave a cloud upon the title of lessor. It was, therefore, provided that the act of cancellation, if by lessees, could be made effective solely by giving the formal written notice prescribed and following this with a reconveyance. The lessor, however, might cancel by simply posting notice on the premises and could then exercise his right of ouster and retake possession of the whole property as it was in him before indenture made. The agreed and all necessary preparations for mining were made by the lessees, and mining operations were carried on in compliance with their contract for a period of over twenty years. By this time the deposits of ore in sight had been exhausted or the end of profitable operations had been otherwise indicated. In the right to declare a cessation the parties had a motive and inducement to meet any new situation in an accommodating spirit. This disposition was manifested by a new or modifying agreement which was entered into under date of February 16, 1883. The fact of the old agreement is recited. The further fact is disclosed that the old workings were about exhausted and that nothing but the extension of the old slope and the opening up of deposits of the hard limestone ore and the reduction of the royalty would make the mine worth further working. The old agreement was in consequence modified in several of its features. Those with which we are now concerned are these:

The minimum quantity requirement was suspended until 1885. The royalties were reduced, and other now past concessions were made to the lessees in consideration of the extension of the slope by them. In all respects not changed the old agreement was declared to be in force. The lessees made the extension, and the mining operations were resumed, or rather, continued until June, 1889. The accounts were then settled in full to that time, and all further mining ceased. Payments which were made after the new agreement was entered into were made on the basis of ore actually taken out. For a part of the time less than the minimum quantity was mined. The difference, however, was not large. Why the minimum was not exacted the evidence does not disclose. It is as likely to have been thought of no consequence either because of the smallness of the amount or because it would be allowed for anyhow through an increased output as because the lessor thought he could no longer claim a minimum. Moreover, we do not know whether the furnaces were out of blast and the minimum had been thereby reduced. From the time the June, 1889, settlements were made not only was no mining done, but this was followed up in September with the dismantling of the mining plant and the removal of all of the property of the lessee, and this in turn, later on, beginning in 1891, with the dismantling of the furnaces. Since 1889 the property has been an abandoned mine property. No payments of royalties were made and none demanded from that day to this except that in May, 1909, suit was brought in the county courts of Montour county by one claiming to be the administrator of Daniel Pursel, and, of course, by the bringing of the present action. In the Montour county action three defenses were interposed. One was a denial of a right of action in the administrator. The second a denial that the plaintiff was the administrator. The third a defense to the merits which, for the present purposes, may be stated to be that now interposed including an averment that the agreement was a dead thing. The case went off upon a variance in allegata and probata. The original statement based the right of action upon the agreement of 1862. It was amended so as to base the claim upon the agreement of 1883, which disclosed that the right of action was in the heirs of Daniel Pursel. The action was by the administrator and the right of action averred to be in him. The proofs showed a right of action in the heirs. The case reached the Supreme Court of the state, and may be found reported in Pursel v. Reading Iron Co., 236 Pa. 79, 84 Atl. 659.

Nothing was afterwards done by the plaintiff until the bringing of the present action in 1914. Title to the interest of the lessor in the mining agreement of 1862 is deduced to the plaintiffs after this manner. Daniel Pursel died in about the year 1868, intestate, leaving six heirs. These heirs entered into the modifying agreement of 1883. A two-sixths interest is in the plaintiffs.

The mining rights title of lessees passed from them to the Pennsylvania Iron Company, which, as already mentioned, was the owner of the furnaces. The title to the mineral rights, together with the ownership of the furnaces, then again passed from the Pennsylvania Iron Company to the Montour Iron

& Steel Company, which latter company was in possession as owner of mining rights and furnaces at the time of the execution of the 1883 agreement, and also at the time of the last payment of royalties, and the abandonment of the mines in 1889, and until after the dismantling of the furnaces.

The Montour Iron & Steel Company became insolvent. Judgment for a large sum was obtained against the company by the Reading Iron Company, the present defendant. Under a vend. ex. issued upon this judgment and another writ of vend. ex. several tracts of land belonging to the defendant in the judgment were sold by the sheriff in 1895, together with whatever real estate interest the defendant had in the Pursel lands, and a sheriff's deed was made to the Reading Iron Company therefor. The sheriff's vendee entered into possession of the lands sold to it other than the Pursel lands. Of these lands it never took possession by possessory proceedings, action or otherwise, and never exercised any right of ownership therein. The Reading Iron Company, the defendant in this action, was also the defendant in the prior action brought in 1909. By its affidavit of defense filed in that action it disclaimed title to the property, for the reason that no title had passed to it by the sheriff's deed, all interest of the defendant in the property which had been sold having ended long before the entry of judgment.

Title to what we have called the surface rights descended upon the death of Daniel Pursel to his six children, of whom William R. Pursel was one. The whole title later vested in William R. Pursel through conveyances from the other heirs before the agreement of 1883, and he was in the possession and occupancy as owner and living in person upon the property from before that date to long after the abandonment of the mine and the dismantling of the mining equipment in 1889.

The minor facts referred to other than those incidentally stated in the foregoing recital of facts and the significance attached to them by the party advancing the evidence by which they are made to appear, are these:

On May 17, 1883 (shortly after the agreement of 1883), William R. Pursel was constituted the attorney in fact of all the other lessors. The significance of this, in the view of defendant, is that he thus became their representative, so that they are bound by anything which would bind him. The letter of attorney, however, is restricted to the sole power to demand and collect the royalties. He was also at the time cotenant with them of the estate in common which they all had in the land. His declarations by word or act would therefore be evidence against all so far as such relation makes them evidential. William R. Pursel had knowledge of what was done in the way of the abandonment of the mine, and the dismantling of the mining equipment, and the removal of the property of the lessees, and of all that transpired upon the premises.

The Reading Iron Company, after the sheriff's deed to them, operated rolling mills at Danville, in Montour county. These mills were in charge of a superintendent. The road supervisors of the township, in which the Pursel lands are situate, complained to this superintendent at Danville that travel on the public highway was endangered by the sinking of the land over the abandoned Pursel slope. By direction of the superintendent workmen of the present defendant filled in the depressions complained of. Whatever significance this fact might have is lessened, if not destroyed, by the agreed fact that the superintendent had no authority outside the rolling mills, and that the defendant neither authorized nor knew of these acts, and the further agreed fact that the defendant "never entered into possession of the premises or did any act to care for or conserve the property in any way whatever."

On September 25, 1905, William R. Pursel sold the stone which had been part of the railroad construction in the abutments and culverts and the stone in the mine.

Discussion.

The claim sued for in this action is the two-sixths share of the plaintiffs in the minimum royalties reserved by the indenture of 1862. No question is raised of the right to thus divide the claim for royalty. The total claim, exclusive of interest, is apparently $15,000. As the claim is for one-third of 17 years' royalties, it is not clear why claim has been made for this sum. This,

however, is of no importance as the parties have agreed upon the correctness of the figures. A number of very interesting questions, which in the view of counsel arise out of this record, have been discussed. We do not feel called upon to follow counsel in this discussion, because in the view we take of the case, it is disposed of by findings of fact. With the exception of certain features of the agreements of 1862 and 1883, we are in accord with the construction placed upon these contracts by counsel for plaintiff. We see no justification in this record for finding the fact which is the necessary support of one of the main positions of the defense. We think it clear there was no obligation on the part of the lessees to mine after the mining operations had been found to be unprofitable. The indenture of 1862 gave them, however, the ores, and to this extent an interest in the lands. The obligation to pay the minimum rental was coterminous with this interest. This obligation could be ended, by their act, only by a reconveyance or relinquishment of this interest. This surrender, so far as the evidence discloses, they never made by the deed or notice required. Whether there is such a privity of estate between the original lessees and the present defendant as to visit upon the latter responsibility for the performance of the covenants of the former (which the defendant denies), we do not feel required to find. We, therefore, do not pass upon this question.

There are two facts (either of which is decisive of this case), each of which we think too clearly appear. When the lessees ceased mining operations and refused to pay further royalties (which we find as a fact they did), we think it was the right of the lessors to re-enter and oust the lessees. Whether it was their right or not, they might in fact do it. After ouster, lawful or otherwise, the lessors could not exact the payment of the rent. This ouster and re-entry we think beyond all question took place and so find. This is one of the decisive facts to which reference is above made. All the facts and circumstances of the case and the situation of the parties indicate this, and certain evidential facts prove it to a moral certainty. Two will suffice to make this clear. If the relation of the parties as lessors and lessees had ended and only in that event and upon the payment of all rentals due, the lessees might remove their property from the premises. A settlement was made in 1889 of all accounts to that date, and lessees dismantled the mining plant and removed all their property from the premises. This was so done that we not only feel justified in finding, but feel compelled to find, that it was with the full knowledge and consent of the lessors, and it is admitted in substance, if not formally, that such was the case. The estate of the lessees could have been ended by lessors only by a re-entry. Such a re-entry did in fact take place, and the lessees acquiesced in this assertion of the right of the lessor. The consequences must be accepted by both, one of which is that the lessor could not thereafter claim any future rent.

The other of the two evidential facts is this: One of the lessors took possession of and sold a part of the railroad construction erected by the lessees. There is no presumption that this act was tortious. The assertion of the right to this material was therefore a declaration by one cotenant (which is evidence against all) that the lessors had re-entered into possession, and the estate of the lessees was gone. Again, the agreement of 1883 clearly meant that no rental should be paid for unmined ores when the furnaces were out of blast continuously for a time exceeding one month. During the whole period covered by this claim the furnaces were out of blast. This is the other decisive fact indicated. Nothing more is required than to state this fact.

The conclusion to which these views lead is that judgment be entered against the plaintiff and in favor of the defendant, with costs. We cannot, however, withhold the observation that the conclusion reached has the sanction of common sense judgment. The claim is not only one which without unfair characterization may be termed stale, but there is this feature of it worthy of remark. The claim is now a large one. It had been allowed to accumulate without demand until after it had been running against this defendant for 13 years. If it had been promptly made the opportunity would have been afforded the defendant either to have secured possession or to have surrendered the property. If the sheriff's grantee had sought to enforce possession it could not have been successful if the lessors had resisted the attempt.

The consequence of requiring the defendant to now pay would be to compel them to pay this large sum for which they would have received nothing.

We append the only findings of fact and conclusions of law which are thought necessary.

Findings of Fact.

1. The facts stated in the foregoing opinion are found as stated.
2. On or about June, 1889, a full settlement of all royalties or rentals was made between the parties, and there was a re-entry upon the demised premises by the lessors and an ouster of the lessees which was acquiesced in and accepted by them.
3. The smelting furnaces referred to in the agreement of 1883 were all out of blast continuously during the whole time for which royalties or rent is claimed in this suit.

Conclusions of Law.

1. The ouster of lessees and re-entry by lessors upon the demised premises ended all interest and estate of the lessees in the lands of lessors and lessees' right to the ores in or upon the land and their right to mine the same and no rental or royalties were thereafter payable.
2. No rent or royalty was payable by the lessees or defendant during the time the smelting furnaces were out of blast and none claimed in this action is payable.
3. The defendant is entitled to judgment, with costs.

Reynolds D. Brown, of Philadelphia, Pa., James M. Davis, of Camden, N. J., and Malcolm Lloyd, Jr., of Philadelphia, Pa., for plaintiffs in error.

Wm. Clarke Mason, of Philadelphia, Pa., and Jefferson Snyder, of Reading, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. [1] The matter out of which this controversy arose is stated at length in the opinion of the District Court. Several questions are presented, the principal one being whether the lease sued upon had been terminated by predecessors of the parties. A decision upon this question in the affirmative disposes of the others.

The case was tried by the court without the intervention of a jury on a state of facts largely agreed upon. The submission was general, authorizing the court to enter judgment "according as the court may be of opinion that the plaintiffs on the one hand or the defendant on the other are entitled to a judgment upon all the facts as thus ascertained." These facts relate generally to the existence of the lease and to its termination. While the conflict in the court below was waged about the issue whether the lease was terminated by delivery of a written notice (the specific method prescribed by its terms), neither the facts nor the submission restrict the decision to that issue. The facts relate and the submission extends to a termination of the lease by any legal means. The District Court found that the lease was terminated, but that it was not terminated by the sole act of the lessee, either in delivering written notice of surrender or by abandoning the demised premises. This finding relieves us of the necessity of reviewing the line of Pennsylvania decisions against the termination of leases (notably of oil lands) by abandonment or without notice, cited by the plaintiff in error (Double v. Union H. & L. Co., 172 Pa.

389, 33 Atl. 694; Ahrns v. Chartiers Gas Co., 188 Pa. 249, 41 Atl. 739; Wilson v. Philadelphia Co., 210 Pa. 484, 60 Atl. 149), if the testimony supports a finding that the lease was legally terminated in another way. Our consideration is therefore directed mainly to the error assigned to the court in affirming the prayer that under the facts the defendant is entitled to judgment.

[2] The District Court found that mining operations were suspended by the termination of the lease, and that the lease was terminated by ouster of the lessee upon re-entry by the lessors. If this was the only finding of fact upon which the court predicated its judgment, we would be constrained to direct a reversal, for we have not found in the testimony a distinct act of ouster in its purely technical sense. The elemental idea of ouster is dispossession, which in turn means ejectment or exclusion of one from the realty, if not to his injury, then certainly against his interest and without his consent. But in finding ouster by the lessors as a fact, the District Court went further and in the same connection found as a fact that the ouster was acquiesced in and accepted by the lessee, the two findings being joined in the following paragraph:

"On or about June, 1889, a full settlement of all royalties or rentals was made between the parties, and there was a re-entry upon the demised premises by the lessors and an ouster of the lessees which was acquiesced in and accepted by them."

From this language it appears that while the court found a re-entry by the lessors, it did not mean a re-entry in its technical sense, for the re-entry it found was not adverse to or against the will or interest of the lessee, but on the contrary met with the lessee's acquiescence and acceptance. The court clearly meant what the evidence amply shows that the parties acted in concert, that the conduct of each was consistent with that of the other, and that the conduct of both was based upon mutual consent. Therefore, except for the word ouster, if viewed in its technical sense, we discern no error by the District Court in reaching a conclusion from the admissible inferences of the testimony, that the lease was terminated by the mutual consent of the parties. This we conceive to be the substance of the court's decision.

Owing to the lapse of time and the death of parties, the trial court was not aided by direct testimony in deciding the question of the termination of the lease, but was left very much to inferences to be drawn from the conduct of parties. While there was no occasion to interpret the terms of the lease in connection with the question of its termination and to that end invoke the rule that the interpretation which the parties themselves had placed upon it by their conduct should prevail (Otis v. Coal Co., 199 Fed. 86, 117 C. C. A. 598; Myers' Estate, 238 Pa. 195, 86 Atl. 89), the learned trial judge, without expressly so stating, evidently applied the principle of that rule to the matter before him, and decided the matter as it was shown that the parties by their conduct had treated it.

If the parties in their acts treated the lease as terminated, the court did not likely go astray if it viewed the lease in the same light in which they regarded it. On the other hand, if the conduct of one

party was not consistent with that of the other and failed to show a common understanding that the lease was ended, then different inferences would compel a different method of solution with probably a different result.

Something happened in 1889 that changed the relations of the parties to the lease. Something transpired at that time between the lessors and the lessee which at least suspended all operations under the lease. Of this the evidence is quite conclusive. It is equally certain that the thing which resulted in the suspension of operations was done with the consent of both the lessors and the lessee. Just what was done to cause the suspension is not entirely clear, and whether the acts of the parties in suspending operations went further and put an end to the lease is not established by direct evidence. But the extent of the transaction and its legal effect, we think, may be gathered from its proper inferences and from inferences properly arising from the conduct of the parties subsequently pursued. In fact, if this case is capable of a correct decision upon the testimony submitted, this is the only way to decide it. Without reciting or summarizing the testimony, it is sufficient to say that, viewing the reasons leading up to the transaction of 1889 and giving to that transaction and to the conduct which the parties pursued thereunder all their admissible inferences, we are satisfied that the lease was not merely suspended but was terminated, and that it was terminated not by formal notice or abandonment, but by mutual consent of the parties. This is shown by the trend of affairs in mining and smelting in that district and by the losses which in changed conditions were attendant upon both. It is evidenced by the settlement respecting royalties coincident with the stopping of mining operations which had all the appearance of a settlement intended by the parties to be final. It is further shown by the subsequent omission of the lessee to pay and of the lessors to demand royalties for a long term of years, the dismantlement of the plant by the lessee and the removal of its implements observed and unopposed by the lessors, such dismantlement being provided for by the lease but being permissible only after its termination, the withdrawal from the property and its surrender by the lessee, re-entry by certain of the lessors and subsequent sale of a part which under the lease would belong to the lessee, and the entire acquiescence of each party in the acts and conduct of the other. By this conduct, which included relinquishment by the lessee of all rights in the property and resumption by the lessors of rights that had theretofore belonged to the lessee, we are led to believe that the parties treated the lease as ended. Though the lease contained a provision for surrender upon written notice, such a provision did not preclude the parties from waiving it and from ending the lease by other means equally legal. This we think the parties did by mutually consenting to its termination. The proper inferences from the conduct of the parties support this conclusion, and in adopting the interpretation of the parties as its own, the trial court committed no error.

The judgment below is affirmed.

INTER-ISLAND STEAM NAV. CO., Limited, v. WARD.

(Circuit Court of Appeals, Ninth Circuit. May 15, 1916.)

No. 2617.

1. APPEAL AND ERROR ⊂⊃928(1)—REVIEW—PRESUMPTIONS.
Where the instructions are not in the record, it will be presumed that they properly applied the law to the facts.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3749, 3753; Dec. Dig. ⊂⊃928(1).]

2. MASTER AND SERVANT ⊂⊃285(11)—INJURIES TO SERVANT—PROXIMATE CAUSE —JURY QUESTION.
Though the defendant master had assured plaintiff a new cable would be installed on the coal conveyer, none was, and on the morning of the injury the cable slipped from the pulley. Plaintiff, being foreman, attempted to pry it back upon the pulley with a crowbar. He did not remove the weight on the cable which gave it tension, the cable slipped from the pulley, knocking plaintiff from the conveyer to the dock, 25 feet below, and he sustained severe injuries. *Held* that, as plaintiff was justified in assuming that the master would install a new cable, pursuant to its promise, and as there was an emergency requiring quick action, when the cable slipped from the pulley, recovery cannot be defeated on the ground that machinery having been stopped, there was no danger, and that plaintiff's method of attempting to replace pulley was as a matter of law an intervening agency, breaking the causal between defendant's negligence, for it might have been foreseen, and therefore the question is one for the jury.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1035; Dec. Dig. ⊂⊃285(11).]

3. MASTER AND SERVANT ⊂⊃288(14)—INJURIES TO SERVANT—ASSUMPTION OF RISK.
Where plaintiff, the foreman in charge of a coal conveyer, reported that a cable was defective, and was assured that a new one then on hand would be installed, he did not, the assurances having been made on Saturday, assume the risk of injury as a matter of law by returning to work on the following Monday, though the defective cable still remained, nor did he assume the risk of injury in attempting to replace the defective cable, when it slipped from the pulley.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1084; Dec. Dig. ⊂⊃288(14).]

In Error to the Supreme Court of the Territory of Hawaii, under Section 246 of the Judicial Code, as Amended by Act Jan. 15, 1915, c. 22, 38 Stat. 803.

Action by George E. Ward against the Inter-Island Steam Navigation Company, Limited, a Hawaiian corporation. A judgment for plaintiff was affirmed on writ of error to the Supreme Court of Hawaii, and defendant brings error. Affirmed.

Action at law by plaintiff (defendant in error) for damages on account of injuries sustained as a result of alleged negligence on the part of defendant (plaintiff in error, and hereinafter referred to as defendant company).

On March 10, 1913, George E. Ward filed his complaint in the circuit court of the First judicial circuit of the territory of Hawaii, to recover damages in the sum of $50,000 for injuries sustained while employed by the defendant company in the capacity of machinist and engineer, and foreman of the latter's coal conveyer, upon which his injuries were sustained. The complaint alleged that, on account of the frayed and worn-out condition of the cable used in drawing the coal cars between the wharf and the company's coal yard

on shore, it had a tendency to slip and become detached from the pulleys holding the same in position; that by reason of the unsafe, dangerous, and worn-out condition of the cable, and by reason of the negligence and carelessness of the defendant company, its agents, servants, and employés, in allowing and permitting the same to remain, continue, and be in use and operation, the cable on the 8th day of July, 1912, became detached and slipped from the pulleys holding the same in position; that while plaintiff was endeavoring to restore the cable to its proper position around the pulleys, and without any fault or negligence on his part, the cable, notwithstanding the efforts of plaintiff and others to keep and maintain the same in position, suddenly and with great force and violence flew and became entirely detached from the pulleys, and struck plaintiff upon his body, and hurled and precipitated him to the ground some 25 feet below; that defendant company, although well knowing the tendency of the cable to slip and become detached from the pulleys by reason and on account of its dangerous, unfit, and worn-out condition, carelessly, negligently, and knowingly failed and neglected to provide a suitable, or any, platform or guard rail around the tracks, so that reasonable protection might be afforded those obliged to work around and near the cable, in the event of the cable slipping from the pulleys or rollers; and that by reason of the unsafe, unfit, dangerous, and worn-out condition of the cable, so supplied and furnished by the defendant company, and by reason of the negligence and carelessness of the defendant in failing to provide a suitable, or any, platform or guard rail, as hereinabove alleged, the plaintiff suffered and still suffers the injuries complained of.

The defendant company having filed a general denial, the action came on for trial before the circuit court and a jury. At the conclusion of the plaintiff's case, the defendant company moved for a nonsuit on the ground, among others, that the proximate cause of the injury to plaintiff was his own negligent act; he having attempted to restore the cable to its proper position around the pulleys by prying the same with a crowbar, and without first removing the tension from the cable by lifting or removing the weighted box of about 500 pounds weight which hung suspended from the cable, maintaining a high tension throughout its entire length. The motion for a nonsuit having been granted, the plaintiff sued out a writ of error to the Supreme Court of Hawaii, where the judgment of nonsuit was held erroneous, reversed, and the case remanded for a new trial. 22 Hawaiian Reports, 66.

On the second trial the defendant company moved as before for a judgment of nonsuit at the conclusion of the plaintiff's case, on the same grounds, which motion was denied on the authority of the decision of the Supreme Court of Hawaii, and the defendant thereupon put on its case. The defendant thereupon requested the court to instruct the jury to find in its favor, and, this having been denied, the case went to the jury, resulting in a verdict in favor of the plaintiff in the sum of $13,000. The defendant company excepted to the verdict as contrary to the law and the evidence, and moved for a new trial, which was denied. Judgment was entered in favor of the plaintiff in the sum of $13,097.20.

The defendant company thereupon took the case to the Supreme Court of Hawaii by writ of error; the main errors assigned being the denial of its motion for nonsuit, the refusal of the trial court to instruct the jury to find in its favor, the rendering of the verdict, the denial of its motion for a new trial, and the entering of judgment against the defendant company and in favor of plaintiff in the sum of $13,097.20. On March 24, 1915, the Supreme Court of Hawaii rendered its decision holding that no error had been committed. 22 Hawaiian Reports, 488. From the judgment entered pursuant to this decision, defendant company sued out the writ of error to this court, under section 246 of the Judicial Code, as amended by Act Jan. 15, 1915, c. 22 (38 Stat. 803).

W. O. Smith, L. J. Warren, E. W. Sutton, Henry Holmes, and C. H. Olson, all of Honolulu, T. H., for plaintiff in error.

E. A. Douthitt, of Honolulu, T. H., for defendant in error.

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

MORROW, Circuit Judge (after stating the facts as above). There was evidence tending to show that the defendant company was negligent in maintaining a defective cable for the purpose of hauling cars along the coal conveyer from the ship to the coal yard. The cable had been in use about 10 months at the time of the accident. The evidence tended to show that the life of such a cable was about 8 months; that the cable was worn by use to such an extent that the strands of wire on the outside surface had broken and the ends stuck out from a quarter of an inch to an inch; that this defective condition of the cable caused it to rise up on the pulleys and come off; that with these broken strands it was in a dangerous condition and unfit for the use in which it was being employed; that the unsafe condition of the cable had been brought to the attention of M. E. Gedge, the secretary and treasurer of the defendant company, who was the proper officer to whom such notice should have been given; that this notice was given by the plaintiff and another employé more than a month prior to the date when plaintiff was injured; that on the Saturday previous to the Monday when the plaintiff was injured the cable came off the pulleys, and plaintiff again notified Mr. Gedge of the fact, and told him that they would have to have a new cable, and he said, "All right, a new cable would be put in;" that a new cable was on hand and could have been put in on Sunday. Plaintiff testified that he relied upon this promise of Mr. Gedge that a new cable would be put in by Monday.

About 7 o'clock in the morning of that day plaintiff returned to his usual work on the wharf and on board the vessel where he was engaged in superintending the discharge of coal to be carried by the conveyer from the wharf to the coal yard. Between 9 and 10 o'clock he was told that the cable was off from the pulleys. The foreman of the conveyer was absent. Plaintiff thereupon went up to the elevated track of the conveyer, the engine was stopped, and, with others, he was proceeding by the use of crowbars to return the cable to its place on the pulleys, when he was struck by the cable, knocked from the conveyer structure, and, falling about 25 feet to the wharf below, received the injuries described in the complaint. There was no platform or guard rail at or near the pulleys, for the protection of workmen engaged in handling or working on the cable in that part of the conveyer.

[1, 2] This evidence, and the legitimate inferences to be drawn therefrom, the jury had a right to believe; but it is contended on behalf of the defendant that there was no evidence that the negligence here recited was the proximate cause of the injury to the plaintiff, and that the trial court was in error in refusing to so instruct the jury, as requested by the defendant. The argument is that, as the cable was at rest at the time of the accident, the fact that it was off the pulleys created the occasion calling plaintiff to the place where it came off for the purpose of replacing it; but at that point of time and place the effect of defendant's negligence with respect to the defective cable had ceased to operate, that the place, in and of itself, was no longer dangerous, and that it only became dangerous when the independent or intervening act of the plaintiff came into play, resulting in the accident.

In support of this view, it is contended that the proximate cause of the accident was the failure of the plaintiff to have the tension of the cable relieved by having a weighted box, suspended from the cable at another place in the structure, lifted from the cable, so as to give it slack, and thus enable the plaintiff to replace it in safety. But there was evidence tending to show that the cable appeared to have sufficient slack to justify the plaintiff in his effort to replace the cable on the pulleys without the delay required to go to another part of the structure and lift the weighted box. The plant was in operation, with its employés at work in the hold of the vessel, where buckets were being filled with coal, and by a continuous movement the coal was being hoisted and dumped into cars, to be hauled by the cable along the track of the conveyer and dumped into the coal yard. The method adopted by the plaintiff for restoring the cable to its place on the pulleys was immediate and avoided delay, and had been pursued before; and this was known to Mr. Gedge, who was the responsible official of the defendant company in charge of the work. The inference to be drawn from this situation is that the plaintiff's duties required him to replace the cable on the pulleys with the least possible delay, that the conveyer might be in operation and the employés kept at work discharging coal from the vessel. The situation was one of emergency, calling for the exercise of ordinary care and prudence on the part of the plaintiff, and, probably influenced by what had been done before, he used the crowbar to replace the cable to its position on the pulleys. The act of the plaintiff and its consequences, considering the unguarded structure, were, therefore, what the defendant might reasonably have anticipated, apprehended, or foreseen.

In Southern R. R. Co. v. Webb, 116 Ga. 152, 42 S. E. 395, 396, 59 L. R. A. 111, 112, the Supreme Court of Georgia had before it the question whether, after an original wrongful act had spent its force and a new cause had intervened, which of itself was sufficient to stand as the cause of misfortune, the former must be considered, as a matter of law, too remote to be submitted to the jury in determining the liability of the original wrongdoer for the injury sustained. The court reviews the leading cases upon this subject and reaches the conclusion that, if the character of the intervening act, claimed to break the connection between the original wrongful act and the subsequent injury, was such as its probable or natural consequences could reasonably have been anticipated, apprehended, or foreseen by the original wrongdoer, the causal connection is not broken, and the original wrongdoer is responsible for all of the consequences resulting from the intervening act. The Supreme Court held that, the jury having solved the question to their own satisfaction, and the trial court having approved their solution, the appellate court had no authority to interfere. As said by the Supreme Court of the United States in Milwaukee R. R. Co. v. Kellogg, 94 U. S. 469, 474, 24 L. Ed. 256:

"The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it."

We need not multiply authorities upon this question. The attempt to solve it as a question of law has resulted in a multitude of decisions in which the courts have endeavored to establish a general rule applicable to all cases, but rarely has it been possible to dispose of the question as one of law alone. In the present case we think the evidence is sufficient to show that the proximate cause was a mixed question of law and fact. In Labatt on Master and Servant (2d Edition, § 1572; 1st Edition, § 805) the rule is stated as follows:

"Whether the breach of duty established in the given case was the proximate cause of the injury is a mixed question of law and fact. It is, therefore, primarily one for the jury to determine under proper instructions. A court will not undertake to settle it in any case, where it involves the weighing of conflicting evidence, the balancing of probabilities, and the drawing of inferences."

In the opinion of the Supreme Court of the territory it is stated that "the question of the proximate cause was properly submitted to the jury." The instructions of the court are not in the record, and we are, therefore, not informed as to their character; but we must assume that the instructions were given with proper reference to the evidence and upon a correct and sufficient statement of the law applicable thereto, if the question was to be submitted to the jury under any possible aspect of the evidence. The jury by their verdict found in effect that the proximate cause of the injury was the negligence of the defendant. This verdict was approved by the trial court upon a motion for a new trial, and by the Supreme Court of the territory upon a writ of error to that court. In the face of this verdict, and the judgments of the trial and appellate courts, we cannot hold, as a matter of law, that reasonable men could not come to the conclusion that the defendant's negligence was the proximate cause of the injury to plaintiff.

[3] It is next contended that the plaintiff assumed the risk attending the work of replacing the cable on the pulleys. The rule with respect to this defense has been definitely stated and has been applied by the Supreme Court of the United States in a number of cases. A late case is that of Seaboard Air Line v. Horton, 233 U. S. 492, 504, 34 Sup. Ct. 635, 640 (58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475). Referring to risks which are not naturally incident to the occupation, but arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work, the court says:

"These the employé is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them."

The court states further elements of the rule as follows:

"When the employé does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment, without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employé assumes the risk, even though it arise out of the master's breach of duty. If, however, there be a promise of reparation, then during such time as may be reasonably required

for its performance, or until the particular time specified for its performance, the employé relying upon the promise does not assume the risk, unless at least the danger be so imminent that no ordinarily prudent man under the circumstances would rely upon such promise."

This case is authority for the further rule that, when these elements are present, the question whether there was an assumption of risk by the plaintiff is a question for the jury under proper instructions. The evidence shows that the plaintiff complained to the proper official of the defendant company that the cable was defective and unsafe and secured a promise that the defective cable would be replaced by a new one. A new cable was on hand, with which the defective cable might have been replaced during the period between Saturday and Monday, when the work of discharging the coal was suspended. This the defendant neglected to do. The plaintiff returned to his work on the vessel on Monday morning, when he had the right to suppose a new cable had been placed in position. When the cable came off a few hours later, and he ascended to the top of the conveyer to see what was the matter, he may have learned for the first time that the defective cable had not been replaced by a new one. He was then confronted with an emergency with which he had to deal promptly, in view of all the surrounding circumstances. Whether, under such circumstances, he appreciated the risk attending the replacing of the cable in the way he attempted to replace it was a question of fact to be determined like any other question of fact.

In Kane v. Northern Central Railway, 128 U. S. 91, 9 Sup. Ct. 16, 32 L. Ed. 339, it was contended that the plaintiff, who was a brakeman on a freight train, was guilty of contributory negligence in staying upon the train in the capacity of a brakeman after observing that a step was missing from one of the cars over which he might pass in discharging his duties, and that he assumed the risk attendant upon such heedless exposure of himself to danger. "But," the court said, "in determining whether an employé has recklessly exposed himself to peril, or failed to exercise the care for his personal safety that might reasonably be expected, regard must always be had to the exigencies of his position, indeed, to all the circumstances of the particular occasion." In this case the court held that the circumstances were such that the question involved should be submitted to the jury. In Shearman & Redfield on the Law of Negligence, § 211, the author, in discussing the duty of a servant under such circumstances, says:

"If every man should cease from work upon the instant of discovering that his safety was imperiled by the negligence of some other person, the business world would come to a stand. If every servant on a railroad or in a factory should refuse to work by the side of a negligent fellow servant or with defective materials, immediately upon becoming aware of the fact, such enterprises could never be carried on. Obviously a reasonable time must be given for removal of the defect; and meantime the business must be carried on with no prejudice to the servant's rights, unless the risk is so great that no one, acting with ordinary prudence, would go on under the circumstances."

We are of the opinion that the question whether the plaintiff assumed the risk of replacing the cable on the pulleys in the way he attempted to replace it was a question for the jury under proper instructions.

With respect to the question of contributory negligence on the part of plaintiff in failing to raise the weight taking up the slack of the cable, so as to make it safer and easier to replace the cable upon the pulleys, the Supreme Court of the territory correctly stated the controversy, and the evidence upon which it was based, in the following language:

"Upon this phase of the case there were conflicting evidence and theories—that of the plaintiff being that it was not necessary, as there were two or three inches of slack at the place where the cable had slipped off the pulleys, all that was necessary, and that lifting the weight would not give any more slack at the place where the cable was to be replaced on the pulleys, unless the cable was drawn by hand from the point where the weight was installed to the point where the cable was to be replaced on the pulleys; the theory of the defendant being that lifting the weight would have given sufficient slack at the point where the pulleys were to be replaced to make it safe to replace them, and that if the weight had been lifted the injury would have been avoided. This feature of the case, covering the question whether or not the plaintiff was guilty of contributory negligence which caused his injury, was submitted fairly to the jury by the court under proper instructions, and the finding of the jury was against the contention of the defendant, and the verdict, so far as the question of contributory negligence on the part of the plaintiff is concerned, should not be disturbed."

In Texas & Pac. Ry. Co. v. Harvey, 228 U. S. 319, 324, 33 Sup. Ct. 518, 520 (57 L. Ed. 852), the Supreme Court of the United States said:

"It has often been held in this court that ordinary negligence or contributory negligence is not a question of law, but of fact, to be settled by the finding of the jury. Where there is uncertainty as to the existence of negligence or contributory negligence, whether such uncertainty arises from a conflict of testimony, or because, the facts being undisputed, fair-minded men might honestly draw different conclusions therefrom, the question is not one of law."

We concur in the opinion of the Supreme Court of the territory that the verdict of the jury upon this question should not be disturbed, and upon the whole case we think the judgment of the Supreme Court of the territory should be affirmed; and it is so ordered.

FINN v. CAROLINA PORTLAND CEMENT CO. et al. SILSBE v. SAME. CLARKE v. SAME.

(Circuit Court of Appeals, Fifth Circuit. March 28, 1916.)

Nos. 2859–2861.

BANKRUPTCY ⊂=14—JURISDICTION OF COURTS—STATUTE—RESIDENCE OR PLACE OF BUSINESS.

Under Bankruptcy Act July 1, 1898, c. 541, § 2, 30 Stat. 545 (Comp. St. 1913, § 9586), giving the courts of bankruptcy jurisdiction to adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within the territorial jurisdiction of the court for the period of six months or the greater portion thereof, the limitation of jurisdiction is one affecting the subject-matter, which, under Judicial Code (Act March 3, 1911, c. 231) § 37, 36 Stat. 1098 (Comp. St. 1913, § 1019), can be questioned at any time; and the objection cannot be waived by the bankrupt, so that proceedings against one who has not resided, or

had his domicile or place of business, within the district during the past six months, should be dismissed when that objection is raised by creditors prior to the adjudication, or by the bankrupt after the adjudication, but before other proceedings have been had, notwithstanding a previous appearance by the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 20; Dec. Dig. ⟸14.]

Petitions for Revision of Proceedings of the District Court of the United States for the Southern District of Florida, in Bankruptcy; Rhydon M. Call, Judge.

In the matter of H. R. Finn, bankrupt. Separate petitions by H. R. Finn, Richard R. Silsbe, and William F. Clarke to revise the orders of the District Court overruling objections by the petitioners to the jurisdiction of the court over petitions in involuntary bankruptcy by the Carolina Portland Cement Company and others. Orders reversed, and causes remanded.

The three petitions to revise raise the same question of jurisdiction and were submitted together. The following statement of the case, appearing in the brief of counsel for the petitioners, with slight changes, is here inserted:

An involuntary petition in bankruptcy was filed by the respondents against H. R. Finn in the District Court of the United States for the Southern District of Florida on the 20th day of January, 1915. The said H. R. Finn, on January 27, 1915, filed a motion to dismiss said petition for various reasons therein set forth, but not raising the question of jurisdiction. The judge, on July 18, 1915, made an order granting the motion to dismiss, unless the petitioning creditors, within five days, filed an amended petition. In pursuance of said order the petitioning creditors, the respondents here, filed their amended petition on the 21st day of July, 1915. Thereupon an order was made requiring Finn to move to dismiss, plead, or answer the amended petition within 15 days from the date of the service of a copy of said amended petition and a copy of said order.

On August 23, 1915, Richard R. Silsbe, one of the petitioners here and a creditor of Finn in the sum of $1,000, filed objections to the jurisdiction of the court and prayed that the petition against Finn be dismissed, upon the ground that Finn did not have his principal place of business, and did not reside nor have his domicile, and did not transact any business whatever, within the Southern district of Florida for a period of six months next preceding the filing of said petition, and alleging that Finn, for more than six months next preceding the filing of said petition, had had his residence and domicile in the city of New York and state of New York. On the same day William F. Clarke, one of the petitioners here, alleging that he was a creditor of Finn in the sum of $1,326.95, filed the same objections to the jurisdiction of said court.

The petitioning creditors, respondents here, on August 23, 1915, and on August 28, 1915, filed motions to strike the objections to the jurisdiction of the court filed by Silsbe and Clarke. The court, on September 16, 1915, granted the motions to strike the said objections to the jurisdiction of the court, and on the said 16th day of September, 1915, adjudged Finn to be a bankrupt.

On October 15, 1915, Finn applied to the court to set aside the adjudication of bankruptcy, upon the ground that he did not have his place of business, nor reside, nor have his domicile within the Southern district of Florida for six months, or the greater portion thereof, preceding the filing of said petition, and because he did not at any time within the six months next preceding the filing of said petition have any place of business or reside or have his domicile within the Southern district of Florida, but that during said period he resided and had his domicile in the city of New York and state of New

York, and tendered to the court a sworn answer alleging said facts. The court denied the motion to set aside the adjudication of bankruptcy on October 19, 1915.

Thereafter the petitioners filed their petition to this court to review and revise the orders of the District Court sustaining the jurisdiction of that court.

E. P. Axtell and C. D. Rinehart, both of Jacksonville, Fla., for petitioners.

E. J. L'Engle, Martin H. Long, and Robert R. Milam, all of Jacksonville, Fla., for respondents.

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

MAXEY, District Judge (after stating the facts as above). The question to be decided is whether the trial court had jurisdiction to adjudge H. R. Finn a bankrupt. Finn and the two creditors, Silsbe and Clarke, interposed objections, verified by affidavit, to the jurisdiction as follows:

"That the said Finn did not have his principal place of business and did not reside and did not have his domicile and did not transact any business whatever within the Southern district of Florida for a period of more than six months next preceding the filing of said petition. That his residence and domicile during said time were in the city of New York, state of New York."

The objections of the two creditors were filed prior to the order of adjudication, and those of the alleged bankrupt subsequent thereto. They were all overruled, without inquiry on the part of the court touching the facts. To determine whether the action of the court was erroneous, resort must be had to the Bankruptcy Act. That part of section 2 of the act, having application to the question under consideration, provides as follows:

"That the courts of bankruptcy as hereinbefore defined, viz., the District Courts of the United States in the several states, the Supreme Court of the District of Columbia, the District Courts of the several territories, and the United States Courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits, as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to (1) adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof. * * *"

By the terms of the act it appears that District Courts are invested with jurisdiction to adjudge persons bankrupt (1) who have had their principal place of business, or (2) who have resided, or (3) who have had their domicile within their respective territorial jurisdictions for the period of six months, or the greater portion thereof. The grant of jurisdiction is therefore not general in the sense that persons may be adjudged bankrupt, regardless of the place of their residence, etc. But the jurisdiction of the court over the estate of the bankrupt, the subject-matter of the proceeding, is confined by the terms of the act

to such persons as may be embraced within one of the three categories mentioned. If the person has resided within the district for the preceding six months or a greater portion thereof, if he has had his domicile therein for the period named, or if he has had his principal place of business within the district for the time prescribed, the court is invested with jurisdiction to adjudge him a bankrupt. If, however, it be made to appear to the satisfaction of the court that the person is not included within either of the three categories, the court is without power or jurisdiction to proceed, and hence the proceeding should be dismissed. The question here involved is one affecting the power, the general jurisdiction, of the court to act. It is not a question of mere personal privilege, which may be waived by the bankrupt at his election, as in a case where the court is invested with general jurisdiction over the subject-matter, but suit is brought in the wrong district. There is no doubt that in the case supposed it is competent for the defendant to waive his right to be sued in the proper district by appearing generally in the suit, or otherwise consenting to the jurisdiction.

But let us go a step further and suppose that a suit between citizens of different states is based upon a note for $1,800 and the defendant appears and consents to the jurisdiction. Has the court the power or jurisdiction to proceed in the case? It certainly has general jurisdiction over the subject-matter, and in the case supposed jurisdiction of the person. But it has not jurisdiction over the subject-matter in the particular case simply for the reason that, by the terms of the statute, the matter in controversy, in order to confer jurisdiction, must exceed $3,000. And in such a case the court sua sponte, and over the protest of the parties, will take notice of the want of jurisdiction and dismiss the suit. Why? Because the law is thus written. And a like rule should apply and for a similar reason to a proceeding of this nature arising under section 2 of the Bankruptcy Act. The fact, therefore, that Finn first appeared in the present case by filing demurrers to the petition of the creditors, going to the merits of the controversy, without objecting to the jurisdiction, would not preclude him from timely asserting thereafter the want of jurisdiction. Indeed, under section 37 of the Judicial Code, the question of jurisdiction proper, as contradistinguished from that of mere personal privilege, may be raised at any time during the progress of the litigation? It was raised in the present case by Finn, the alleged bankrupt, within a month after the order of adjudication and before any further proceedings were had, and by the two creditors, Silsbe and Clarke, prior to the order adjudging Finn a bankrupt. Hence it is evident there was no laches on the part either of the alleged bankrupt or of the two creditors.

We conclude, therefore, that if, in an appropriate proceeding instituted by the trial court, it be made to appear that the allegations, contained in the verified motions of Finn, Silsbe, and Clarke, are true, the court should proceed no further, except to dismiss the proceeding for want of jurisdiction. So far as we are advised the precise question here considered has not been passed upon by the Supreme Court, but the views herein expressed find support in the following authorities: In re Garneau, 127 Fed. 677, 62 C. C. A. 403; In re Plotke, 104 Fed.

964, 44 C. C. A. 282; In re Guanacevi Tunnell Co., 201 Fed. 316, 119 C. C. A. 554; In re Williams (D. C.) 120 Fed. 34; In re San Antonio Land & Irrigation Co., Limited (D. C.) 228 Fed. 984; Collier on Bankruptcy (9th Ed.) p. 30.

It follows from the foregoing that the court was in error in overruling, or striking the motions calling in question its jurisdiction. The orders sought to be revised should therefore be reversed, and the causes remanded for further proceedings not inconsistent with the views above expressed. And it is so ordered.

HORN v. MITCHELL, U. S. Marshal.

(Circuit Court of Appeals, First Circuit. April 27, 1916.)

No. 1154.

1. HABEAS CORPUS ⊜90—PROCEEDING—HEARING ON PETITION.
On the filing of a petition for a writ of habeas corpus, setting out the facts and cause of detention, the court may properly consider, and determine upon the facts so presented, whether the prisoner, if brought before it, would be discharged.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 80; Dec. Dig. ⊜90.]

2. CARRIERS ⊜38—INTERSTATE TRANSPORTATION—CARRIAGE OF EXPLOSIVES.
Criminal Code (Act March 4, 1909, c. 321) §§ 232–236, 35 Stat. 1134–1136 (Comp. St. 1913, §§ 10402–10406), making it unlawful to transport explosives in interstate commerce on any vessel or vehicle operated by a common carrier and carrying passengers, are important regulations of commerce, designed for the protection of passengers and others, and as a safeguard for the prevention of the use of instrumentalities of interstate and foreign commerce in aid of crimes which involve the use of high explosives, and their violation was regarded by Congress as of such serious character as to rank as a felony.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 96, 97; Dec. Dig. ⊜38.]

3. CARRIERS ⊜38—OFFENSES AGAINST INTERSTATE COMMERCE—CARRIAGE OF EXPLOSIVES.
It is no defense to a charge of carrying explosives in a passenger vehicle operated by a common carrier in interstate commerce, in violation of Criminal Code, § 235, that the accused was an officer in the army of a foreign country engaged in war, and that the explosive was so carried for the purpose of being used in an alleged act of war in the enemy territory.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 96, 97; Dec. Dig. ⊜38.]

4. CARRIERS ⊜38—OFFENSES AGAINST INTERSTATE COMMERCE.
The mere fact that the accused held a commission in the army of his country raises no presumption that he was acting under the authority of his government, so as to raise any question of international law.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 96, 97; Dec. Dig. ⊜38.]

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

Petition by Werner Horn against John J. Mitchell, United States

Marshal, for writ of habeas corpus. Petition denied (223 Fed. 549), and petitioner appeals. Affirmed.

Joseph F. O'Connell, of Boston, Mass. (James E. O'Connell and Daniel T. O'Connell, both of Boston, Mass., on the brief), for appellant.

George W. Anderson, U. S. Atty., of Boston, Mass. (Leo. A. Rogers, Sp. Asst. U. S. Atty., and Lewis Goldberg, Asst. U. S. Atty., both of Boston, Mass., on the brief), for appellee.

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

BROWN, District Judge. We are of the opinion that the petition of Werner Horn, the appellant, for a writ of habeas corpus was properly denied, and that it appears from the petition itself that the petitioner is not entitled to the writ.

The petition sets out the cause of detention, and the issue of the writ was unnecessary to bring that upon the record by a return to a writ.

[1] In proceeding to consider and determine whether, upon the facts presented in the petition, the prisoner, if brought before the court, would be discharged, the learned District Judge followed an approved course, and did not in this respect deny to the petitioner any right secured to him by section 753 of the Revised Statutes. Frank v. Mangum, 237 U. S. 309, 332, 35 Sup. Ct. 582, 59 L. Ed. 969; Ex parte Milligan, 4 Wall. 2, 110, 111, 18 L. Ed. 281.

The petition represents that at the February term, 1915, of the United States District Court for the District of Massachusetts, an indictment was returned by the grand jury charging that the petitioner—

"did unlawfully, knowingly, willfully and feloniously transport and carry and convey certain explosives contrary to law and in violation of the United States statutes applicable to the transportation and conveyance of explosives."

[2] Such statutes are set forth in chapter 9 of the Criminal Code of the United States, which relates to offenses against foreign and interstate commerce. Sections 232 to 236, inclusive, relate to explosives.

These statutes are important regulations of commerce, designed for the protection of the lives of passengers and others, and must also be regarded as an important safeguard for the prevention of the use of instrumentalities of interstate and foreign commerce in aid of crimes which involve the use of high explosives, such as safe-breaking, bank robberies, and malicious injuries. See Ryan v. U. S., 216 Fed. 13, 132 C. C. A. 257.

As the postal service and the service of common carriers afford great facilities for the wide extension of legitimate business, so also, unless safeguarded, they would afford equally great facilities for the wide extension of acts of crime, or of negligent and reckless disregard of the safety of our citizens. It is necessary, therefore, for the United States strictly to regulate the use in interstate and foreign commerce of the service of common carriers, as well as the use of its own postal service.

The penalty for a violation of the statutes concerning explosives, as defined in section 235 of the Criminal Code, is a fine of not more than $2,000, or imprisonment not more than 18 months, or both. Under section 335 crimes so punishable shall be deemed felonies.

[3] We call attention to the fact that the indictment charges an offense regarded by Congress as of such serious character as to rank as a felony, because of the contention of the petitioner that it should be considered merely as a necessary part of, or as inseparable from, or as an incident or detail of, an act of war against Great Britain, which he claims is cognizable only by the law of nations, and thus affords him immunity from punishment under a charge of violation of the laws of the United States.

This contention, which, so far as we are informed, is without precedent, is stated in paragraph 35 of the amended petition, as follows:

"(35) That your petitioner is an officer in the army of the empire of Germany, to wit, a first lieutenant in the division of the aforesaid army known as the Landwehr; that a state of war exists between the empires of Great Britain and Germany, which state of war has been recognized by the President of the United States in an official proclamation; that your petitioner is accused of destroying part of the international bridge in the township of McAdam, province of New Brunswick and Dominion of Canada; that he is now held in custody by the respondent on the charge of carrying explosives illegally, which allegation, if true, is inseparably connected with the destruction of said bridge; that he is a subject and citizen of the empire of Germany and domiciled therein, and is being held in custody for the aforesaid act, which was done under his right, title, authority, privilege, protection, and exemption claimed under his commission as said officer as described aforesaid."

The accusation of acts done in the jurisdiction of His Britannic Majesty appears from the petition to comprise the crimes of the willful and unlawful destruction of a railroad, in destroying a part of a bridge belonging to the railroad of the Canadian Pacific Railway Company; the unlawful obstruction of a railroad, endangering human life; placing upon said bridge and causing to be exploded an explosive substance, with intent to render and rendering said bridge dangerous, etc.

The main contention now made is that the offense charged against Horn in the indictment pending in the District Court was itself an act of war, because of its "inseparable connection" with the alleged act of war against Great Britain, and therefore cognizable only by the law of nations.

It seems unnecessary to decide whether the petition sufficiently sets forth any acts, committed in Canadian territory, which would constitute an act of war against Great Britain. Even if the allegations of the petition are assumed to be sufficient to show that the destruction of the bridge, on the Canadian side, might be regarded as an act of war against Great Britain, committed on British territory, we think that it by no means follows that these allegations are sufficient to show that an act of war against Great Britain was committed within the district of Massachusetts, where the indictment was found.

It must be borne in mind that the United States statutes involved do not make illegal the transportation of explosives, but only their transportation on vessels or vehicles operated by a common carrier, and car-

rying passengers for hire (section 232, Criminal Code), or otherwise in violation of sections 233, 234, 235. The mode of conveyance, rather than the transportation itself, is the ground of offense. A disregard of the safety of fellow passengers on trains engaged in interstate commerce, and a violation of statutory regulations of interstate commerce, constitute the gravamen of the offense, and this is not necessarily connected with the transportation of explosives, and is not war against either the United States or Great Britain.

Though counsel urge that it was inseparably connected with, and a part of, the blowing up of the bridge, the petition as we read it, nowhere admits that Horn did blow up the bridge, nor alleges that the explosives which he is charged with transporting illegally were used in blowing up the bridge. Without an allegation that an act of war was, in fact, committed by Horn, the whole theory of an "inseparable connection" amounts only to making an act done in the United States a part of something which, so far as appears, may never have been done. Certainly an act done in the United States cannot be justified as a part, or incident, or detail, of an act of war upon Great Britain, which existed not in fact, but only in the verbal form of an accusation. To convert the offense charged into a justifiable act of war upon the theory of inseparable connection, we first must have facts to connect; therefore, to pursue the appellant's argument, we must assume that Horn did blow up the bridge before proceeding to examine further the question of whether there is a connection, and, if so, whether it is an inseparable connection, between this and his alleged disregard of the laws of the United States.

The connection between the use of prohibited means of transportation and the subsequent use of the explosive to destroy a bridge is remote. The act of war, if we may call it such, can be completely described without any reference to the mode in which the explosive was conveyed to the scene of its use. Whether the explosive was transported lawfully or unlawfully has no causal connection with its use or its effectiveness to destroy a bridge.

Likewise the offense against the United States may be fully described without any reference to the use of the explosive after transportation.

The connection, so far from being "inseparable," is wholly artificial, for the purpose of invoking a single ground of exemption for two separate acts.

A conviction under this indictment would not involve punishment for any act done in British territory. Neither an intent to use nor the use of the explosive on British territory, subsequent to its transportation in violation of the statutes of the United States, could form any part of the offense charged in the indictment, under which the guilty intent is the intent to carry, irrespective of any intent to use.

So, also, a conviction under the charges of acts done upon British territory would not involve punishment for the transportation of the explosive within the territory of the United States, nor would that constitute any part of the offense.

The two offenses charged, therefore, are clearly distinct and sepa-

rate, for they do not involve the same acts, nor parts of the same act; but each is complete in itself, without involving as a part or element any act or intent essential to the other. They differ completely in time and place and in the acts charged. Both in fact and in law the transactions are substantially different and separate.

In our opinion the allegations that the acts done in the United States are "necessarily connected" with, or inseparable from, the act of blowing up the bridge have no weight, but state merely an erroneous conclusion of law. This, we think, is a vital error underlying the whole contention of the appellant. The theory that what Horn did in the United States was a mere detail or incident of an act of war done in British territory by Germany against Great Britain would lead to the conclusion that neither Horn nor his government is responsible to the United States.

[4] The principle of international law which is invoked for Horn's protection is thus stated:

"That an individual forming part of a public force, and acting under the authority of his government, is not to be held answerable as a private trespasser or malefactor, is a principle of public law sanctioned by the usages of all civilized nations, and which the government of the United States has no inclination to dispute."

See 26 Wend. *683, quoting instructions of Webster, Secretary of State, to the Attorney General.

But this exemption of the individual is on the ground that his act was a national act of his sovereign, and thus to be dealt with between nations under the law of nations.

Upon what theory, then, is this act of Horn in the United States to be held a national act of his sovereign? There is no allegation that what he did in the United States or in Canada was specifically authorized or avowed by the appellant's government. He relies upon a commission as a first lieutenant of the Landwehr (second reserve) Pioneers, which is dated August 18, 1908; but this is insufficient to show that he had been called to active service, or had become a part of an armed force. Surely his government, upon the mere ground that it has issued such a commission, cannot, as a nation, be presumed to have authorized his acts either here or in Canada.

It is urged that implied authority is sufficient; but the holding of a commission of this kind is no basis for an implication either of authority in Horn or of responsibility of his government.

As the only authority asserted by Horn is under his commission, which, in our opinion, is no evidence of authority to do any acts as a belligerent within the United States, we find no ground for extending to him any of the privileges or exemptions which might result from a finding that his act was a national act. Due respect to his government would forbid us from imputing to it a national responsibility to the United States upon such facts as are set forth in the petition.

The appellant cites the well-known case of People v. McLeod, 25 Wend. 483, 37 Am. Dec. 328, and the commentaries upon that case in 26 Wend. 663 et seq.; but these have little bearing on the present case. See also Wharton's International Law Digest, vol. 1, § 21.

No principle of international law that was recognized by the United States in the correspondence with Great Britain over the attack upon the schooner Caroline is applicable to this case.

The fact that Horn holds such a commission as he relies upon, in our opinion, is insufficient to show authorization of an attack upon Great Britain in Canada; but even if such authority to attack a public enemy follows from such a commission, it affords no implication of authority for a violation of the laws of a neutral nation in a matter having so remote a relation to the proximate act of exploding an explosive substance in hostile territory.

The petition, in our opinion, fails entirely to show either express or implied national authority for doing the acts charged in the indictment; therefore no question of international law is involved, and the District Court has full jurisdiction to proceed to trial of the indictment found by its grand jury.

We agree with the contention of the United States attorney that, if the present petition cannot be maintained on its merits, it is immaterial whether an earlier petition to the same unmeritorious effect was or was not erroneously refused consideration. Our conclusion that the grounds upon which the appellant seeks a discharge are unsound cuts under all other questions raised. He fails to show that the acts for which he is indicted were done under compulsion or command of his sovereign. There is no question of punishing him for anything done in Canada; there is no question of double punishment for the same act. No defense which he may have against punishment for violation of the laws of another nation, or against extradition upon a charge of such offense, is taken away from him by a refusal of the writ of habeas corpus.

The petition contains many matters which, upon this appeal, we have no power to review. We may say, however, that in our opinion the grounds upon which he contested the jurisdiction of the commissioner were without substantial merit, and that he has had a full hearing upon the merits of his claim to immunity from trial upon the indictment.

The judgment of the District Court is affirmed.

WILSON et al. v. CONTINENTAL BUILDING & LOAN ASS'N et al.

(Circuit Court of Appeals, Ninth Circuit. May 15, 1916.)

No. 2685.

1. BANKRUPTCY ⊜126—TRUSTEE—SELECTION.

Under General Order 13 (89 Fed. vii, 32 C. C. A. xvii), providing that the selection of a trustee by the creditors is subject to approval or disapproval by the referee, the referee cannot exercise the discretion conferred arbitrarily.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 182, 184, 187; Dec. Dig. ⊜126.]

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2. BANKRUPTCY ⊂=446—REVIEW—FINDING OF REFEREE.
A finding of fact by referee in bankruptcy, approved by the District Court, will be upheld on review, if supported by any substantial evidence.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. ⊂=446.]

3. BANKRUPTCY ⊂=120—TRUSTEE—SELECTION.
As a trustee under Bankr. Act July 1, 1898, c. 541, 30 Stat. 544, and the General Orders may be called upon to sue to set aside transfers, to compel persons to account for property belonging to the bankrupt estate, etc., a trust company, which was trustee of mortgages belonging to the bankrupt, and which was intimately associated with the bankrupt's business, should not be appointed trustee, for the company might be compelled to assume inconsistent positions.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 185; Dec. Dig. ⊂=120.]

4. BANKRUPTCY ⊂=446—REVIEW—DISCRETION OF REFEREE.
As the approval or disapproval of a trustee in bankruptcy is discretionary with the referee, the exercise of his discretion will not be reviewed.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. ⊂=446.]

*Petition for Revision of an Order 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 bankruptcy of the Continental Building & Loan Association, a corporation. Petition by W. L. Wilson and others for revision of an order of the District Court (232 Fed. 413), affirming an order of the referee disapproving the selection of a trustee. Order affirmed.

B. M. Aikins, of San Francisco, Cal., for petitioners.

Heller, Powers & Ehrman, Hugo D. Newhouse, and Reuben G. Hunt, all of San Francisco, Cal., for respondents.

Nat Schmulowitz, of San Francisco, Cal., for bankrupt.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. The Continental Building & Loan Association, a building and loan association formed under the laws of the state of California, filed a petition in voluntary bankruptcy, and on August 9, 1915, was adjudged a bankrupt. In its petition the corporation set forth that it owed debts which it was unable to pay in full, and accompanied the petition with a schedule in which it named its stockholders as creditors. The District Court referred the matter to A. B. Kreft, Esq., referee in bankruptcy.

The first meeting of creditors was held on August 30, 1915. A large number of the stockholders, creditors, appeared, and elected T. C. Tognazzi trustee. The referee disapproved of the selection, basing his disapproval upon the ground that "the choice of Mr. Tognazzi had been influenced by the acts of the officers and attorneys connected with the bankrupt corporation." Thereupon the matter was continued until September 15, 1915, when a new election was held and the Anglo-California Trust Company was elected trustee over two other candidates whose names were presented. At this meeting the referee declined to allow directors, officers, and attor-

neys of the bankrupt to participate in the election of a trustee. The Anglo-California Trust Company had the support of 403 claimants, whose claims aggregated about $320,437; the next highest candidate for trustee, the Union Trust Company, had claimants whose claims represented $140,000; and the third candidate, Mr. Williams, was supported by 107 claims, aggregating $62,000. The only claimants who voted were shareholders of the bankrupt corporation.

Counsel representing the claimants who voted for the two unsuccessful candidates at once objected to the election of the Anglo-California Trust Company upon two grounds: (1) That that company was the depositary of the bankrupt, and had acted as trustee in its deeds of trust; (2) that its election was brought about by activity on the part of officers, directors, and attorneys of the bankrupt. The referee heard evidence upon these issues and disapproved of the selection. In the course of his opinion the referee states it to be the fact that the Anglo-California Trust Company is trustee under many deeds of trust for the Continental Building & Loan Association. He added:

"I would be pleased to have the creditors herein select as trustee a financial institution of equal standing with the Anglo-California Trust Company, but because of its relations with the bankrupt, and the association with it of attorney of the bankrupt, it is my opinion that it should not be the trustee herein."

And later he expresses the opinion that:

"The evidence shows that the officers and attorneys of the bankrupt have dictated the steps leading up to the choice of the Anglo-California Trust Company and evidences a determination on their part to control the administration of this estate in this court."

And in support of this he incorporates much of the evidence heard before him, which tends to show intimacy of association between one or more of the attorneys for the bankrupt association and the Anglo-California Trust Company.

Thereafter the petitioners herein, creditors, filed a petition for a review of the referee's order, and the referee filed his certificate on petition to review. The District Court affirmed the action of the referee in disapproving of the selection, upon the ground that the choice had been influenced, if not brought about, by the officers and attorneys of the bankrupt, whereupon the order denying the petition was brought before this court for review.

The petitioners rely upon 13 assignments of error, based substantially upon the following grounds: That the Anglo-California Trust Company was not disqualified by reason of any relationship it bore to the bankrupt, and that the election of the Anglo-California Trust Company was not brought about by any activity on the part of the officers, directors, or attorneys of the bankrupt, and that there was no evidence that any activity on the part of such persons influenced any of the creditors to vote for the Anglo-California Trust Company, and that it was an abuse of discretion on the part of the referee to disapprove of the selection of the Anglo-California Trust Company.

[1] The petitioners invoke the general right of the creditors to appoint a trustee of the bankrupt estate, and while admitting that the appointment is, by General Order 13 (89 Fed. vii, 32 C. C. A. xvii), subject to approval or disapproval by the referee, they argue that action by the referee is not to be exercised arbitrarily, but only for cause. There can be no dispute over this general rule. All must agree that the vital interest which creditors have in the preservation and wise management of the estate of the bankrupt must, as a general rule, make them the best judges of who shall be appointed as trustee, and their selection cannot be arbitrarily ignored. But the Supreme Court, in the exercise of its power to make general orders in bankruptcy, foresaw that instances might arise where, notwithstanding the desire of the creditors for the selection of some particular person as trustee, the best interests of the estate would not be served by allowing such choice to stand, and they reserved a supervisory power in the referee or judge.

[2] We must therefore inquire whether the referee and the District Court had before them substantial evidence that the relations between the bankrupt and the Anglo-California Trust Company were such as to justify the referee in disapproving of it as trustee, or whether the selection was accomplished through the efforts of the officers and attorneys of the bankrupt. If there is substantial evidence upon either of these points, this court will not interfere upon a petition to revise. In Ohio Valley Bank Company v. Mack et al., 163 Fed. 155, 89 C. C. A. 605, 24 L. R. A. (N. S.) 184, Judge Lurton, for the Court of Appeals of the Sixth Circuit, said:

"No arbitrary rule can be laid down for determining the weight which should be attached to a finding of fact by a bankrupt referee. His position and duties are analogous, however, to those of a special master directed to take evidence and report his conclusions, and the rule applicable to a review of a referee's finding of fact must be substantially that applicable to a master's report. * * * Much in both cases must depend upon the character of the finding. If it be a deduction from established fact, the finding would not carry any great weight, for the judge, having the same facts, may as well draw inferences or deduce a conclusion as the referee. But if the finding is based upon conflicting evidence involving questions of credibility, and the referee has heard the witnesses, much greater weight naturally attaches to his conclusion, and the weight of authority is that the District Judge, while scrutinizing with care his conclusions upon a review, should not disturb his finding, unless there is most cogent evidence of a mistake and miscarriage of justice."

[3, 4] We can safely rest our decision upon one ground. It appeared before the referee that the Anglo-California Trust Company is the trustee named in and holds certain securities, to wit, a large number of deeds of trust securing obligations owing to the bankrupt. The referee finds that this trust relationship is evidenced by statements in the bankrupt's schedules in which it appears that the Anglo-California Trust Company is trustee under many deeds of trust for the Continental Building & Loan Association. It was also found by the referee that the principal counsel for the Continental Building & Loan Association is a director of the Anglo-California Trust Company and from time to time acts as attorney of the Anglo-California

Trust Company. These facts, which were not disputed, were sufficient warrant for the referee to disapprove of the selection of the Anglo-California Trust Company. It is very clear to our minds that, during the various proceedings to be had in the bankruptcy court, the trustee should be wholly free from any possible position whereby it might occupy the position of a trustee in bankruptcy calling upon itself, as trustee under deeds of trust, to account to itself. It is elementary that the duty of a trustee is to administer the estate impartially for the good of each and all of the creditors. No interest, except that of the estate, should be his consideration. The duties which a trustee may be called upon to perform under the Bankruptcy Act and General Order 17 (89 Fed. viii, 32 C. C. A. xix), and others, are often of a character which require him to reclaim property and sue to avoid transfers, to take possession of property, books, and papers belonging to the estate, to redeem and discharge mortgages upon real property, to defend pending suits, possibly to call for assessments upon stockholders of a bankrupt corporation, to demand accountings from those who have business relations with the bankrupt, and to do very many things which can best be done where there is no relationship out of which can arise any conflict of interest, or even serious embarrassment to the trustee, by reason of business relationships, or, in case of corporations, by having directors or officers in common. We are not unmindful of the advantage which often comes by having as trustee one who is familiar with the affairs of the bankrupt, and where those interested in the estate agree upon a selection, the referee should be satisfied by evidence before he withholds his approval of the one so agreed upon. But this brings us back to the original point that, inasmuch as the referee has a discretion, if in the exercise of it in the case of a building and loan association he refuses to approve of the appointment as trustee of a trust company which is a trustee under many instruments of trust for the bankrupt association, it is not for the reviewing courts to interfere with the action had.

The order of the District Court is affirmed.

MERCHANTS' NATIONAL BANK OF SAN FRANCISCO v. CONTINENTAL BUILDING & LOAN ASS'N et al.

In re CONTINENTAL BUILDING & LOAN ASS'N.

(Circuit Court of Appeals, Ninth Circuit. May 15, 1916.)

No. 2684.

1. BANKRUPTCY ⟸231—PROCEEDINGS—RIGHTS OF CREDITORS.

Under Bankr. Act July 1, 1898, c. 541, §§ 56b, 57e, 30 Stat. 560 (Comp. St. 1913, §§ 9640, 9641), relating to secured creditors, a secured creditor cannot after selection of a trustee, participate in creditors' meetings, except in so far as the security does not cover his entire claim.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 541; Dec. Dig. ⟸231.]

2. BANKRUPTCY ⊂=123—CLAIMS—BUILDING AND LOAN ASSOCIATION.
Shareholders in a building and loan association, who are entitled at any time to withdraw and demand payment of the book value of their stock, are upon the bankruptcy of the association to be deemed creditors, entitled to vote for the selection of a trustee, for the bankruptcy fixes the association's liability, being treated as an anticipatory breach of contract.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 171–179; Dec. Dig. ⊂=123.]

3. BANKRUPTCY ⊂=123—CLAIMS—BUILDING AND LOAN ASSOCIATION.
Shareholders in a building and loan association, entitled at any time to demand the book value of their shares, are upon the bankruptcy of the association to be deemed creditors, entitled to vote for the selection of a trustee, notwithstanding a reference to the books is necessary to determine the amounts of their claims.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 171–179; Dec. Dig. ⊂=123.]

4. BANKRUPTCY ⊂=446—REVIEW—HARMLESS ERROR.
That petitioner was denied the right to vote for trustee is harmless, though erroneous, where petitioner's claim was so small that, had the right not been denied, the selection of the trustee could not have been affected.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. ⊂=446.]

Petition for Revision of an Order of the District Court of the United States for the Northern District of California; Maurice T. Dooling, Judge.

In the matter of the bankruptcy of the Continental Building & Loan Association, a corporation. Petition by the Merchants' National Bank of San Francisco for revision of an order of the District Court (232 Fed. 413), affirming an order of the referee denying petitioner's claim to vote for a trustee. Order affirmed.

R. P. Henshall, of San Francisco, Cal., for petitioner.

Heller, Powers & Ehrman, Hugo D. Newhouse, and Reuben G. Hunt, all of San Francisco, Cal., for respondents.

Nat Schmulowitz, of San Francisco, Cal., for bankrupt.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. This case arises out of the matters connected with the bankruptcy of the Continental Building & Loan Association referred to in Wilson et al, Petitioners, v. Continental Building & Loan Association et al., Respondents, 232 Fed. 824, —— C. C. A. ——, just heretofore decided. The history of the adjudication need not be repeated.

The petitioner and appellant herein is a national bank, and held an unsecured claim, a note for $2,511.20, against the bankrupt. The claim was presented, filed, approved, and allowed by the referee, and a proxy in due form was executed, authorizing the attorney of the claimant to vote the claim at any meeting held for the election of a trustee. At a meeting of the creditors held on September 15, 1915, appellant attempted to vote its claim. One or two other creditors, not shareholders of the bankrupt, and other persons who were stockholders and members of the bankrupt association, were present. The appellant moved

the referee that any and all claimants who were stockholders or members of the association bankrupt be denied the right to vote upon the ground that they were not creditors within the meaning of the bankrupt law and held no provable claims as such. When the petitioner, through its attorney, endeavored to vote for trustee, the referee inquired whether the petitioner intended to waive its claim of priority, which had theretofore been made. Counsel representing the bankrupt association replied that no waiver of claim of priority was intended. The referee ruled that stockholders, or members, had the right to vote for a trustee, but that appellant and petitioner had not. Upon petition for review of the order of the referee, the order was affirmed, and review by this court is now sought.

The principal points relied upon by the appellant are: (1) That a shareholder of a building and loan association is a distributee of its assets after claims against the corporation are paid, and that it is therefore impossible for such a shareholder to be a creditor of the corporation within the meaning of the Bankruptcy Act; (2) no person can vote to select a trustee, unless he has a provable claim against the bankrupt, and shareholders of a building and loan company do not possess, by virtue of their holdings, provable claims against the corporation within the meaning of the Bankruptcy Act; and (3) even though the assets to be administered upon in the bankruptcy court are greatly in excess of the provable claims against the bankrupt, yet that fact does not deprive the only creditors who have provable claims from electing a trustee for the bankrupt and administering upon his estate until they are paid; and (4) that petitioner was erroneously denied a right to vote for trustee.

[1] Appellant never objected, and does not now object, to the jurisdiction of the court which made the adjudication in bankruptcy, although such adjudication was based upon the inability of the association to pay debts which it owed, and which were stated to be due to those only who were listed in the schedules of liabilities and assets which accompanied the petition in bankruptcy as shareholders in the association. The referee finds that in these lists of shareholders, called creditors, the names of the petitioner and two other creditors not shareholders were inadvertently admitted. Appellant claims, and properly insists upon, a right to priority of payment under sections 56b and 57e of the Bankruptcy Act, and it is conceded by respondent that as a creditor of the corporation it is entitled to such a priority over debts due to stockholders. Now, with assets worth $751,508.13 due to shareholders, and a total indebtedness of only $12,198.90 due to creditors other than shareholders, of which $2,511.20 is all that is due to appellant, petitioner is scarcely in a position to urge serious harm to its rights because it was not permitted to vote for a trustee.

But, assuming that it had a right to vote for selection of a trustee, nevertheless, under the statute, after trustee was chosen, it could not in respect to its claim have voted at creditors' meetings, nor could its claim be counted at such meetings in computing either the number of creditors or the amounts of their claims unless the amounts exceeded the value of such securities or priorities, and then only for the excess. Section

56b, Bankruptcy Act. Clearly, then, under the conditions existing, appellant's complaint, in effect, is that, by allowing the stockholders to vote for a trustee, it (appellant) could not secure the selection for trustee it desired. We therefore inquire whether the referee was correct in ruling that the stockholders were creditors entitled to vote for a trustee.

[2-4] Building and loan associations are at once distinguishable from ordinary commercial corporations. In building and loan corporations, where the capital stock consists of the dues paid in by members, together with the apportioned profits, the shareholder has a right to withdraw at any time from the association and to receive what he has paid in plus his share of the profits earned and minus the penalties imposed for withdrawal, without being compelled to complete his stock subscription. As was said by the referee in his report:

"* * * To the extent of the obligation of the corporation to pay the withdrawal value of the stock based upon profits actually existing, the identity of the corporation is distinguished from that of its members. If the corporation is solvent, they can in law or in equity recover such withdrawal value. If the corporation is unable to pay back the principal paid in, a state of insolvency exists."

Appellant argues that liabilities of a contingent character are not provable in bankruptcy, and, taking a rent contract as an example, says that, if rent is due at the time of the filing of the petition, it constitutes a provable claim; whereas a claim for rent to become due cannot be proved, because it was not a fixed liability when the bankruptcy occurred. The inapplicability of this argument is met by the opinion of the Supreme Court in Central Trust Company v. Chicago Auditorium Association, 240 U. S. 581, 36 Sup. Ct. 412, 60 L. Ed. ——, holding that cases arising out of the relation of landlord and tenant are distinguishable from ordinary executory agreements, because of the diversity between duties which touch the realty and the mere personalty. The Supreme Court holds, also, that in some cases where a party is bound by an executory contract, and repudiation or disablement occurs during performance by intervention of bankruptcy, the contract may be regarded as terminated, and damages may be demanded. This is upon the theory that intervention of bankruptcy constitutes a breach and gives rise to a claim provable in bankruptcy proceedings. The court speaks of the conflict in decisions of the federal courts upon the point, and cites cases holding that such a claim is provable, and those holding to the contrary, and includes within the citations many of the decisions cited by appellant and respondent in the present case, and concludes that proceedings, whether voluntary or involuntary, resulting in an adjudication in bankruptcy, are the equivalent of an anticipatory breach of an executory contract within the doctrine of Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953. The court said:

"The claim for damages by reason of such a breach is 'founded upon a contract, express or implied,' within the meaning of section 63a4, and the damages may be liquidated under section 63b. Grant Shoe Co. v. Laird, 212 U. S. 445, 448 [29 Sup. Ct. 332, 53 L. Ed. 591]. It is true that in Zavelo v. Reeves, 227 U. S. 625, 631 [33 Sup. Ct. 365, 57 L. Ed. 676, Ann. Cas. 1914D, 664], we held that the debts provable under section 63a4 include only such as existed at the time of the filing of the petition. But we agree with what

was said in Ex parte Pollard, 2 Low. 411, Fed. Cas. No. 11,252, that it would be 'an unnecessary and false nicety' to hold that because it was the act of filing the petition that wrought the breach, therefore there was no breach at the time of the petition. As was held by the same learned judge in Re Pettingill [D. C.] 137 Fed. 143, 147: 'The test of provability under the act of 1898 may be stated thus: If the bankrupt, at the time of bankruptcy, by disenabling himself from performing the contract in question, and by repudiating its obligation, could give the proving creditor the right to maintain at once a suit in which damages could be assessed at law or in equity, then the creditor can prove in bankruptcy on the ground that bankruptcy is the equivalent of disenablement and repudiation. For the assessment of damages proceedings may be directed by the court under section 63b (30 Stat. 562).' "

We believe, also, that the liability of the association to stockholders for amounts paid in and proportions of profits, if any, is fixed, notwithstanding the fact that it may require examination of books to ascertain the exact amount due to each shareholder.

In conclusion, we hold that the claims of shareholders are provable against the bankrupt, and that the referee and the District Court were correct in their rulings upon the point, and that, inasmuch as no possible harm was done to the appellant by denying it the right to vote for a trustee, it has no cause for complaint. In re Ashland Steel Company et al., 168 Fed. 679, 94 C. C. A. 165.

The petition for revision is denied.

S. M. HAMILTON COAL CO. v. WATTS.

(Circuit Court of Appeals, Second Circuit. April 11, 1916.)

No. 57.

1. APPEAL AND ERROR ⟸962—REVIEW—DECISIONS REVIEWABLE.

An order vacating a judgment of dismissal and setting the case for hearing, which is equivalent to one setting aside a judgment and granting new trial, rests in the discretion of the lower court, and will not be reviewed, save in so far as the lower court exceeded its jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3838; Dec. Dig. ⟸962.]

2. DISMISSAL AND NONSUIT ⟸81(3)—VACATION OF DISMISSAL—JURISDICTION.

An order dismissing a complaint for failure to prosecute is a final disposition of the case, and cannot be vacated after the expiration of the term at which it was granted, unless there were circumstances as some clerical error or misprision taking it from the ordinary rule, or there was error which the old writ coram nobis would have reached.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 184; Dec. Dig. ⟸81(3).]

3. DISMISSAL AND NONSUIT ⟸60(1)—VACATION—RIGHT TO.

Though defendant's answer was not properly verified, yet as plaintiff did not comply with Code Civ. Proc. N. Y. § 528, declaring that the remedy for a defective verification is to treat the same as an unverified pleading, and as a nullity where verification is necessary, and did not use due diligence to return the answer and demand judgment for want of an answer, the answer cannot be disregarded, but put the case at issue, so that a dismissal for want of prosecution could be had.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 140, 145, 146, 150, 151; Dec. Dig. ⟸60(1).]

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4. DISMISSAL AND NONSUIT ⊂⊃60(1)—WANT OF PROSECUTION—ISSUE.
Where defendant's original answer, which was not properly verified, was amended without plaintiff seeking a default judgment, the amended answer put the case at issue, so that the action might be dismissed for want of prosecution.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 140, 145, 146, 150, 151; Dec. Dig. ⊂⊃60(1).]

5. DISMISSAL AND NONSUIT ⊂⊃60(1)—VACATION.
Where defendant's amended answer improperly limited an admission in the original answer, that fact will not prevent the case from being put at issue, so that it might be dismissed for want of prosecution, and though the impropriety might have been corrected on plaintiff's application to reinstate the admission, would not have been reached by writ coram nobis, and is no ground for setting aside the dismissal.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 140, 145, 146, 150, 151; Dec. Dig. ⊂⊃60(1).]

6. DISMISSAL AND NONSUIT ⊂⊃81(5)—VACATION—RIGHT TO.
Where defendant, whose first answer was not properly verified, was not a party to the disloyalty of plaintiff's counsel in refusing to enter default, and was guilty of no fraud in procuring a dismissal for want of prosecution, the dismissal will not be vacated.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 186; Dec. Dig. ⊂⊃81(5).]

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

Action by James R. Watts against the S. M. Hamilton Coal Company. On application of plaintiff, a judgment of dismissal was vacated (219 Fed. 1003), and the case was set for hearing, and defendant brings error. Order vacating judgment reversed.

This is a writ of error to review an order of the District Court vacating a judgment of dismissal and setting the cause down for trial upon the docket of the court. The action was originally brought in the state court by service of a summons without complaint, on July 13, 1907. An appearance was entered on July 30th for the defendant, and on August 15, 1907, the plaintiff served his complaint for breach of contract in the sum of $4,524.95, with interest. On September 24, 1907, the defendant removed to the United States District Court for the Eastern District of New York, and on October 3d filed its answer with the clerk of that court; the removal papers being filed in the clerk's office on October 2d. According to one version of the facts the answer was first served on November 1, 1907. Whether served before or not, in any case it was served on that day and retained by the attorney for the plaintiff, and the case was noticed for trial by the defendant's attorney on November 8th, and a cross-notice served on the same day. On November 18th on the call of the calendar the case was set over until the next term. On January 19, 1909, over a year after, it was set down for trial for February, 1909, and on the February call was marked for March 9th. It was eventually reached for trial on April 5, 1909, and the defendant then took a default before Judge Chatfield, who directed notice to be given to the plaintiff's attorney that judgment of dismissal would be taken. The proposed order, with notice of settlement, was served on the plaintiff's attorney on April 13, 1909. The order was submitted to the court on April 17, and was signed on April 20, 1909, the mandatory part of it reading as follows: "Ordered that plaintiff's complaint herein be dismissed for failure to prosecute and that the defendant have judgment accordingly, with costs as taxed," etc. A copy of the order as signed was duly served upon the plaintiff's attorney on April 23, 1909, but nothing further was done until June 20, 1914, when a notice of motion was served by new attorneys for the plaintiff, upon which the order was entered vacating the order of dismissal and restoring the cause to the docket

for the reasons stated below. A writ of error was sued out by the defendant.

The plaintiff himself swears that he personally inquired at the clerk's office on October 28, 1907, and again on October 29, 1907, this time in the company of his wife. He examined an answer then on file, and found that it contained an admission that "plaintiff procured the contract" for the defendant, for procuring which the complaint asked for a commission. He also found that the verification to the answer was undated, that under the name of the notary public appeared only the word "Notary," and that it bore no notary's seal. Plaintiff and his wife thereupon visited their attorney on the same day and saw in his possession a copy of the answer, which conformed to the answer which they had seen in the clerk's office. The plaintiff told his attorney then to enter a judgment in his favor on the ground that the answer was a nullity. On November 6, 1907, the plaintiff and his wife went again to their attorney's office, who told them that the answer was still the same, and still refused to enter the judgment by default. On November 11, 1907, the plaintiff called at the clerk's office, found the note of issue of November 8th, and an answer which he insists was different from the earlier one. In place of the words "procured the contract" occurred the words, "contributed to the procurement of such contract," the answer now had a notary's seal upon it, after the word "Notary" appeared the word "Public," and the verification had been dated September 20, 1907. On November 18th, on still another visit to the clerk's office, the clerk told the plaintiff that the case would probably not be reached for two or three years.

Barry, Wainwright, Thacher & Symmers, of New York City (Herbert Barry, of New York City, of counsel), for plaintiff in error.

McLear & McLear, of New York City, for defendant in error.

Before COXE and WARD, Circuit Judges, and LEARNED HAND, District Judge.

LEARNED HAND, District Judge (after stating the facts as above). [1] An order of the character now under review, which is equivalent to one setting aside a judgment and granting a new trial, being in the discretion of the court below, is not within the jurisdiction of this court to review. If, however, the action of the court is beyond its jurisdiction, that question and that alone may be reviewed by writ of error. City of Manning v. German Ins. Co., 107 Fed. 52, 46 C. C. A. 144; Phillips v. Negley, 117 U. S. 665, 6 Sup. Ct. 901, 29 L. Ed. 1013.

[2] The order dismissing the complaint for failure to prosecute was a final disposition of the cause, and was therefore not within the power of the court to vacate after the term at which it was granted (U. S. v. Mayer, 235 U. S. 55, 35 Sup. Ct. 16, 59 L. Ed. 129), unless there are some circumstances in the case which take it out of the ordinary rule. The court may correct its judgment after the term, if there be a clerical error, or in case the judgment has been entered by misprision of the clerk, or for any error which the old writ of error coram nobis would have reached. Those errors are stated by Mr. Justice Hughes in U. S. v. Mayer, supra, 235 U. S. page 68, 35 Sup. Ct. page 19, 59 L. Ed. 129. They were only errors of law disclosed by the record, or "errors in matters of fact which had not been put in issue or passed upon and were material to the validity and regularity of the legal proceeding itself."

[3] In the case at bar there was no clerical error, no misprision of the clerk, no error of law disclosed by the record. Assuming, without deciding, that the plaintiff's story was correct, the only possible

irregularity in the proceedings affecting their regularity, arose from his contention that the original answer had not been verified in accordance with section 526 of the Code of Civil Procedure, in that the date of the verification was not stated, that no notarial seal was added, and that the word "Public" was left off in the phrase, "Notary Public." The law regarding errors in the verification is to be found in section 528 of the Code of Civil Procedure of New York, which is as follows:

"The remedy for a defective verification of the pleading is to treat the same as an unverified pleading. Where the copy of a pleading is served without a copy of a sufficient verification, in a case, where the adverse party is entitled to a verified pleading, he may treat it as a nullity."

Now the plaintiff swears that when he came to his attorney's office on October 29, 1907, the copy of the answer which he then saw was the same as that on file. In order, then, to take advantage of those defects in the verification of the pleadings, it was necessary for the attorney to return that answer with due diligence and the Supreme Court of the state of New York has determined that due diligence in such a case requires a return within 24 hours. Sweeney v. O'Dwyer, 45 Misc. Rep. 43, 90 N. Y. Supp. 806; Paddock v. Palmer, 32 Misc. Rep. 426, 66 N. Y. Supp. 743. No one contends that the plaintiff's attorney did return the first answer in season, if he ever received it, as the plaintiff himself asserts. Hence there was no excuse for disregarding the answer.

[4, 5] If, on the other hand, the answer was first served in November, and if at that time the original answer had been changed upon the files of the clerk, as might be done by amendment, the second answer was still not a nullity, and the case was at issue. It is true that if an admission in the answer had been changed, as the plaintiff claims, the earlier form of the admission might have been restored on application by the plaintiff himself; but that question would be relevant only in a trial upon the merits, and did not affect the fact that the case was at issue under the answer, and therefore subject to dismissal for lack of prosecution. The error of fact, and it was really not such at all, therefore, would not have been one "material to the validity and regularity of the legal proceeding itself," and would not have been searched by a writ of error coram nobis.

[6] The defendant is not shown to have been privy to the disloyalty of the plaintiff's attorney, if such disloyalty existed, for the District Court has not found that it committed any fraud in procuring the judgment of dismissal or in changing the answer. Even assuming that the answer had been changed by procurement of the defendant, the change did not prevent the cause from being at issue, or contribute to the dismissal of the complaint, and it would be irrelevant for the purposes of this review.

The order vacating the judgment was therefore without the jurisdiction of the District Court, and it must therefore be reversed, with costs, leaving the judgment of dismissal to stand.

In re EQUITABLE TRUST CO. OF NEW YORK.

(Circuit Court of Appeals, Ninth Circuit. May 15, 1916.)

No. 2781.

JUDGES ⟸53—DISQUALIFICATION—RIGHT TO ASSERT.

Where, on the motion of petitioner, the District Judge was proceeding to decide the question whether, on foreclosure, an upset price, below which the property should not be sold, should be fixed, petitioner cannot have the judge removed by an affidavit charging bias and prejudice.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 232; Dec. Dig. ⟸53.]

Petition for Writ of Mandamus to the Judge of the District Court of the United States for the Second Division of the Northern District of California.

Petition by the Equitable Trust Company of New York, as trustee, for a writ of mandamus to be directed to William C. Van Fleet, Judge of the United States District Court. Writ denied.

See, also, 231 Fed. 571, — C. C. A. —.

Murray, Prentice & Howland, of New York City, and Jared How, of San Francisco, Cal., for petitioner.

Garret W. McEnerney and John S. Partridge, both of San Francisco, Cal., for respondents.

Byrne & Cutcheon, of New York City, and Charles S. Wheeler and John F. Bowie, both of San Francisco, Cal., amici curiæ.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. March 6, 1916, was the first day of the March term of the District Court for the Northern District of California, Second Division, over which Hon. William C. Van Fleet presides. Fifteen days before that, to wit, on the 21st of February, 1916, he had made an order directing that the Denver & Rio Grande Railroad Company and the Missouri Pacific Railroad Company be made parties defendant to and respectively interplead in a suit theretofore brought in said court by the Equitable Trust Company of New York, as trustee, against the Western Pacific Railway Company, to foreclose a first mortgage given by the latter company to the trust company to secure a bond issue of $50,000,000, and also enjoining the trust company from proceeding with a certain dependent suit it had theretofore brought in the state of New York in respect to some of the property covered by the mortgage.

Claiming that the order directing the making of the Denver & Rio Grande Company and Missouri Pacific Company parties to the suit and the injunctive order were beyond the power of the court to make, and were therefore void, the complainant in the suit, based upon a stipulation of all of the parties thereto purporting to authorize such course, moved the court on the 6th day of March, 1916, for the immediate entry of a decree in the cause in the terms of a form annexed to the stipulation, and, in the event of a denial of such immediate entry, that

the cause be set for hearing and for entry of the decree at such early day as the court should assign; Mr. How, the attorney for the complainant, saying, among other things:

"I move the court that this decree be entered forthwith, in the terms of the form attached to the stipulation; in the alternative, if that motion shall be denied, I move that the cause be set for hearing and for the entry of the decree at such early date as the court may assign. The affidavits which I produced before your honor are merely in support of our motion for a hearing at an early day and the entering of a decree at that time. If the court thinks it wants to consider the matter of an upset price, I should think, of course, it ought to be allowed that time, but I wanted to impress upon the court the urgency of the situation."

Four days thereafter, and while the motion was pending, to wit, March 10, 1916, the Equitable Trust Company appealed to this court from the injunctive part of the order of the District Court above referred to, and also applied to this court 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, and also for a writ of mandamus directing the District Court to grant the motion of the complainant made to that court for the entry of a decree in the foreclosure suit in accordance with the stipulation referred to.

The records show that during the proceedings had before the District Court Judge Van Fleet became apprised of the applications that had been made to this court, postponed from time to time action upon the pending motion before him for the entry of a decree, and awaited the action of this court upon the applications made to it, and in the course of the discussion of the application so made to him for the immediate entry of a decree said, among other things:

"Should the Circuit Court of Appeals, for instance, determine either that this court has no power to bring in the Denver, or that the presence of the Denver here is not essential, there will be no difficulty whatsoever. We can proceed and dispose of this matter in a very short time. * * * If the Court of Appeals shall determine that this court is wrong in its view that contract B must be interpreted here, and may be disposed of like any other piece of physical property that is pledged under a mortgage, there will be no difficulty at all in wiping the slate very clean in a very quick and expeditious way, thus disposing of all the difficulties."

During the pendency of the applications to this court, and during the pendency of the motion made by the Trust Company to Judge Van Fleet on the 6th of March, 1916, for the immediate entry of a decree, to wit, on the 13th day of March, 1916, the Savings Union Bank & Trust Company of San Francisco, as the owner of 125 of the first mortgage bonds of the Western Pacific road and as the representative of the holders of 575 additional of the first mortgage bonds, filed in the District Court a petition in intervention, praying, among other things, that before the sale of any of the properties of the Western Pacific Company be ordered evidence be taken with respect to the value of the properties of that company, and an upset price be fixed below which the commissioner making the sale be not permitted to receive a bid therefor, which upset price be high enough to properly protect the interest of the interveners and of first mortgage bondholders

not parties to the plan of reorganization set forth in the opinion of this court handed down at 2 p. m. of the 29th day of March, 1916, after full hearing and consideration of the applications made to it. In the course of that opinion we held:

"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."

And summarizing the principal points involved we held and decided that:

"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. 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; McCellan 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. 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."

It is manifest from that decision of this court that nothing remained for Judge Van Fleet to do but to fix the upset price (in the event he should find the case a proper one for such action) and to enter the decree agreed upon by all of the parties to the suit; this court denying the mandate asked for by the complainant to that end only because it felt assured that the judge of the District Court would promptly carry into execution the decision of this court, as, indeed, the records show he had declared his intention of doing, without being compelled to do so by writ of mandate. And that is exactly what he was proceeding to do, on the motion of the complainant itself, when interrupted by the filing of an affidavit of one of its chief officers, which the records show had been largely prepared during the time the complainant had been urging the District Court to enter a decree in its favor, and during the time it was seeking at the hands of this court a writ compelling him to do so. That affidavit, designed to disqualify Judge Van Fleet, was, according to the testimony of Mr. How, in preparation in San Francisco during the days of March 18, 19, and 20, 1916, during all of which time the complainant was maintaining before that judge a proceeding for the entry by him of a decree of foreclosure in the suit, and during which time it was maintaining in this court proceedings to compel him to do so. That affidavit, it appears from the records, was not completed until March 29, 1916, when it was executed in the city of

New York—the day that this court at 2 p. m. decided the applications above referred to that had been made to it. The affidavit appears to have been executed in duplicate, one copy of which was received here, according to the testimony of Mr. How, on Sunday, April 2, 1916, and the other in the first mail of Monday, April 3, 1916. On the last-named day it was filed in the District Court, and Judge Van Fleet was thereupon moved to proceed no further in the cause, and, instead, to certify the matter to the senior Circuit Judge of this circuit, to the end that he might designate another District Judge to take the place of Judge Van Fleet in the proceeding, by virtue of section 21 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1090 [Comp. St. 1913, § 988]), which reads as follows:

"Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section 23, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action."

Judge Van Fleet having ruled that the affidavit had not been filed in time, that no good cause had been shown for the failure to file the same ten days before the commencement of the term, and also that the affidavit did not otherwise conform to the requirement of the statute, refused to make the order requested by the petitioner, which order, omitting the title of the court and cause, is in these words:

"An affidavit of personal bias and prejudice and application that another judge shall be designated for further proceedings in this action, accompanied by a certificate of counsel of record for plaintiff herein that such affidavit and application are made in good faith, having been filed by said plaintiff in this action, it is hereby ordered that the fact of the filing of such affidavit and application be entered on the records of the court and that an authenticated copy thereof shall be forthwith certified to the senior Circuit Judge for this circuit now present in the circuit, to the end that such proceedings may be had thereon as are provided by law."

Thereupon the present application was made to this court for a writ of mandate compelling Judge Van Fleet to proceed no further in the cause and to certify the matter to the senior Circuit Judge for his action. Like the Supreme Court in the case of Ex parte American Steel Barrel Company, 230 U. S. 35, 33 Sup. Ct. 1007, 57 L. Ed. 1379, we shall not pass upon the timeliness of the affidavit, nor upon the legal sufficiency of the facts and reasons therein stated as affording ground for the averment that "personal bias or prejudice" existed on the part of Judge Van Fleet, who decided against the petitioner on both of those propositions. Whether or not it was within his province to do so it is not necessary for us to decide, in the view we take

of the case, and therefore we pass that question also, and base our ruling denying the writ prayed for upon the ground that, when the charge of "personal bias or prejudice" on the part of the judge was first made by the petitioner, its motion that Judge Van Fleet proceed with the entry of a decree in accordance with the stipulation of the parties was still pending before him, which motion he was actually proceeding to execute in pursuance of the decision of this court made upon proceedings here taken by the petitioner to compel him to do so. The action of the trial judge thus set in motion and continuously prosecuted before him by the petitioner itself cannot, we think, be thus paralyzed. The basis of the disqualification prescribed by the statute upon which the petitioner relies is as stated by the Supreme Court in Ex parte American Steel Barrel Company, supra:

"That 'personal bias or prejudice' exists, by reason of which the judge is unable to impartially exercise his functions in the particular case. It is a provision obviously not applicable save in those rare instances in which the affiant is able to state facts which tend to show not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice. It was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise, but to prevent his future action in the pending cause. Neither was it intended to paralyze the action of a judge who has heard the case, or a question in it, by the interposition of a motion to disqualify him between a hearing and a determination of the matter heard. This is the plain meaning of the requirement that the affidavit shall be filed not less than ten days before the beginning of the term."

In that case the District Judge ruled that the affidavit presented to him was sufficient in law to make it his duty to proceed no further, and, acting upon that determination, certified his withdrawal and the affidavit to the senior Circuit Judge, that he might in the exercise of his jurisdiction under section 14 of the Judicial Code (Comp. St. 1913, § 981) designate another judge to proceed with the hearing of the case. In that connection the Supreme Court said:

"If Judge Chatfield had ruled that the affidavit had not been filed in time, or that it did not otherwise conform to the requirement of the statute, and had proceeded with the case, his action might have been excepted to and assigned as error when the case finally came under the reviewing power of an appellate tribunal. Henry v. Speer, 201 Fed. 869 [120 C. C. A. 207]; Ex parte Fairbank Co. (D. C.) 194 Fed. 978; Ex parte Glasgow, 195 Fed. 780, affirmed by this court in Glasgow v. Moyer, 225 U. S. 420 [32 Sup. Ct. 753, 56 L. Ed. 1147]."

And that:

"If the designation of Judge Mayer under these conditions was wholly beyond the judicial power of the senior Circuit Judge, his authority to make any order or decree acting thereunder might have been excepted to and thus made the subject of review in due course of law."

And, holding that the writ of mandamus would be granted by that court only when it is clear and indisputable that there is no other legal remedy, it discharged the rule.

The construction thus put by the Supreme Court upon the statute in question, applied to the facts above detailed, requires, in our opinion, a denial of the writ prayed for here.

Writ denied.

AMERICAN SURETY CO. OF NEW YORK v. MILLS et al.

(Circuit Court of Appeals, Ninth Circuit. May 1, 1916.)

No. 2699.

1. PRINCIPAL AND SURETY ⟸172—LIABILITY OF SURETY—MARSHALING CLAIMS—EQUITABLE JURISDICTION.

Where claims against a surety exceed the amount of the penalty of the bond, the surety may sue in equity to obtain protection and relief by securing a pro rata distribution of the amount of the penalty between the several claimants; legal remedies affording no adequate relief.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 495, 496; Dec. Dig. ⟸172.]

2. COURTS ⟸493(1)—PRIORITY OF JURISDICTION.

Where, from a judgment rendered against it by state court, complainant appealed to the state Supreme Court, and on affirmance took a writ of error to the United States Supreme Court, complainant could not secure relief against the judgment by an independent suit in the federal District Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1346, 1348; Dec. Dig. ⟸493(1).]

3. EXECUTION ⟸171(1)—INJUNCTION—GROUNDS—RELIEF.

Where a creditor obtained a judgment against a surety, and the amount of the claims against the surety exceeded the penal sum of the bond, the creditor will be enjoined from enforcing his judgment, it appearing that the judgment might be reversed on decision of a pending writ of error to the United States Supreme Court, and it not being shown what percentage of the judgment the creditor was entitled to recover, for a payment to such creditor of a greater percentage than he was entitled to would be no protection to the surety against other claimants.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 497, 503, 517, 518; Dec. Dig. ⟸171(1); Judgment, Cent. Dig. §§ 794, 795, 813, 825.]

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

Bill by the American Surety Company of New York, a corporation, against Clara Mills and George F. Steele, Insurance Commissioner of the State of Idaho and others. From interlocutory orders giving only partial relief by injunction, complainant appeals. Modified, and cause remanded.

The appellant brought a suit, one purpose of which was to enjoin certain of the appellees, represented by Clara Mills, from collecting under a judgment obtained against the appellant in the state court of Idaho more than the pro rata part of said appellees of the penalty of a fidelity bond executed by the appellant, under which a large number of claimants were asserting claims against the appellant. The total of all of the claims was alleged to be about $90,000, whereas the penalty of the bond was but $50,000. The appellant also sought in the same suit to enjoin the insurance commissioner of Idaho from taking action to annul the appellant's license to do business in that state on account of its refusal to pay Mills and her associates the full amount of their claims, for which they had obtained their judgment in the sum of $22,624.33. The appellant sought also to determine the amounts due the respective claimants and the pro rata part of the penalty of the bond which each was entitled to receive, and sought to compel the appellees, represented by Mills, to account for certain dividends which they had received, and which it was alleged had not been credited upon their claim and

judgment. The court below granted the temporary injunction against the insurance commissioner, but refused to enjoin Mills and her associates from collecting the pro rata part of their judgment, and directed that the appellant pay on said judgment forthwith $13,614, in default of which its securities deposited with the state of Idaho would be sold to satisfy the same. The court made no determination of the amount due the other claimants, or the aggregate sum of valid claims, and made no order requiring the appellees to account for dividends received, or determining the just proportion of the penalty of the bond to which other claimants would be entitled. The appeal is taken from two interlocutory orders whereby the court, while enjoining the Mills group of claimants from taking any action to collect more of the penalty of the bond than their proportionate share, fixed at $13,614, or enforcing the collection of the full amount of the judgment which they had recovered, refused to enjoin or restrain them from collecting the said sum of $13,614, and enforcing said judgment for that amount.

Richards & Haga and McKeen F. Morrow, all of Boise, Idaho, for appellant.

W. E. Sullivan and L. L. Sullivan, both of Boise, Idaho, for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The appellees moved to dismiss the suit in the court below for want of jurisdiction in equity, and although they have taken no appeal from the adverse ruling of the court upon the motion, it is proper for this court to consider first the question of the jurisdiction so suggested. We think equity had cognizance of the cause of suit, for the reason that the very nature of the suit itself demands relief which equity alone can afford, and there is no adequate remedy at law. The appellant, a surety on a bond in the penal sum of $50,000, could lawfully be required to pay no more than the penal sum so named. It was confronted with claims largely in excess of that amount, and it could obtain relief only by a decree for a pro rata distribution of the fund for which it was liable, and this could only be done in a single suit in equity, to which all claimants might be made parties. In American Surety Co. v. Lawrenceville Cement Co. (C. C.) 96 Fed. 25, there was a large number of actions at law on a contractor's bond, and the aggregate amount of the claims exceeded the penalty of the bond. It was held that those facts entitled the surety to maintain a suit in equity, through which the fund in its hands might be equitably distributed. Cases illustrative of that rule are Thomas Laughlin Co. v. American Surety Co., 114 Fed. 627, 51 C. C. A. 247; United States v. Wells (D. C.) 203 Fed. 146; Illinois Surety Co. v. United States, 212 Fed. 136, 129 C. C. A. 584; Illinois Surety Co. v. United States, 226 Fed. 665, 141 C. C. A. 421. In Illinois Surety Co. v. Mattone, 138 App. Div. 175, 122 N. Y. Supp. 929, the court said:

"The plaintiff, however, is liable in the aggregate only to the amount of its undertaking, and that amount constituted a fund for the payment of the creditors pro rata, and is to be distributed among them equitably according to their respective claims. Mere diligence in prosecuting a claim against such a fund will not entitle the prosecuting [procuring] claimant to a priority of payment. The fund can therefore be reached only by an action in equity, prosecuted in a court possessing equitable jurisdiction."

[2] The appellant presents two grounds for reversing the decree. One is that the judgment upon which payment was ordered to be made is void, for the reason that it was taken by default in the state court, after proceedings had been begun to remove the case to the federal court, and before the cause was remanded to the state court. The question of the validity of the judgment on that ground was presented by the appellant to the state court, and its adverse decision was affirmed on appeal to the Supreme Court of the state of Idaho, and it is now stated that the question has been taken by writ of error to the Supreme Court of the United States. The appellant by those proceedings pursued its proper remedy, and the question is not open to review on the appeal in the present case.

[3] The other ground is that the court below could not require the appellant to pay the sum so ordered to be paid on account of the Mills judgment without prejudicing the appellant's substantial rights in the suit. This ground we think is well taken. Assuming that the judgment obtained by Mills is valid, the court below could order paid thereon no more than a just percentage of the sum that shall finally be adjudged payable on each claim within the penalty of the bond. In determining that amount, the court will be required to take into consideration all the claims and all dividends paid or to be paid out of the assets of the company upon the claims. While the dividends paid and to be paid will not, of course, reduce the appellant's liability on the bond, unless they amount to a sum sufficient to reduce the total net loss of the claimants to less than $50,000, they are proper to be taken into consideration as affecting the question whether the appellant could safely pay on the Mills judgment so large a sum as $13,614 before the final decision of the suit. We think that to order the payment of $13,614 upon the Mills judgment at the present time is premature, for the reason that it does not appear with certainty that such payment will not result in overpayment on the Mills judgment and consequent loss to the appellant. In Commonwealth v. City Tr., S. Dep. & Sur. Co., 224 Pa. 223, 73 Atl. 425, the court held that where a surety on a contractor's bond pays a judgment obtained against it by a materialman, and subsequently other claims are established which, together with the amounts paid, exceed the penal sum of the bond, the surety is not liable to the other claimants merely for the difference between the amount previously paid and the penal sum, but its liability is determined by ascertaining the per centum which the creditors would be entitled to in equal distribution among all, even if the result is a payment by the surety of an aggregate in excess of the penal sum of the bond. The court said:

"The surety company is without the slightest equity. It paid the judgments obtained against it with the full knowledge of the fact that there was then an outstanding and unsatisfied claim * * * then in suit, for an amount which, together with the claims already liquidated, much exceeded the limit of its own liability. Yet, with knowledge of this fact, it proceeded to pay some of the creditors in full. It is no excuse to say that these payments were made to avoid execution. Threatened execution could and should have been met by appeal to the court to put its restraining hand upon the creditor who would attempt to use its process, not for the collection of his own debt solely, but

in part to defeat some one else in equal right with himself in the fund to be subjected, and that, too, at the cost of the surety."

The orders appealed from are so modified as to withdraw the authority to enforce the payment on the Mills judgment, and the cause is remanded for further proceedings and final decree, with costs in favor of the appellant and against the appellees.

CUMMINS v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. May 16, 1916.)

No. 4530.

1. BANKS AND BANKING ⟸256(3)—OFFENSES—INTENT.
Under Rev. St. § 5209 (Comp. St. 1913, § 9772), declaring that every clerk of any national banking association who abstracts any of the credits of the association with intent to injure or defraud, and every person who with like intent aids or abets any clerk, shall be guilty of a misdemeanor, the intent of accused to injure, defraud, or deceive by the abstraction of credits is an essential element of the offense.
[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 964; Dec. Dig. ⟸256(3).]

2. CRIMINAL LAW ⟸390—EVIDENCE—INTENT.
Where the intent with which accused aided a clerk of a national bank to abstract credits was material, in a prosecution therefor, accused may testify as to his intent.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 858; Dec. Dig. ⟸390.]

3. BANKS AND BANKING ⟸257(4)—JURY QUESTION—INTENT.
While the law presumes that every person intends the natural consequence of his acts knowingly committed, the question whether accused, who participated in a clerk's abstraction of credits from a national banking association, intended to injure or defraud the association, and so was guilty of aiding and abetting, under Rev. St. § 5209 (Comp. St. 1913, § 9772), is a question for the jury in connection with other evidence, and cannot be decided by the court as a matter of law, and therefore an instruction that accused is conclusively presumed to have intended to injure the association by reason of the abstraction is erroneous.
[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 965; Dec. Dig. ⟸257(4).]

4. CRIMINAL LAW ⟸753(3)—TRIAL—INSTRUCTIONS.
In a criminal prosecution, the court cannot peremptorily instruct the jury to find accused guilty, and an instruction which in effect requires a conviction is improper.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1728, 1729; Dec. Dig. ⟸753(3).]

5. CRIMINAL LAW ⟸907—TRIAL—ACQUITTAL.
An acquittal cannot be set aside by the court.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2130; Dec. Dig. ⟸907.]

In Error to the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

William H. Cummins was convicted of crime, and he brings error. Reversed and remanded.

George W. Murphy, E. L. McHaney, and Wallace Townsend, all of Little Rock, Ark., for plaintiff in error.

W. H. Martin, U. S. Atty., of Hot Springs, Ark., and W. H. Rector, Asst. U. S. Atty., of Little Rock, Ark.

Before HOOK and SMITH, Circuit Judges, and REED, District Judge.

HOOK, Circuit Judge. [1] Cummins was convicted of aiding and abetting a clerk of a national bank to violate section 5209, Rev. Stat. (Comp. St. 1913, § 9772), by abstracting therefrom without payment certain drafts and attached bills of lading with intent to injure and defraud the bank and to deceive its officers and any agent appointed to examine its affairs. The section so far as applicable is as follows:

"Every * * * clerk * * * of any (national banking) association who * * * abstracts * * * any of the * * * credits of the association * * * with intent * * * to injure or defraud the association * * * or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any * * * clerk * * * in any violation of this section, shall be deemed guilty of a misdemeanor. * * *"

[2] This statute expressly makes the intent of the bank clerk to injure or defraud or deceive and the like intent of the person aiding or abetting him an essential element of the offense. Agnew v. United States, 165 U. S. 36, 17 Sup. Ct. 235, 41 L. Ed. 624; McKnight v. United States, 49 C. C. A. 594, 111 Fed. 735; Id., 54 C. C. A. 358, 115 Fed. 972. The accused was the cashier and bookkeeper of a commission company which had dealings with the bank. His defense, on which evidence was offered and received, was that he was following in good faith the instructions of his superiors in the commission company in a course of business conduct that previously existed and of which he believed the bank was cognizant; also that he had no intent to injure or defraud the bank or to deceive any one in the examination of its affairs. When the accused was testifying in his own behalf his counsel asked him:

"What intent, if any, had you to injure or defraud the bank or to deceive its officers or any one examining into its affairs?"

The question was excluded upon objection by counsel for the government. The rule long settled in this country, almost without exception, is that, whenever the motive or intent of an act or the conduct of a person is material he may testify directly what it was. He may be asked whether he had the motive or intent in question. It is contended that another question of substantially the same character was allowed and answered, but it is doubtful that it was of the same full import.

[3] By several requests variously phrased the accused sought instructions setting forth his defense as above noted and that if the jury believed it they should find him not guilty; also that in order to convict him it was necessary that the evidence show that the acts of the bank

clerk were with the intent charged and that the aiding and abetting therein by the accused were with like intent. The trial court refused the requests, and instead charged the jury as follows:

"In determining the intention of the defendant so far as the bank is concerned, it is not necessary that the government should show that he expected to be benefited by it, or that he had any intention of his own to defraud the bank. The law presumes that every person intends to do that which is the natural result of his actions. If a man obtains property or securities from any person by means of a worthless check, he knowing that the check was worthless, because he had no money in the bank on which it was drawn, the fact that he intends to make it good at a future day and put the money in there to meet it or take it up, would not relieve him of responsibility for having passed that worthless check. That is no excuse. Every person, under the law, is held responsible for what, as a reasonable man, he must have known would be the result of his act; that is, if a check is drawn on a bank with no money to his credit, and the bank clerk to whom it is given is told not to present it, because 'I have no money in there, but I will put in the money,' and by reason thereof he obtains unlawfully possession of property of value, which otherwise he could not obtain, in this instance, the bills of lading, the law will not accept his excuse for the offense that he did not intend to wrong or defraud any one."

The law presumes that every person intends the natural consequences of his act knowingly committed, but in a case like this, in which a specific intent accompanying the act is a necessary element of the offense charged, the presumption is not conclusive, but is probatory in character. It is for the consideration of the jury in connection with the other evidence upon the subject. This question was fully considered by Mr. Justice Day, when Circuit Judge, in the McKnight Case, above cited, which, like the case at bar, arose under section 5209, Rev. Stat. (Comp. St. 1913, § 9772). See particularly the discussion in 115 Fed. 972, 54 C. C. A. 358, 360. Of course a jury, in the absence of other evidence, would be authorized to infer the intent from the character and natural consequence of the act; but even then the ultimate finding is for the jury, not the court. We do not think the prejudice caused by the refusal of the definite requests and by the giving of the instruction above quoted was cured by other parts of the general charge. The dominant note of the general charge appears in the quotation.

[4, 5] Counsel for the government argue that the evidence of the intent was conclusive, and that therefore the court could properly tell the jury as matter of law that the intent had been proved. What has been said shows the premise of fact to be unwarranted. Practically the whole controversy at the trial was over the intent of the accused, and if the court might properly have instructed the jury that the evidence was legally conclusive against him, it could as well have directed a verdict of guilty in so many words. In Sparf and Hansen v. United States, 156 U. S. 51, 105, 15 Sup. Ct. 273, 294, 39 L. Ed. 343, it was said:

"We have said that, with few exceptions, the rules which obtain in civil cases in relation to the authority of the court to instruct the jury upon all matters of law arising upon the issues to be tried, are applicable in the trial of criminal cases. The most important of those exceptions is that it is not competent for the court, in a criminal case, to instruct the jury peremptorily to find the accused guilty of the offense charged or of any criminal offense less than that charged."

In United States v. Taylor (C. C.) 11 Fed. 470, 3 McCrary, 500, the court said:

"It would be a useless form for a court to submit a civil case involving only questions of law to the consideration of a jury, where the verdict, when found, if not in accordance with the court's view of the law, would be set aside. The same result is accomplished by an instruction given in advance to find a verdict in accordance with the court's opinion of the law. But not so in criminal cases. A verdict of acquittal cannot be set aside; and therefore, if the court can direct a verdict of guilty, it can do indirectly that which it has no power to do directly."

Upon the question of the intent required under section 5209, Rev. Stat. (Comp. St. 1913, § 9772), the inferences to be drawn from the evidence are "peculiarly within the province of the jury." Coffin v. United States, 162 U. S. 664, 674, 16 Sup. Ct. 943, 40 L. Ed. 1109. Other matters complained of may not arise again, and therefore have not been considered.

The sentence is reversed, and the cause is remanded for a new trial.

STATE BANK OF WINFIELD v. ALVA SECURITY BANK et al.

SECOND NAT. BANK v. SAME.

(Circuit Court of Appeals, Eighth Circuit. April 17, 1916.)

Nos. 4446, 4447.

1. TRUSTS ⟸372(3)—TRUST FUNDS—PURSUIT OF—EVIDENCE.
Where plaintiffs sought to hold defendant banks for funds, resulting from the sale by the cashier of one of the banks of forged notes to plaintiffs, evidence *held* insufficient to trace the funds and establish a trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 602, 603; Dec. Dig. ⟸372(3).]

2. TRUSTS ⟸358—CONSTRUCTIVE TRUST—TRUST FUNDS.
Defendant cashier sold forged notes to plaintiffs, and then drew sight drafts for the proceeds. These drafts were in the main used to transfer funds to reserve agents, but there was no showing as to the state of defendant's accounts with such reserve agents, or that in all cases the accounts were maintained. *Held* that, it appearing that the cashier juggled the accounts and used the proceeds of forged paper to take up prior forged paper, no trust fund can be established in the accounts with reserve agents, which were grouped under the title "Cash and Sight Exchange"; there being no showing that plaintiffs' moneys were applied to any specific account, which is an essential to maintenance of such claim.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 523, 553; Dec. Dig. ⟸358.]

Appeal from the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Suits by the State Bank of Winfield, a banking corporation of the state of Kansas, and by the Second National Bank, a banking corporation of New Hampton, in the state of Iowa, against the Alva Se-

curity Bank, a banking corporation of the state of Oklahoma, and another. From decrees for defendants, plaintiffs appeal. Affirmed.

Sam K. Sullivan, of Newkirk, Okl., and S. C. Bloss, of Winfield, Kan. (G. H. Buckman, of Winfield, Kan., on the brief), for appellants.

H. G. McKeever, of Enid, Okl. (W. H. Hills and Guy S. Manatt, both of Enid, Okl., and Theodore Church, of Los Angeles, Cal., on the brief), for appellee Central State Bank.

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

AMIDON, District Judge. M. M. Fulkerson was for several years the cashier and active manager of the Alva Security Bank of Alva, Okl. On the 9th of August, 1913, the bank was found to be hopelessly insolvent and was taken charge of by the state bank commissioner. That was Saturday. By the following Monday morning the defendant, the Central Bank, had been organized. It was composed largely of the stockholders and officers of the Alva Security Bank. The bank commissioner turned over to this new bank substantially all the assets of the old, upon its agreement to pay depositors of the Security Bank in full.

These suits are brought to recover alleged trust funds. They arise out of similar facts, and were tried together. Their basis may be briefly stated as follows: April 16, 1912, Fulkerson, as cashier, sold to the plaintiff, the State Bank of Winfield, what purported to be the note of J. E. Patterson, payable to the Security Bank for $5,000, indorsed "Payment guaranteed, G. A. Harbaugh." Both these signatures were forgeries. The $5,000 was placed to the credit of the Security Bank on plaintiff's books and drawn out from time to time by means of sight drafts. The note was renewed twice on similarly forged instruments. The other plaintiff, the Second National Bank of New Hampton, purchased two forged notes, one for $4,000 on March 23, 1912, and the other for $4,000 on December 16, 1912. The proceeds of the notes were credited to the Alva Bank in its account with the plaintiff and drawn out by drafts. Both plaintiffs now seek to follow the funds thus obtained as a "trust fund" into the hands of the defendant Central Bank, and recover the same in full. They each had on hand a small balance in favor of the Alva Bank at the time of its failure. This the trial court held they were entitled to retain, but dismissed the bill on the merits as to the remainder of their funds upon the ground that plaintiffs had failed to trace the same into the hands of the new bank. Plaintiffs appeal from that part of the decree.

[1] The trial court was right. The plaintiffs wholly failed to trace their funds after they passed from their hands. Their only attempt to do so consisted of unconvincing evidence combined with an erroneous legal theory. Fulkerson testified that drafts such as were drawn against plaintiffs were "generally made to transfer funds to reserve agents." That was the only evidence on the subject. The drafts themselves were not produced, nor was any attempt made to identify the

account in which they were deposited, or to show the state of that account between the time of the deposit and the date of the bank's failure. It is plain that this evidence falls short of the clear proof which the law requires. First, it fails to show that the fund was not dissipated. Fulkerson's statement that such drafts were generally used to transfer funds to reserve agents is insufficient. He was a discredited witness. He was engaged in many hazardous enterprises in which the funds of his bank were squandered. His evidence fails to show that plaintiff's funds were not used in that way. The drafts could have been easily traced and their actual use shown. Second, if the drafts were in fact deposited with reserve banks, the amount so deposited in specific banks should have been shown and then the state of that bank's account should have been followed down to the failure of the Alva Bank. Upon such a showing a trust might have been impressed upon the smallest balance remaining in the account at any time during the period.

[2] The capital defect, however, of plaintiffs' theory is their treatment of the grand division of the bank's assets in its reports known as "Cash and Sight Exchange" as a "fund" within the law relating to the following of trust funds. To adopt that theory is to re-establish under a mere bookkeeping disguise the exploded notion that a trust fund may be recovered if it can be traced into the general assets of an insolvent estate. The courts have shown a tendency to restrict the "trust fund" doctrine. Empire State Surety Co. v. Carroll County, 194 Fed. 593, 114 C. C. A. 435; Board of Commissioners v. Strawn, 157 Fed. 49, 84 C. C. A. 553, 15 L. R. A. (N. S.) 1100; In re Brown, 193 Fed. 24; Commercial National Bank v. Armstrong (C. C.) 39 Fed. 684. The rule is accurately stated and numerous authorities cited by this court in the first case referred to, as follows:

"It is indispensable to the maintenance by a cestui que trust of a claim to preferential payment by a receiver out of the proceeds of the estate of an insolvent that clear proof be made that the trust property or its proceeds went into a *specific fund* or into a *specific identified piece of property* which came to the hands of the receiver."

If a trust fund can be traced into a single account, like cash, or a credit at a single bank, then the trust may be impressed upon the smallest balance that remains in the fund between the time of the deposit and the date when a return of the trust fund is demanded. But the rule does not admit the grouping of numerous accounts together as a single fund. Brennan v. Tillinghast, 201 Fed. 609, 120 C. C. A. 37. The term "Sight Exchange" in the estate of the Alva Bank covered its credits with all its numerous correspondents. The subject was not fully developed in the evidence, but there is sufficient to justify the inference that Fulkerson was engaged in selling forged paper to different banks to meet the same kind of instruments which had been previously sold. His correspondents were constantly changing. Some accounts even of reserve agents were entirely closed, and accounts of others were reduced to the vanishing point. Plaintiffs showed that between the time of the purchase of their notes and the bank's failure there was always in "Cash and Sight Exchange" two or three times the amount which was obtained from them on the forged paper. It

is manifest, however, that no presumption can be entertained from this fact that plaintiff's funds survived the shifting devices of this desperate man. Those funds may have gone into an account which was wholly wiped out. Again, all the accounts with his numerous correspondent banks were as distinct as separate promissory notes. Suppose Fulkerson had testified that sight drafts were usually invested in promissory notes, would a court of equity then treat the entire bills receivable of his bank as a trust fund? Certainly not. The rule requires that the fund be traced to a specific note or notes. Burnham v. Barth, 89 Wis. 362, 62 N. W. 96; Empire Surety Co. v. Carroll County, 194 Fed. 593, 604, 114 C. C. A. 435. For the same reason the numerous credits embraced under the general heading "Sight Exchange" cannot be treated as a single fund.

The decrees of the trial court are affirmed.

ONG SEEN v. BURNETT, Immigration Inspector.

(Circuit Court of Appeals, Ninth Circuit. May 8, 1916.)

No. 2714.

1. ALIENS ⟸32(8)—CHINESE PERSONS—MERCHANTS.

The mere fact that a Chinese personally admitted into the country and domiciled as a merchant thereafter becomes a laborer does not justify his deportation; but a showing that a Chinese person, almost immediately upon his arrival, engaged in the occupation of a peddler, instead of a merchant, warrants a finding that he was admitted as a merchant on fraudulent representations, it appearing that he never engaged in business as a merchant.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 84; Dec. Dig. ⟸32(8).]

2. HABEAS CORPUS ⟸30(1)—PROCEEDINGS—VALIDITY OF WARRANT.

Under Rev. St. § 761 (Comp. St. 1913, § 1289), declaring that in habeas corpus the judge shall dispose of the party as law and justice require, a Chinese person, seeking discharge on habeas corpus from arrest by immigration officials, who sought his deportation, is not entitled to discharge because the warrant merely alleged he was unlawfully in the United States in violation of the Chinese Exclusion Laws and subject to deportation, where the Chinese person made no objection to the indefiniteness of the warrant and was advised of the charge against him.

[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 Arizona; Wm. H. Sawtelle, Judge.

Application by Ong Seen, alias Ong Chung Lung, for writ of habeas corpus against Alfred E. Burnett, Inspector in Charge of United States Immigration Service at Tucson, Ariz. From a judgment denying the writ, applicant appeals. Affirmed.

The appellant, a native of China, had been ordered deported, and a warrant of deportation had been issued, when he sued out a writ of habeas corpus in the court below, and on the hearing he was ordered remanded to the custody of the inspector in charge at Tucson, Ariz. In his return to the writ, the inspector annexed a full transcript of the proceedings on which the

appellant was ordered deported. The facts are in substance the following: The appellant arrived at San Francisco from China on April 8, 1906, and he was permitted to land upon the strength of a certificate which had been issued to him under Act May 6, 1882, c. 126, § 6, 22 Stat. 60, as amended by Act July 5, 1884, c. 220, 23 Stat. 116 (Comp. St. 1913, § 4293), in which it was represented that he was a merchant and that he had $2,000 (gold) interest in the firm of Hop Yick Loong in China, and on the representations contained in a letter from the American Consul General at Canton to the Commissioner of Immigration at San Francisco, stating that the appellant's certificate had been viséed, that the appellant would take with him $1,000 in gold and would have about $3,000 sent him later by draft, and that his father was known to have $70,000, while the appellant himself was worth $50,000 (Mexican), and it was stated that the appellant was going to set up a wholesale sundry goods shop in San Francisco. From the time of his arrival until January 23, 1912, the appellant resided in San Francisco and Oakland, and during the first four years of that time he was occupied as a peddler of herbs from house to house. In July, 1908, he invested $500 in a drug store in San Francisco, but did not become an active member of that firm until November 1, 1910. He still retains his interest in the firm, but has never received any dividends. On January 23, 1912, after securing a pre-investigation of his status as a lawfully domiciled Chinese merchant, the appellant departed for China. He returned to San Francisco a year later, and was admitted by the Commissioner of Immigration, who issued to him a certificate of identity. Thereupon he returned to his old occupation of peddling herbs. In February, 1914, he went to Phœnix, Ariz., and remained there a few days, and then went to Mesa, Ariz., making the Arizona Restaurant his headquarters. He testified that he came to Arizona looking for a location for business. He admitted that he had no money, and that no one owed him money, but he said that if he found a suitable location he could borrow money and start a store. In March, 1914, he was seen working in a restaurant at Mesa, where it appeared that he worked as an employé for a period of three or four weeks. In April of that year he was arrested, and upon the hearing was ordered to be deported.

Struckmeyer & Jenckes, of Phœnix, Ariz., and John L. McNab, of San Francisco, Cal., for appellant.

Thomas A. Flynn, U. S. Atty., of Phœnix, Ariz., and Samuel L. Pattee, Asst. U. S. Atty., of Tucson, Ariz., for appellee.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The appellant contends that he was not allowed a fair hearing in the proceedings for deportation. We find nothing in the record to sustain the contention. Throughout the hearing and at every session the appellant was represented by his own counsel, and every opportunity was afforded him to produce evidence.

[1] The appellant relies principally on the contention that there is no evidence in the case to overcome the presumption that, having been admitted to the United States as a merchant, he had the right to be and remain in the United States, and he argues that one who has lawfully entered the United States is not forbidden thereafter to change his occupation, and that he may do so without incurring the penalty of deportation. It may be conceded that the mere fact that an alien who has been domiciled as a merchant thereafter becomes a laborer does not in itself justify his deportation. But there is in this case more than the mere fact of a change of occupation. There is evidence which we think might justify the immigration officers in

believing, as no doubt they did believe, that the appellant never in fact belonged to the merchant class, and that he was admitted in the first instance upon fraudulent representations as to his status as a merchant, for it is shown that almost immediately upon his arrival he engaged in the occupation of a peddler, and that has been his occupation during nearly the whole period of his residence in the United States. In United States v. Yong Yew (D. C.) 83 Fed. 832, it was held that, if one who has been admitted on certificate as a merchant of China immediately upon his arrival proceeds to and continues in employment as a laborer, that fact has a strong retroactive bearing as evidence of the intent with which he came here. To the same effect are Chain Chio Fong v. United States, 133 Fed. 154, 66 C. C. A. 220; Cheung Him Nin v. U. S., 133 Fed. 391, 66 C. C. A. 453. It is argued that the appellant's course in becoming a peddler was the result of the great earthquake and fire at San Francisco, which occurred a few days after his arrival, but the argument is not convincing. He has suggested no reason why he might not have entered into business in some other city or town of California or elsewhere. He makes no showing that in fact he brought money with him when he first came from China, or that at any time he could have commanded money with which to enter into business during the first two years of his residence in the United States, and in fact he wholly fails to show any causal connection between the disaster of 1906 and his own failure to enter into business as a merchant.

[2] It is contended that the appellant should have been discharged for the reason that the warrant under which he was taken into custody was fatally defective, in that it did not advise him of the charge against him, and so was insufficient to confer jurisdiction upon the Secretary of Labor. The warrant alleged that the appellant was unlawfully within the United States and had been found therein in violation of the Chinese Exclusion Laws, and was therefore subject to deportation, under Act Feb. 20, 1907, c. 1134, § 21, 34 Stat. 905 (Comp. St. 1913, § 4270). The warrant may have been subject to a motion to vacate, or so indefinite that the appellant was entitled to demand a bill of particulars. But he made no objection to proceeding thereunder, and the record proves that he was fully advised of the ground on which his deportation was sought, and that he met the charge with such testimony as was available. It is well settled that a defect in the warrant is no ground for the discharge of the petitioner on a writ of habeas corpus. Nishimura Ekiu v. U. S., 142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146; Toy Tong v. United States, 146 Fed. 343, 76 C. C. A. 621; Ex parte Hamaguchi (C. C.) 161 Fed. 185; Siniscalchi v. Thomas, 195 Fed. 701, 115 C. C. A. 501; United States v. Uhl, 211 Fed. 628, 128 C. C. A. 560; United States v. Williams, 200 Fed. 538, 118 C. C. A. 632; Healy v. Backus, 221 Fed. 358, 137 C. C. A. 166. The rule in all such cases, made obligatory by section 761 of the Revised Statutes (Comp. St. 1913, § 1289), is that the judge granting the writ shall on the hearing "dispose of the party as law and justice require." This means not as law and justice required at the time of the arrest, but as law and justice require at the time of the hearing. Iasigi v. Van De Carr, 166 U. S. 391, 17 Sup. Ct. 595.

41 L. Ed. 1045; Motherwell v. United States, 107 Fed. 437, 455, 48 C. C. A. 97.

We find no ground for holding that the appellant did not have a fair hearing, and we are not convinced that there was no substantial evidence to overcome the presumption arising from his possession of a certificate, and to sustain the conclusion that when he first came to the United States he did not belong to the merchant class.

The order of the court below is affirmed.

ONG CHEW LUNG v. BURNETT, Immigration Inspector.

(Circuit Court of Appeals, Ninth Circuit. May 8, 1916.)

No. 2715.

1. ALIENS ⟸25—CHINESE PERSONS—"MERCHANTS."
A Chinese person, engaged solely in conducting a factory for the manufacture of materials furnished by others, is not a merchant; but if, in addition to the work, he buys and sells goods, he is a merchant.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 79–82; Dec. Dig. ⟸25.
For other definitions, see Words and Phrases, First and Second Series, Merchant.]

2. ALIENS ⟸28—CHINESE PERSONS—MERCHANT'S CERTIFICATE.
Where a Chinese person holds a merchant's certificate, such certificate is prima facie valid, and should not be set aside, unless there is some competent evidence to overcome it.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 88–90; Dec. Dig. ⟸28.]

3. ALIENS ⟸32(12)—CHINESE PERSONS—DEPORTATION.
While the courts will not review the evidence upon which immigration officials ordered the deportation of a Chinese person, an order of deportation of one prima facie entitled to remain, resting upon conjecture and without support of competent evidence, is arbitrary, and subject to review.
[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 District of Arizona; Wm. H. Sawtelle, Judge.

Application by Ong Chew Lung, also known as Ong Gin Lung, for a writ of habeas corpus against Alfred E. Burnett, Inspector in Charge of United States Immigration Service at Tucson, Ariz. From a judgment denying the writ, applicant appeals. Reversed and remanded, with directions to discharge applicant.

The appellant came to the United States from China in 1903, when he was less than 18 years of age, and he acquired a domicile here as the son of Ong Hung, a resident merchant of San Francisco. He attended school until October, 1907, when he became an active member of the mercantile firm of Kim Lun Chong in San Francisco. In January, 1910, having made application to the Immigration Department at San Francisco for a preinvestigation in order that he might return, he went to China on a visit. As a result of that investigation he was readmitted to the United States on July 27, 1911. He returned to the Kim Lun Chong store. In August, 1913, he acquired an in-

terest in a restaurant at Phœnix, Ariz. About that time he asked the local inspector at Tucson whether it would be permissible for him to work, to which he received an affirmative answer. On April 23, 1914, he was arrested, for deportation on the charge of being unlawfully in the United States. The sole ground on which the immigration officers held him for deportation was that his original entry in 1903 was fraudulent, for the reason that his father was not at that time in truth a merchant, but was a factory owner and a laborer, and therefore not entitled to have his minor child admitted. The evidence that the appellant's father was in 1903 not a merchant consists in a statement made by the appellant, through an interpreter, at a time shortly before he was arrested. He stated that at the time when he first came to this country his father was the sole owner of and was conducting a factory for making shirts and overalls, employing 20 or 30 men, and having contracts to make shirts for several firms, which business his father continued to operate until the San Francisco fire of 1906. On his examination in the deportation proceedings, the appellant testified that he wished to correct his statement, and to say that his father's business was a store, where "it has clothing and things like that for sale," and that his father sold goods and bought goods from the firms for which he was making shirts and overalls. From the order of the District Court, denying his petition for a writ of habeas corpus, and remanding him to custody, the appellant appeals.

Struckmeyer & Jenckes, of Phœnix, Ariz., and John L. McNab, of San Francisco, Cal., for appellant.

Thomas A. Flynn, U. S. Atty., of Phœnix, Ariz., and Samuel L. Pattee, Asst. U. S. Atty., of Tucson, Ariz., for appellee.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] With the exception of the time occupied in a visit to China, the appellant had been 11 years domiciled as a merchant and as the minor son of Ong Hung, a merchant, in the United States, when proceedings for his deportation were commenced. If Ong Hung in 1903 was engaged solely in conducting a factory for the manufacture of materials furnished by others, he was not a merchant; but if, in addition to the work of a factory, he bought and sold goods, he was a merchant. The statement made by the appellant that his father was engaged in conducting a factory for the manufacture of garments is not inconsistent with his testimony under oath that his father was also engaged in buying and selling garments. The status of Ong Hung seems to have been thoroughly investigated shortly prior to the time when the appellant first came to the United States, and Ong Hung's affidavit, together with that of three white persons, was taken to the effect that Ong Hung was a merchant doing business at 210 Jackson street, under the firm name of Wing & Co., and the inspector in charge certified that Ong Hung's mercantile status "has been established." Again, at the time when the appellant returned to China in 1910, the local inspector examined the store of Kim Lun Chong & Co., in which the appellant had an interest, and certified that the mercantile status of the appellant was established as required by the rules of the Department.

[2, 3] The appellant was admitted in the first instance as the minor son of a merchant, and upon the established status of his father, who was in possession of the certificate required by law. Before the ap-

pellant can be lawfully deported, it must be shown by competent evidence that he obtained admission by fraudulent representations. There is no evidence before the immigration officials, except the casual statement of the appellant above adverted to, which even tended to show that Ong Hung fraudulently acquired a status as a merchant in the United States. Ong Hung still remains in the United States under the protection of his merchant's certificate. In Liu Hop Fong v. United States, 209 U. S. 453, 28 Sup. Ct. 576, 52 L. Ed. 888, the Supreme Court said that the certificate "certainly ought to be entitled to some weight," and held that a Chinaman, having been duly admitted to residence thereunder, could not be deported "unless there is some competent evidence to overcome the legal effect of the certificate."

It is not our function to weigh the evidence in this class of cases; but we may consider the question of law whether there was evidence to sustain the conclusion that the appellant, when he first came, fraudulently entered the United States. We find that that conclusion rests upon conjecture and suspicion, and not upon evidence. In the absence of substantial evidence to sustain the same, the order of deportation is arbitrary and unfair, and subject to judicial review. Whitfield v. Hanges, 222 Fed. 745, 751, 138 C. C. A. 199; McDonald v. Siu Tak Sam, 225 Fed. 710, 140 C. C. A. 584; Ex parte Lam Pui (D. C.) 217 Fed. 456.

The judgment is reversed, and the cause is remanded, with instructions to discharge the appellant from custody.

CHAN KAM v. UNITED STATES.

Ex parte CHAN KAM.

(Circuit Court of Appeals, Ninth Circuit. May 15, 1916.)

No. 2482.

1. ALIENS ⟸32(8)—DEPORTATION—CHINESE PERSONS.
   Where it was sought to deport a Chinese woman on the ground that she was guilty of prostitution, evidence *held* insufficient to establish the charge.
   [Ed. Note.—For other cases, see Aliens, Cent. Dig. § 84; Dec. Dig. ⟸32(8).]

2. ALIENS ⟸32(12)—CHINESE PERSONS—DEPORTATION.
   While the courts will not review the evidence upon which immigration officials ordered the deportation of a Chinese person, an order of deportation of one prima facie entitled to remain, which is based upon conjecture and without support of competent evidence, is arbitrary, and subject to review.
   [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 First Division of the Northern District of California; Maurice T. Dooling, Judge.

Application of Chan Kam, alias Cham Kam, for a writ of habeas

corpus, against the immigration officers of the United States. From a judgment denying the writ, applicant appeals. On rehearing. Judgment reversed, and cause remanded, with directions to discharge applicant from custody.

See, also, 230 Fed. 990, — C. C. A. —.

Joseph P. Fallon, of San Francisco, Cal., for appellant.

John W. Preston, U. S. Atty., and Casper A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. In the petition for a rehearing in this case it is contended that unfairness was manifested by the immigration officers in securing a statement from Chan Kam while in jail, without the presence of counsel or of any of her friends, upon which statement the order of deportation was based. It appears that Chan Kam did not speak the English language and could not understand the questions propounded; that, notwithstanding this ignorance and disadvantage under which Chan Kam was laboring, there was imputed to her answers concerning the visit of one Jew Lin the inference that she had been having improper relations with him just prior to her arrest.

[1, 2] We think this objection to the proceedings is well taken. It appears from the examination to which reference is made that Chan Kam was married and was living with her husband. She was asked by the immigration officer:

"When you were arrested, at that time you were found in bed with a Chinaman who was not your husband?

"No; I was standing beside the bed, and the man was in the bed."

She was then told that the officers who arrested her said she was in bed with Jew Lin when she was arrested. She answered:

"That is not true. I was standing beside the bed."

She was asked:

"Had you been in bed with the man before the officers came into the room?"

She answered:

"No."

She was then asked:

"What were you doing in the room with the door closed at that time of the night [9 o'clock] and a strange man in your bed, with your husband absent?"

She answered:

"It was my room and bed, and Jew Lin was in bed, waiting for my husband."

It is contended by the government that this testimony is evidence of improper relations with the man with whom she was found and arrested, and proof that she was engaged in the practice of prostitution; but the testimony of the officers who made the arrest is not in the record, and we do not know from them what the situation of the parties

was at the time the arrest was made. In that aspect of the evidence there is, at most, only a suspicion, which is not sufficient. The testimony of Chan Kam is that she is married; that one Ho Bat is her husband; that she was not a prostitute, and had never practiced prostitution, and was not at the time of her arrest, or at any other time, an inmate of a house of prostitution. In this testimony she was corroborated by the testimony of Ho Bat, her husband. Jew Lin, whose visit was the cause of her arrest, testified he was not in Chan Kam's bed, but sat on the corner of her bed, because there was no chair in the room. He had been invited by Ho Bat to visit him, and had done so pursuant to his invitation, and had been in the room only about three minutes when the arrest was made. Two Chinese witnesses who occupied an adjoining room in the building testified that Chan Kam was not a prostitute, and had not practiced prostitution. This evidence is not contradicted by any direct testimony. The case therefore rests upon a supposed statement made by Chan Kam concerning Jew Lin, which appears to have been incorrect, probably because of an incorrect interpretation. The statement, whatever it was, appears to have been obtained by an unfair examination of Chan Kam by the officers.

We think the rule applicable in this case was stated by this court in Ong Chew Lung v. Alfred E. Burnett, 232 Fed. 853, — C. C. A. —, decided at the present term of court:

"It is not our function to weigh the evidence in this class of cases, but we may consider the question of law whether there was evidence to sustain the conclusion that the appellant, when he first came, fraudulently entered the United States. We find that that conclusion rests upon conjecture and suspicion, and not upon evidence. In the absence of substantial evidence to sustain the same, the order of deportation is arbitrary and unfair, and subject to judicial review. Whitfield v. Hanges, 222 Fed. 745, 751 [138 C. C. A. 199]; McDonald v. Siu Tak Sam, 225 Fed. 710 [140 C. C. A. 584]; Ex parte Lam Pui (D. C.) 217 Fed. 456."

Judgment reversed, and the cause remanded, with instructions to discharge the appellant from custody.

CROOKER et al. v. KNUDSEN.

(Circuit Court of Appeals, Ninth Circuit. May 1, 1916.)

No. 2704.

1. COURTS ⟸405(12)—CIRCUIT COURT OF APPEALS—REVIEW—DECISIONS REVIEWABLE.

The Circuit Court of Appeals can only review final judgments other than injunction orders.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1099, 1100; Dec. Dig. ⟸405(12).]

2. APPEAL AND ERROR ⟸78(1)—REVIEW—DECISIONS REVIEWABLE.

An order denying a motion to vacate an order of arrest is not a final judgment disposing of the case on the merits, and cannot be reviewed on writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 426, 470, 472; Dec. Dig. ⟸78(1).]

In Error to the District Court of the United States for the Southern Division of the Southern District of California; Benj. F. Bledsoe, Judge.

Action by Elizabeth Knudsen against Edwin R. Crooker and others, whose arrest was ordered. Defendants' motion to vacate the order of arrest was denied, and they bring error. Writ dismissed.

R. W. Kemp and Davis, Kemp & Post, all of Los Angeles, Cal., for plaintiffs in error.

Robert L. Hubbard, of Los Angeles, Cal., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The defendant in error brought an action against the plaintiffs in error to recover damages caused by the alleged fraudulent practices of the plaintiffs in error, and in her complaint she prayed that an order of arrest be issued against the plaintiffs in error, and each of them, under sections 479, 480, and 481 of the Code of Civil Procedure of the state of California. The court below signed an order for the arrest of the plaintiffs in error, and directed that they be held in custody and for bail in the sum of $10,000 each for Edwin R. Crooker and W. P. Ellis, and $5,000 each for Louise E. Crooker and F. W. Sterling. Thereafter the marshal took in custody the said plaintiffs in error, and they each gave bail as required by the order of arrest. Subsequently the plaintiffs in error moved that the order of arrest be vacated. The motion was overruled. Thereafter, and before a trial on the merits of the case, the plaintiffs in error sued out a writ of error from this court to review the judgment of the court below in denying the motion to set aside the order of arrest.

[1, 2] The defendant in error has moved to dismiss the writ of error on the ground that the order so sought to be reviewed is not a final judgment, and is not appealable. The motion must be sustained. The Circuit Courts of Appeals are given no right to review other than final judgments, except injunction orders, and no judgment is final which does not terminate the litigation between the parties on the merits of the case, or on some severable phase thereof, nor until it is entered in a court from which execution can issue. Green v. Van Buskirk, 3 Wall. 448, 18 L. Ed. 245; Bostwick v. Brinkerhoff, 106 U. S. 3, 1 Sup. Ct. 15, 27 L. Ed. 73; St. L., I. M. & S. R. Co. v. Southern Ex. Co., 108 U. S. 24, 2 Sup. Ct. 6, 27 L. Ed. 638; Southern Ry. Co. v. Postal Tel. Co., 179 U. S. 641, 21 Sup. Ct. 249, 45 L. Ed. 355; Heike v. United States, 217 U. S. 423, 30 Sup. Ct. 539, 54 L. Ed. 821. And it is well settled that decisions affecting provisional remedies only, such as orders sustaining or dissolving attachments, are not appealable unless made so by statute. Hamner v. Scott, 60 Fed. 343, 8 C. C. A. 655; Leitensdorfer v. Webb, 20 How. 176, 15 L. Ed. 891; Atlantic Lumber Co. v. Bucki & Son Lumber Co., 92 Fed. 864, 35 C. C. A. 59; Loeber v. Schroeder, 149 U. S. 580, 13 Sup. Ct. 934, 37 L. Ed. 856; Assets Collecting Co. v. Barnes-King Development Co., 209 Fed. 206, 126 C. C. A. 300. And the state courts have uniformly held that, in the absence of a statute allowing

an appeal, no appeal lies from an order sustaining or dissolving a writ of arrest in a civil action. State v. Butler, 38 Tex. 560; Casey v. Curtis, 41 Ill. App. 236; Burch v. Adams, 40 Kan. 639, 20 Pac. 476; Cline v. Harmon, 2 Wash. 155, 26 Pac. 191, 269; First Nat. Bank of Peterborough v. Barker, 58 N. H. 185; Porter v. Griffin, 143 Ky. 138, 136 S. W. 130.

The plaintiffs in error cite the case of Stroheim v. Deimel, 77 Fed. 802, 23 C. C. A. 467, in which it was held that an order of the Circuit Court, discharging from imprisonment a defendant held under execution against his person upon a judgment in a civil action, is final, and appealable to the Circuit Court of Appeals. The essential difference between that case and the case at bar is that in the former a final judgment had been rendered between the parties, and the defendant was imprisond under a capias ad satisfaciendum. In discharging the defendant from imprisonment the court entered a judgment which was final as to the substantial right of the plaintiffs to subject the defendant to imprisonment under the writ in order to obtain satisfaction of his judgment, and it was on that ground that the Circuit Court of Appeals entertained jurisdiction.

The writ of error is dismissed.

KIRKPATRICK v. McBRIDE.

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

No. 1400.

DEPOSITIONS ⊂=83(3)—REFUSAL TO ANSWER—EXCLUSION OF TESTIMONY.

Where a witness refuses to answer pertinent questions, stating she acts on advice of counsel, thus evading proper inquiry, her whole testimony may be stricken.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. § 221; Dec. Dig. ⊂=83(3).]

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

Suit by Harriet Elizabeth McBride against Emma Jane Kirkpatrick. From decree for complainant (207 Fed. 893), defendant appeals. Affirmed.

Monroe Buckley, of Philadelphia, Pa. (Charles H. Burr, of Philadelphia, Pa., on the brief), for appellant.

T. M. Kirby, of Cleveland, Ohio (Henry M. Russell and Russell & Russell, all of Wheeling, W. Va., and Squire, Sanders & Dempsey, of Cleveland, Ohio, on the brief), for appellee.

Before KNAPP and WOODS, Circuit Judges, and JOHNSON, District Judge.

KNAPP, Circuit Judge. The original decree in favor of plaintiff, appellee here, was affirmed by this court on appeal. 202 Fed. 144, 120 C. C. A. 322. Afterwards a rehearing in part was granted, with the result that the case was remanded to the District Court, "for the

purpose of allowing the respective parties, in such manner and at such times as that court may prescribe, to put in such additional competent testimony as they may be advised upon the question of the ownership of the personal property as claimed in the said answer, and that said District Court do thereupon, upon the testimony in this cause and such additional testimony as may be introduced, proceed to a final decree upon such question, but that in the determination of the same the answer of the defendant, Emma Jane Kirkpatrick, shall have only such force and effect as if an answer under oath had been waived in the bill. * * *" 203 Fed. 449, 120 C. C. A. 328. Petition to the Supreme Court for a writ of certiorari was denied. 229 U. S. 612, 33 Sup. Ct. 772, 57 L. Ed. 1351.

Thereafter the limited question so reopened was referred to a special examiner for the taking of testimony and Mrs. Kirkpatrick was examined at unusual length. In the course of her cross-examination she repeatedly refused to answer questions which appear to be obviously legitimate and proper in view of her testimony in chief, and in each instance she stated that her refusal was based "upon the advice of counsel," and not upon any belief that the answer would tend to her incrimination. These questions were certified to the court, and plaintiff's counsel thereupon filed a petition to strike her testimony from the record or require her to appear and answer. Upon consideration of this petition, both parties being allowed to submit briefs, it was held in a careful opinion (McBride v. Kirkpatrick [D. C.] 207 Fed. 893) that defendant's entire testimony should be stricken from the record as incompetent under section 3945 of the West Virginia Code of 1906, and also because of her refusal to answer the questions certified. This left no substantial evidence in support of her ownership of the property in dispute, which the original decree had awarded to plaintiff, and that decree was accordingly reaffirmed.

Even if it be assumed that some portion of the voluminous testimony of Mrs. Kirkpatrick was not incompetent, under the statute which forbids one party to a transaction to testify when the other party is dead, we are of opinion that the court below was clearly right in excluding her entire deposition because of her refusal to answer pertinent questions on cross-examination. When she asserted, for example, that specified property was bought with her own funds, it was perfectly proper to ask her where she got the money. Indeed, the right to interrogate her upon that subject was so obvious as to make her refusal utterly inexcusable. The administration of justice requires full disclosure of the truth, and the attitude of evasion and concealment which plaintiff maintained "upon the advice of counsel" is not to be tolerated. The action of the court below in striking her testimony from the record, because of conduct which amounted to contumacy, was justified by the facts and circumstances of the case, and has the sanction of abundant authority. Blease v. Garlington, 92 U. S. 1, 23 L. Ed. 521; Thomson-Houston Electric Co. v. Jeffrey Mfg. Co. (C. C.) 83 Fed. 614.

The other questions raised are not of sufficient merit to call for discussion, and the decree appealed from is accordingly affirmed.

Affirmed.

FISHER v. RULE.

(Circuit Court of Appeals, Eighth Circuit. May 16, 1916.)

No. 4525.

1. PUBLIC LANDS ⟸103(1)—CONTEST—RIGHTS OF CONTESTANT.
Plaintiff, who was not a party to a contest by his father against the entry of defendant on public lands, can take no advantage of his father's contest upon claiming the land under a subsequent entry.
[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 298; Dec. Dig. ⟸103(1).]

2. PUBLIC LANDS ⟸102—ENTRY—RIGHTS OF ENTRYMEN.
Plaintiff's application to enter public land stated that by reason of his adoption of a minor child he was the head of a family, though plaintiff was not of age. Plaintiff's application was suspended for proof of adoption, and he was notified that, unless proof was made within a given time, it would be denied. Plaintiff failed to appeal from the order, and did not furnish the required proof. *Held* that, the land having been subsequently patented to another, plaintiff could not complain.
[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 294–297; Dec. Dig. ⟸102.]

Appeal from the District Court of the United States for the District of Nebraska; Thos. C. Munger, Judge.

Suit by William Allen Fisher against Newton Rule. From a decree dismissing the bill, complainant appeals. Affirmed.

Allen G. Fisher, of Chadron, Neb., for appellant.

Edwin D. Crites, of Chadron, Neb. (F. A. Crites and Albert W. Crites, both of Chadron, Neb., on the brief), for appellee.

Before HOOK and SMITH, Circuit Judges, and REED, District Judge.

HOOK, Circuit Judge. This is a suit by Fisher to have Rule declared a trustee for him of a tract of land in Nebraska and for the execution of the trust by an appropriate conveyance. On final hearing the trial court dismissed the bill of complaint, and Fisher, the plaintiff, appealed.

[1, 2] The defendant obtained a patent for the land from the United States in 1914 by completing as the heir of a deceased entryman a homestead entry initiated in 1904. The father of plaintiff contested the entry before the officials of the land office and the Secretary of the Interior, but finally failed. The details of this contest need not be set forth since plaintiff can gain nothing by it. He was not a party to it nor in privity in a legal sense with the contestant. He applied to enter the land as a homestead at a time when the Department had decided the contest against the defendant; but the decision was subsequently revoked, and the latter was awarded the final certificate, upon which a patent was issued. The plaintiff's application to enter the land with his supporting affidavit, stated that, though he was not of age, he was the head of a family by reason of his adoption of a minor child, of which he was the sole and only support. The application was

suspended for proof of the adoption, and plaintiff was notified that, if he failed to furnish the proof by a time fixed his case would be closed without further notice. He neither furnished the proof, nor appealed from the ruling.

It is manifest that plaintiff is in no position to question defendant's patent, with the validity of which the government is satisfied. Much less is he entitled to a decree that the title evidenced by it shall inure to him as though he had lawfully entered the land and performed the duties requisite under the homestead law. This being so, the real facts of the pretended adoption of a minor child are not important.

The decree is affirmed.

STEFFENS et al. v. STEINER et al. (ten cases).

(Circuit Court of Appeals, Second Circuit. February 15, 1916. On Motion to Retax Costs, March 14, 1916.)

No. 89.

1. PATENTS ⟸28—DESIGNS—NECESSITY OF INVENTION.

To sustain a design patent, the design must involve something more than mere mechanical skill; and whether the assembling of old design elements into one unitary design is patentable depends on whether, in the particular case, such assembling rises to the level of invention and the result possesses originality and beauty.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 33; Dec. Dig. ⟸28.]

2. PATENTS ⟸328—VALIDITY—DESIGNS FOR CIGAR BANDS.

The Jones design patents, Nos. 42,777, 42,781, and 42,786, for designs for cigar bands, *held* void for lack of invention.

On Motion to Retax Costs.

3. COSTS ⟸254(6)—APPELLATE COURT—COST OF PRINTING RECORD.

For the purposes of the record on appeal in a patent suit the defendants, who were engaged in the business, did certain lithographic work in reproducing exhibits. Defendants were successful in the appeal. *Held* that, under court rule 23 (150 Fed. xxxii, 79 C. C. A. xxxii), providing that "the amount paid for printing the record shall be taxed against the party against whom costs are given," defendants were entitled to tax only such sums as they paid for labor and material in doing such work, and that a further claim for overhead or shop charges was not taxable.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 976, 977; Dec. Dig. ⟸254(6).]

4. COSTS ⟸254(6)—DOCKET FEE—SUITS CONSOLIDATED FOR APPEAL.

Where separate infringement suits between the same parties were tried as one by stipulation, and by consent the court made an order dispensing with separate transcripts on appeal and requiring the printing of but one record, the prevailing party is entitled to the taxation of only one docket fee.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 976, 977; Dec. Dig. ⟸254(6).]

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

Ten suits in equity by Emil Steffens, Jr., and Hómer A. Jones, copartners as Steffens, Jones & Co., against Henry Steiner, Isidor Stein-

er, and Joseph Kopperl, copartners as Wm. Steiner, Sons & Co. Decrees for complainants in three cases, and defendants appeal, all being heard on one record as one appeal. Reversed.

Joseph L. Levy, of New York City, for appellants.

Charles A. Brodek, of New York City (T. F. Bourne, of New York City, of counsel), for appellees.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. The complainants brought against defendants ten suits for infringement of ten design patents for cigar bands granted to complainants. The separate bills alleged infringement of letters patent Nos. 42,778, 42,788, 42,787, 42,786, 42,784, 42,783, 42,781, 42,780, 42,779, and 42,777. An injunction, the recovery of $250, and an accounting of profits, damages, and costs were asked in each bill. For the convenience of the court the cases were tried together. On January 6, 1915, an opinion was filed holding that patents Nos. 42,777, 42,781, and 42,786 were infringed, and that injunctions should issue, and that complainants should recover $250 on each of the three suits. As the cases were tried together, no costs were awarded. Pursuant to that opinion separate decrees were entered dismissing the bills as respects the remaining seven patents. As to those seven suits no appeal has been taken, and the time within which an appeal can be taken has now expired. As respects the other three cases, an appeal was duly taken, and the three cases were embodied in one appeal record, and were heard as one appeal.

[1] The suits are based on the act of Congress of February 4, 1887, which reads:

"That hereafter, during the term of letters patent for a design, it shall be unlawful for any person other than the owner of the said letters patent, without the license of such owner, to apply the design secured by such letters patent, or any colorable imitation thereof, to any article of manufacture for the purpose of sale, or to sell or expose for sale any article of manufacture to which such design or colorable imitation shall, without the license of the owner, have been applied, knowing that the same has been so applied. Any person violating the provisions, or either of them, of this section, shall be liable in the amount of two hundred and fifty dollars." 24 Stat. 387, c. 105, § 1 (Comp. St. 1913, § 9476).

The District Judge in his opinion said:

"The most important issue in these cases is the validity of the patents themselves, because the imitation is so deliberate, unblushing and minute as to require no consideration at all. Were the matter open to me de novo, I should hardly think that these groupings of elements, so long familiar in the art, into such new combinations as are here presented, was beyond the competence of an ordinary designer, who for these purposes should be regarded as the test of invention. It is true that no such combinations are exactly presented before in the art, and indeed their literal novelty is unquestioned; but I cannot bring myself to think that the especial combinations were variations beyond what scores of designers could produce at will out of the materials at hand."

But notwithstanding the opinion thus expressed the court below, evidently contrary to its own conviction and in deference to its understanding of the opinions of this court in Graff, Washbourne & Dunn v. Webster, 195 Fed. 522, 115 C. C. A. 432 (1912), Dominick & Haff

v. R. Wallace & Sons Mfg. Co., 209 Fed. 223, 126 C. C. A. 317 (1913), and Mygatt v. Schaffer, 218 Fed. 827, 134 C. C. A. 515 (1914), felt compelled to sustain the validity of the three patents herein involved.

The Supreme Court of the United States in Smith v. Whitman Saddle Company, 148 U. S. 675, 13 Sup. Ct. 768, 37 L. Ed. 606 (1893), quoted approvingly from an opinion by Mr. Justice Brown, written when he was District Judge for the Eastern District of Michigan, in which he stated that the law applicable to design patents did not materially differ from that in cases of mechanical patents. He added:

"To entitle a party to the benefit of the act, in either case, there must be originality, and the exercise of the inventive faculty. In the one, there must be novelty and utility; in the other originality and beauty. Mere mechanical skill is insufficient. There must be something akin to genius—an effort of the brain as well as the hand. The adaptation of old devices or forms to new purposes, however convenient, useful, or beautiful they may be in their new rôle, is not invention."

The Supreme Court, Chief Justice Fuller writing the opinion, after expressing its approval of the above passages, added:

"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."

That decision established the law on this subject for this country. And this court has been guided by it in its decisions. In no one of them have we laid down anything which is contrary to the rule laid down in the Whitman Saddle Case. That a design patent must disclose invention is an accepted principle in this and in all federal courts. In Graff, Washbourne & Dunn v. Webster, supra, each element of the patented designs considered separately was old. And this court held that that fact did not negative invention which might reside in the manner in which they were assembled, since it is the design as a whole and the impression it makes on the eye, which must be considered. Judge Coxe said:

"The situation in this respect is analogous to machines made up of a combination of old elements. The machine produces a new result, the design a new impression upon the eye. To refuse patentability to a design because the separate elements are old would be tantamount to denying originality to 'The Lion of Lucerne,' because other sculptors before Thorwaldsen had carved lions from stone. It would relegate 'The Angelus' to obscurity, because other artists before Millet had painted peasants at work in the harvest field."

If the court had not thought that invention was involved in what was done, the patents would not have been sustained. The same remark applies to the decision in Dominick & Haff v. R. Wallace & Sons Mfg. Co., supra, as well as to that in Mygatt v. Schaffer, supra. Invention may or may not reside in combining a multitude of old design elements into one unitary design. Whether or not invention is involved in any particular case of that kind must depend upon the novelty of the unitary and resultant design and the circumstances of the case.

The question in the case at bar is not whether a design patent can be sustained, although each separate element in the design may be old, but it is whether what has been done in assembling the old elements in the new designs rose in these particular cases to the level of invention. What has been done in the patents in suit has been to vary

slightly the shape and disposition of the otherwise old design elements or surface ornamentation of the cigar bands. The test of invention by which the court below decided the case was stated as follows:

"This test will not allow validity to a patent for immaterial changes which do not differentiate from the prior art enough to be distinguishable, but will allow any new combination of old elements, even though it took no invention beyond that of a skilled designer."

In laying down the above test the court below has been led into error. To sustain a design patent the design must involve something more than mere mechanical skill. There must be invention.

[2] Plaintiff's design patent No. 42,781, which is the most elaborate of the three, contains in the center a woman's head and bust and over it the word "Esquisitos." There is nothing about this that is novel. There were prior to this design numerous cigar bands containing the heads of women and some containing the heads of men. The word "Esquisitos" even appears on a similar design prior to 1903, although placed at the bottom of the design, instead of the top. The outline of the band, if not old, so nearly resembles the prior art that it is not entitled to consideration. We cannot discover in the design of that patent, or in the design of the other two, anything which indicates patentable invention.

In view of the conclusion to which we have come, it is not necessary to consider any of the other questions which were presented on the argument. The decrees must be reversed, and the bills dismissed.

It is so ordered.

On Motion to Retax Costs.

PER CURIAM. This is a motion to retax the costs in the above-entitled cases.

[3] 1. There were ten cases, and separate decrees filed in each case. In the District Court seven of the cases were dismissed and three went against defendants, and these three were appealed to this court, where defendants were successful. The subject-matter involved was certain cigar bands, and at the trial certain prior art bands were offered in evidence. These original bands were by order of court removed from the original records and grouped together as to each patent in suit in the Exhibit E to L; this exhibit taking the place of the original record.

The original bands were colored and embossed, and to reproduce this exhibit, ordinary lithographic processes were not available. Thus the reproduction of these bands became a part of the record on appeal, and the first question is whether the amount fixed by the clerk for this work was correct. Defendants, being engaged in business of that character, made the lithographic exhibit. The costs, as taxed by the clerk, included (in addition to what was actually expended) an amount for what might be called overhead charges. Thus, 213 hours of engraving were charged for at the rate of 75 cents an hour. The actual amount paid was 60 cents an hour. The balance, according to defendants, was "for the materials, light, rent, power, and general overhead charges."

Rule 23 of this court (150 Fed. xxxii, 79 C. C. A. xxxii) provides, among other things:

"In case of reversal, affirmance or dismissal with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given."

The theory of this rule is that the litigant shall be reimbursed for his actual expenditure, which, of course, must be a proper expenditure. If, as in this case, a defendant does his own printing, he should receive only the amount actually paid. So-called overhead expenses are all estimates, and to allow such expenses would open the door to uncertainty and unnecessary controversy. If a defendant desires to print his own record, he must keep accurate account of the cost of materials, the time occupied, and any other items which involve actual expenditures, and he cannot expect to tax costs upon the basis either of the price at which he would make a profit in the open market, or at which he would do the work for a customer, figuring in what he might be pleased to estimate as overhead charges. We think, therefore, that defendants were entitled to tax only such sums as were paid by them for labor and material.

[4] 2. Defendants, who, as above stated, were defeated in three of the cases below, but prevailed here in those cases, now ask for three docket fees. It was stipulated that the cases "shall be tried as one action." A certain saving clause of the stipulation did not relate to costs, but referred to the rights and defenses of the parties. Later, and apparently with the consent of the parties, an order was signed by the District Court dispensing with the separate transcript of record from each of the decrees appealed from, and providing that but "one decree (as they are all alike in all the three cases) need be printed in the transcript, papers being entitled in all three cases."

It is apparent that the parties intended to limit the expenses to one bill of costs, and to present, with the permission of the court, the whole subject in a single record. Under these circumstances, we think that defendants appellants are entitled to only one docket fee. As to this the taxation is affirmed, and as to the cost of printing the record the clerk should retax the costs for the amount paid for labor and material, but excluding so-called overhead charges.

ZIMMERMAN et al. v. ADVANCE MACHINERY CO.

(Circuit Court of Appeals, Sixth Circuit. April 10, 1916.)

No. 2719.

1. PATENTS ⟸328—INVENTION—PROCESS OF CONVERTING GLUE.
The Zimmerman patents, No. 961,058 and No. 1,009,616, each for a process for melting or converting glue, *held* void for lack of invention in view of the prior art.

2. PATENTS ⟸36—INVENTION—PRIOR PATENTS.
The question whether a patent involves invention is one of fact, to be answered in the light of all pertinent considerations, including the prior art, and although a process patent is not completely anticipated by any

single prior patent, all prior patents containing elements of the process are to be considered in determining the question of invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 40; Dec. Dig. ⇐36.]

Appeal from the District Court of the United States for the Northern District of Ohio; John M. Killits, Judge.

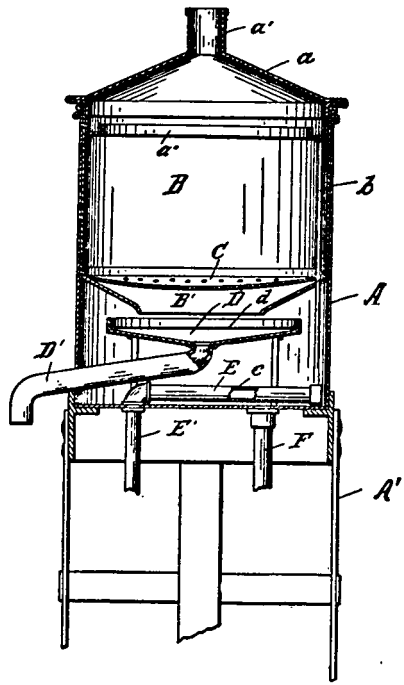
Suit in equity by Charles M. Zimmerman and the Instantaneous Glue Converter Company against the Advance Machinery Company. Decree for defendant, and complainants appeal. Affirmed.

W. F. Murray, of Cincinnati, Ohio, for appellants.

Owen, Owen & Crampton, of Toledo, Ohio (Wilber Owen, of Toledo, Ohio, of counsel), for appellee.

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

KNAPPEN, Circuit Judge. Suit for infringement of patents to Zimmerman, No. 961,058 (June 7, 1910) and No. 1,009,616 (November 21, 1911), on process for melting or converting glue. The process of the first patent is best shown in connection with the drawing of the apparatus referred to by the inventor as suitable for carrying out his process, which drawing (reduced) we here reproduce:



Glue (previously dry) soaked "in a predetermined quantity of cold water until all the water has been absorbed by the glue and the glue has been reduced to the form of lumps of jelly" is placed within the drum *B*, contained within the cylindrical chamber *A*, which is open at its upper end. Steam injected through an opening *c* in the supply pipe *E* (fed by a steam pipe *E'*) is made directly to contact with and permeate the cold glue-jelly which rests upon the bottom *C* of the drum *B*, this bottom being so constructed, by perforations or otherwise, as to support the jelly and at the same time permit the melted glue to run through, whereupon it passes through the funnel-shaped portion *B'* below the perforated bottom *C* and into a collecting trough *D*, from which the melted glue is drawn off through the pipe *D'*; the water resulting from condensation of the steam, and collected in the trough *a''*, is conducted by the pipe *b* to a point near the bottom of the chamber *A*, whence it escapes through the pipe *F*.

The first patent has six claims, all of which are in issue. The first reads:

"1. *The process as herein described of converting glue into liquid form, which consists in soaking the dry glue in a predetermined amount of water to form a jelly,* and subjecting the jelly to the action of steam."

The second claim differs from the first only in omitting the limitation upon the water used for soaking the glue to "a predetermined amount," and in subjecting the jelly to the action of steam "in a closed chamber." Each of the claims contains the words in the first claim which we have italicized, with the limitation above stated as to the second claim. Each of the claims (except the fifth) provides for "subjecting the jelly to the action of steam," or for "passing steam throughout the mass of jelly," or for "passing steam through the body of the jelly so as to cause it to attack the jelly on all sides and thoroughly permeate the same." The fifth claim omits all mention of the steam, and so fails in terms to disclose a complete process. The third contains the element of collecting the liquid glue as it runs through the perforations of the support; the fourth the catching of the water of condensation to prevent its mixing with the liquid glue; the fifth and sixth cover both the last-named elements, although in slightly different verbiage.

The process of the second patent differs from the first only (a) in that, as stated in the specification, but not in the claim, the dry glue is soaked in the converting vessel (afterwards put into the converter) —so saving the removal of the jelly from the vessel in which it is formed, as in the process of the first patent—and (b), as stated in both specification and claim, in adding to the dry glue "as much water as the glue can take up" instead of "a predetermined amount of water," as in the specification and certain of the claims of the first patent. The single claim of the second patent reads thus:

"The herein described process of melting glue, which consists in adding to the quantity of glue to be melted, as much water as the glue can take up in passing into jelly form, and after the glue has been thus converted into a jelly, melting the jelly by subjecting it directly to steam."

The defenses are invalidity of the patents and noninfringement. On final hearing on pleadings and proofs, the District Judge held both patents invalid and dismissed the bill, which contained also a charge of unfair competition not now in the case.

[1] When Zimmerman entered the field it had for many years been common practice to form glue into a jelly by soaking in water before applying heat for melting. Indeed, this practice is expressly recognized by the inventor in the specification of his first patent. In the woodworking art it had been the practice to melt the glue jelly by means of a jacket of hot water or steam, or both, enveloping the jelly-containing vessel. Zimmerman claimed an improvement over this method in saving not only the time required to melt the glue, but deterioration of the glue in both strength and quality, due to the superheating, under the old process, of the portions of the jelly next to the heating jacket of its container, the evaporation of water in the glue, and the necessity of having a supply kettle with a quantity of glue under constant heat.

There is no room for dispute that in the glue-melting art every

element of the process of Zimmerman's first patent was old. In making glue for coating and sizing paper, and for sticking the coloring material to paper, it was common practice to soak the glue in water until it jellied, and then to melt the jelly by the direct application of steam thereto while contained in the soaking vessel. In making glue for the manufacture of printers' rollers Bingham, by patent No. 412,720, had, in 1889 (21 years before Zimmerman) disclosed a process by which the glue, suspended in open-work trays of wire cloth or perforated metal, or other like construction, and contained within an enclosing cylinder, was subjected, through the open-work of the top, bottom and sides of each of the trays, to the direct action of steam, which permeated the mass of glue and melted it, the melted glue passing through the openings in the trays into a funnel-shaped bottom, from which it was conducted into an appropriate receiver—the water of condensation being prevented from mixing with the glue, and collected and conducted away by a drain pipe.

Rowe, by patent No. 631,327, had, in 1899 (more than 10 years before Zimmerman) disclosed a process for melting glue, also for manufacturing printers' rollers, differing from Bingham's process in that the glue was exposed to the direct action of the steam while contained in a revolving, perforated cylinder enclosed in a casing. The molten glue dripped from the revolving cylinder upon inclined plates. There was an outlet pipe for the melted glue, as well as troughs for collecting and a pipe for discharging the water from condensed steam. Bingham in actual practice, although not disclosed by his patent, soaked the glue in water before putting it into his open-work trays for subjection to the steam action; he testified that the soaking process was not referred to in the patent because "that was the only method of melting glue that I knew of"; that he had never heard of glue being melted in a dry state. "All the glue melting I ever knew of in our business, was that of glue that had previously been soaked in water, and it was to melt the glue thus prepared, that this machine was to be used." The record contains nothing to discredit this statement, and it must be accepted as true. In converting raw glue material into liquid glue, to be formed into the dry commercial product, it was common practice to subject the raw material, after first soaking it in water, to the direct action of steam.

[2] The question is not whether the patents in suit are directly anticipated by either of the prior patents mentioned, but whether in view of the prior art the patents involve invention. This question of the presence or absence of invention is one of fact, to be answered in the light of all pertinent considerations. Herman v. Youngstown Car Mfg. Co. (C. C. A. 6th Cir.) 191 Fed. 579, 112 C. C. A. 185; Ferro Concrete Co. v. Concrete Steel Co. (C. C. A. 6th Cir.) 206 Fed. 666, 668, 124 C. C. A. 466; Loose Leaf Co. v. Loose Leaf Binder Co., 230 Fed. 120, 144 C. C. A. 418 (decided by this court December 15, 1915).

Referring to the first patent: As already shown, the prior art of melting glue embraced every feature of the process disclosed. True, the fact alone that each feature of a process is old is not enough to invalidate a patent therefor; the order in which the steps of the process are taken is necessary to complete identity (Expanded Metal

Co. v. Bradford, 214 U. S. 366, 29 Sup. Ct. 652, 53 L. Ed. 1034), and the process as a whole is to be considered in determining invention. But all prior patents and all elements of the prior art have a bearing upon the question of fact whether there is invention in the process under consideration. The general considerations applicable to combination claims are pertinent. For the rule relating to such claims see Keene v. New Idea Spreader Co., 231 Fed. 701, — C. C. A. — decided by this court March 17, 1916. And so it is not necessary to a finding of lack of invention that every element of the process be found in one embodiment of the prior art. Bingham, however (assuming that his glue was jellified), disclosed the complete process of Zimmerman's first patent, for Bingham's open-work trays are plainly the equivalent of the perforated drum bottoms of Zimmerman's patent; and the same result is true of the Rowe patent, provided Rowe also soaked his glue before melting, as Bingham said was the universal practice. True, Bingham's soaked glue was of much heavier consistency than the jelly used in the wood-joining art to which Zimmerman's patent is specially applicable (and presumably the same is true of Rowe's glue), because if used in the manufacture of printers' rollers the glue was necessarily thicker than adaptable generally to wood-joining. It is also true that the glue used for coating, sizing and coloring paper was thinner than required for wood-joining; but the art of melting glue for manufacturing printers' rollers and for making coatings, sizings and colorings for paper is not so remote from that of melting glue for the wood-joining art as to make it irrelevant to the question of invention. And there seems no reasonable doubt that Bingham's apparatus at least would convert glue suitable for the wood-joining industry, if the same kind of jelly were used as employed by Zimmerman.

Taking into account the entire prior art, together with the fact that even for wood-joining glue was invariably made into jelly before melting, and Bingham's testimony that "all glue soaked in water is to a certain extent jellified, but the jelly is harder or softer according to the strength of the glue," we are unable to escape the conviction that applying Bingham's process (used on his stiff, water-treated glue mass) to the thin glue jelly required for the wood-joining art was not invention, whether or not invention might be found but for the disclosures of Bingham and Rowe. In reaching the conclusion that Zimmerman's first patent did not involve invention, we have not overlooked the consideration that it occurred to no one previous to Zimmerman to apply the processes of Bingham and Rowe to melting glue in the wood-joining art. This fact has a bearing upon the question of invention, as has also the fact of the favorable reception of Zimmerman's patent by manufacturers. But neither consideration is decisive; they are merely aids in determining the ultimate question of invention. We may add that it seems not unlikely that a part, at least, of the favor with which Zimmerman's process has been received is due to the apparatus rather than the process. Plaintiff has a patent upon the apparatus, but that patent is not included in this suit. Whether the feature of storing the melted glue in the converter is or is not valuable is immaterial, for it is included in none of the claims.

As to the second patent: We think we should regard its process as differing from the first patent only in the respect that it calls for "as much water as the glue can take up in passing into jelly form" instead of "a predetermined quantity of cold water." The claim presents no other feature of difference, and plaintiff's counsel claims no other. Zimmerman admits that it was old, prior to the invention of his first patent to soak glue in as much water as it would take up, and that he intended that under the process of his first patent such course should be taken, provided it would give the correct consistency when melted. The change effected by the second patent was not invention over the first patent. Laumann v. Urschel White Lime Co. (C. C. A. 6th Cir.) 136 Fed. 190, 69 C. C. A. 206; Hyde v. Minerals Separation (C. C. A. 9th Cir.) 214 Fed. 100, 130 C. C. A. 576. Moreover, the process of softening glue (before melting) by making it absorb as much water as it will take up had been disclosed in printed publications several years before Zimmerman's second patent. Were we to consider the fact that the process of the second patent contemplated the soaking of the dry glue in the converting vessel, the patent would be equally invalid.

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

FT. PITT SUPPLY CO. et al. v. IRELAND & MATTHEWS MFG. CO.

(Circuit Court of Appeals, Sixth Circuit. May 2, 1916.)

No. 2776.

1. PATENTS ⊂=328—INVENTION—FLUSHING VALVE MECHANISM.

The Young & Robertshaw patent, No. 925,550, for mechanism for operating flushing valves of water-closet tanks, is for a device operating the same as those of the prior art, the only novelty claimed being in the unitary nature of the mechanism, requiring only a single means of attachment to the tank, and but one hole in the tank wall; and while such device has merit and usefulness, it involves the exercise of only mechanical skill, and is void for lack of invention.

2. PATENTS ⊂=34—"INVENTION"—PRIOR ART.

All elements of the prior art have a bearing upon the question whether there is "invention" in the device of a patent, and it is not necessary to a finding of lack of invention that every element be found in one embodiment of the prior art.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 38; Dec. Dig. ⊂=34.

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

3. PATENTS ⊂=26(1)—INVENTION—COMBINATION OF OLD ELEMENTS.

It is not invention merely to combine into one unitary structure mechanism formerly made in separate pieces, so long as each element operates in the same way to produce the same result.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27-30; Dec. Dig. ⊂=26(1).]

4. PATENTS ⊂=36—INVENTION—QUESTION OF FACT.

The question of invention is at the last one of fact.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 40; Dec. Dig. ⊂=36.]

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Suit in equity by the Ft. Pitt Supply Company and another against the Ireland & Matthews Manufacturing Company. Decree for defendant, and complainants appeal. Affirmed.

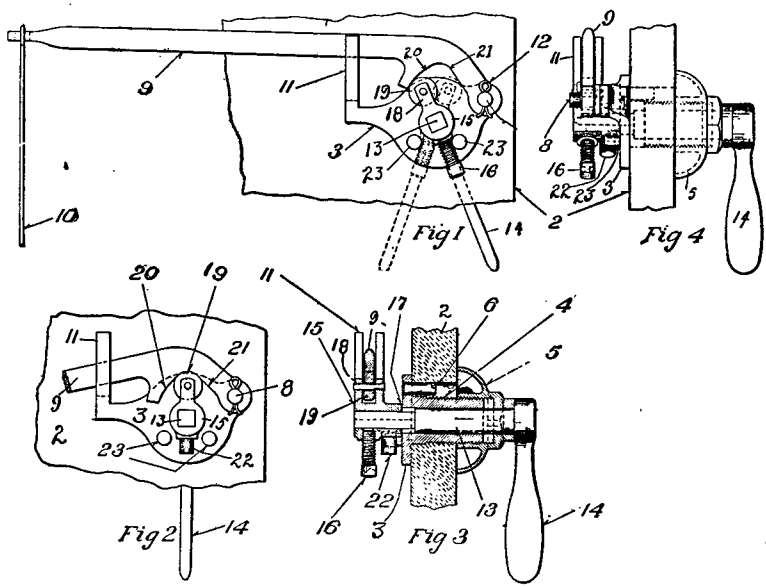
F. W. Winter, of Pittsburgh, Pa., and A. H. Graves, of Chicago, Ill., for appellants.

Wm. M. Swan, of Detroit, Mich., for appellee.

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

KNAPPEN, Circuit Judge. Suit for infringement of United States patent No. 925,550, June 22, 1909, issued to plaintiff Ft. Pitt Supply Company as assignee of Young & Robertshaw. Plaintiff Frost Manufacturing Company is licensee under the patent. The defenses are invalidity and lack of infringement. On hearing upon pleadings and proofs the district judge held the patent not infringed, and entered decree dismissing the bill. The appeal is from this decree.

[1] The patent relates to mechanism for operating the familiar type of water-closet flush valve, which is closed by a vertically operable plunger, and opened by the lifting of the plunger through the raising of a horizontal arm connected with the lift rod. We reproduce the patent drawings, reduced in size:



The mechanism, so far as necessary to be stated, is seen to be this: A plate *3* on the inner side of the tank wall has mounted thereon a valve-operating lever *9* fulcrumed at *8*, and having cam faces *20* and *21*; from the opposite side of the plate *3* a sleeve *4*, integral

with the plate, extends through the tank wall *2*, the outer end of the sleeve being threaded to receive a cap nut *5*, which serves to secure the plate to the tank and to give finish on the outside of the tank; a projection *6* on the plate *3* enters a suitable hole in the tank wall and prevents the plate from turning; within the sleeve *4* is carried from the outside the lever *13* (operated by the handle *14*) which actuates a sleeve *15* fitted upon the squared inner end of the actuating lever *13*; the turning of the handle *14* actuating the lever *13* causes the roller *19* on the sleeve *15* to contact with the cam faces *20* and *21* of the lever *9*, so tripping the lever and thereby raising the rod *10* which lifts the plunger.

The claims in suit are 1, 2, 4, 5, 6, 7, and 9. Claim 4, which is the broadest, is as follows:

"4. Mechanism for operating flushing valves, comprising a plate provided with a threaded sleeve projecting therefrom and arranged to extend through the wall of the tank and with a lever fulcrum center at the side of said sleeve, a lever fulcrumed on said center, a rotatable actuating shaft projecting through the sleeve and operatively connected to said lever, and a finishing nut on the outer end of the sleeve serving to secure the fitting to the tank and conceal the opening."

The main question is whether the patent involves invention. The art is old and crowded. No novelty is claimed in the flushing mechanism itself. Not only was the plunger valve old, but there was nothing novel in actuating the plunger through the tilting of a fulcrumed horizontal bar within the tank connecting with a vertical plunger rod; nor in rocking the bar by means of a handle on the outside of the tank, swinging in both directions—a method specially adapted to tanks of the low-down type. Indeed, Tilden (No. 821,002) had in 1906 shown substantially the complete flushing valve operating mechanism of the patent in suit, save only the unitary feature hereafter discussed. While Tilden did not employ a cap nut for securing the fitting to the outside of the tank, there was no invention in its use; it was common in the arts generally, and is found specifically in the patent to Malcolm, No. 468,725, which, however, was for a tilting tank, and had no flush valve. Nor was there invention in the use of the threaded sleeve extending through the tank-wall and carrying the operating lever. That is an ordinary mechanical expedient. It is found in fact in Malcolm's flushing tank device. There was likewise no invention in employing the device for preventing the movement of the operating shaft too far in either direction. In fact, invention is not claimed with respect to either or all of the features mentioned.

The feature relied upon as differentiating the patent in suit from the prior art, and as constituting invention, is the unitary nature of the mechanism, in that it has only a single means of attachment to the tank, which means of attachment carries both elements of the operating mechanism, including the integral sleeve. As stated in the patent specification, "both the center of the operating shaft *13* and also the center on which the valve operating lever *9* is fulcrumed are carried on" one fitting, viz. the plate *3* on the inner side of the tank-wall; whereas, as also said in the specification, "with

all prior valve mechanisms the tank or wall had to have separately attached thereto at least two centers, sometimes more." This construction makes the device more readily and accurately attachable, in that it dispenses with the necessity of positioning the fulcrum pin and the actuating lever *13* relatively to each other (thus removing danger from unskilled or careless workmanship), and requires but one hole in the tank wall; it being practically necessary in the case of porcelain and enameled iron tanks to have the holes made at the factory. The unitary construction of course also makes the fixture more readily detachable, less liable to get out of order, and apparently less expensive. The question is: Does this unitary construction alone amount to invention? It is clear that the *operation* of the device is precisely the same in all respects whether the pin *8*, on which the lever *9* is fulcrumed, is an integral part of the plate *3* or whether it is inserted from the outside through the tank wall and *directly* secured thereto, instead of being *indirectly* so secured, by being part of the otherwise secured plate *3*. In the former case the device of the patent would plainly lack invention.

This unitary construction of a flush-valve mechanism on the *inner wall* of the tank was apparently new; although White had in 1889 (patent No. 398,681) shown a construction whereby the valve-operating lever and the hand-actuated lever (which had a cam connection) are both fulcrumed upon an integral bracket upon the upper edge of the tank, presumably of the elevated type; White's mechanism was of the chain type, and his lever oscillated in but one direction.

Neither of the references cited by defendant show anticipation. But the question we are dealing with is not one of anticipation, but of invention: and upon the question whether the device of the patent involves more than the skill of the mechanic, neither White nor the reference to the lock and latch art are wholly irrelevant.

[2, 3] All elements of the prior art have a bearing upon the question whether there is invention in the device under consideration (Zimmerman v. Advance Machinery Co., 232 Fed. 866, —— C. C. A. ——, decided by this court April 10th last); and it is not necessary to a finding of lack of invention that every element be found in one embodiment of the prior art (Keene v. New Idea Spreader Co., 231 Fed. 701, —— C. C. A. ——, decided by this court March 17, 1916). It is not invention merely to combine into one unitary structure mechanism formerly made in separate pieces, so long as each element operates in the same way to produce the same result. Caster Co. v. Caster Co. (C. C. A. 6) 113 Fed. 162, 168, 51 C. C. A. 109; Eames v. Worcester Institute (C. C. A. 6) 123 Fed. 67, 73, 60 C. C. A. 37, and cases cited; Herman v. Youngstown Car Mfg. Co. (C. C. A. 6) 191 Fed. 579, 586, 112 C. C. A. 185; Gould v. Cincinnati Shaper Co. (C. C. A. 6) 194 Fed. 680, 685, 115 C. C. A. 74. And while that proposition is not conclusive of the problem here, it is not without pertinency, for here the relative arrangement of the several parts of the valve-operating mechanism is the same, and each performs its mechanical functions in precisely the same way as if they were mounted separately instead of as parts of a unitary construction—and this

without addition or adaptation. The case before us is thus distinguishable from the cases cited by plaintiff, in that here the feature of unitary construction (through the indirect attachment to the tank wall of the valve-operating lever and the integral sleeve by the use of the plate) is alone relied on as constituting invention. For example: In Scaife v. Woolen Mills Co. it was said by Judge Denison (209 Fed. at page 218 [126 C. C. A. 304]):

"Greth [the patentee] adapted and combined together the treatment and settlement tanks of De la Coux, the separable unit idea of the city water systems, and the cleaning by reverse flow * * * found in other filters. To do this, he devised suitable forms and arrangement for an entire unitary structure, and for the filtering apparatus, gates, and inlet and outlet pipes necessary. All had to be adapted to the combination."

The device of the patent in suit is not a new machine. The only problem solved is one of convenience and usefulness, resulting only from the unitary mounting. It fairly expresses the applicants' advance to say that they assembled upon one supporting frame the same operating parts which had before been carried upon separate supporting members, and that these parts accomplished the same operative result in the same essential inter-relation, after the reassembly as before.

The favorable public reception of plaintiff's device is not highly persuasive of invention. Plaintiff Frost, after speaking of the earlier method of flushing, says that:

"With the advent of the low-down tank * * * some other means of flushing had to be found. The latest practice is this type of lever, which presents a very neat appearance on the outside of the tank and is also a very convenient method of flushing. * * * The trade has very largely turned to this type of lever. The push button is still used to some extent, to a very small extent compared to what it used to be."

The push button type differs from the rocking lever type of mechanism.

It is fairly inferable that the favor with which plaintiff's structure has been received rests in considerable measure upon the low-down tank feature and the rocking lever operated by a double-swing handle, specially adapted thereto. Neither of these features originated with plaintiff's assignors; Tilden employed them both, and his structure seems not to have been superseded. Nor is it a case where long-continued and unsuccessful attempts to solve a problem evidence more than mechanical skill in its ultimate solution; for the unitary mounting seems to have been occasioned by the introduction of enameled iron and porcelain tanks (which have only recently come into anything like common use), whose use made more than one hole in the tank wall specially undesirable. There is no evidence that the problem of unitary construction was not promptly solved when occasion therefor was presented. Neither Young nor Robertshaw testified, nor is there any testimony on the part of any one connected with the working out of the asserted invention.

[4] Taking into account all the considerations presented which bear upon the question of invention, which is at the last a question of fact (Herman v. Youngstown Car Mfg. Co. [C. C. A. 6] 191 Fed.

579, 112 C. C. A. 185; Ferro Concrete Co. v. Concrete Steel Co. [C. C. A. 6] 206 Fed. 666, 668, 124 C. C. A. 466; Loose Leaf Co. v. Loose Leaf Binder Co., 230 Fed. 120, — C. C. A. —, decided by this court December 15, 1915), we are impressed that while the device of the patent has merit and usefulness, it is only a manufacturing expedient, involving no more than mechanical skill.

The judgment of the District Court is accordingly affirmed, with costs.

ROBERT et al. v. KREMENTZ.

(District Court, D. New Jersey. April 29, 1916.)

1. PATENTS ⊂=328—VALIDITY OF REISSUE—MATCH BOX.
The Dodge reissue patent, No. 12,290 (original No. 749,539), for a match-box, claims 5 and 10, which were added in the reissue, are void, as broadening the claims of the original patent by the omission of limitations imposed by the Patent Office and acquiesced in by the patentee.

2. PATENTS ⊂=141—REISSUES—BROADENING OF CLAIMS.
A reissue cannot embrace a claim presented on the application for the original patent and rejected, the omission of which could not have been the result of inadvertence, accident, or mistake.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 206–213; Dec. Dig. ⊂=141.]

In Equity. Suit by Samuel Robert, trading as the A. R. T. Manufacturing Company, and Harold A. Dodge, against George Krementz, trading as Krementz & Co. On final hearing. Decree for defendant.

James H. Griffin, of New York City, for complainants.
Seward Davis, of New York City, for defendant.

RELLSTAB, District Judge. Samuel Robert is the exclusive licensee, and Harold A. Dodge is the grantee, of United States letters patent, reissue No. 12,290 (applied for March 8, 1904), dated November 29, 1904, for improvement in match-boxes. The original patent, No. 749,539, is dated January 12, 1904. The alleged invention is a match-box for holding book matches, provided with a cover pivoted at one end of the box, which cover, when in a closed position, is adapted to cover the entire front of the box and completely conceal the matches contained therein, a match-engaging means at one end of the box, arranged to partly overlie and retain a package of matches within the box, and when the box is uncovered to permit the detaching of individual matches from the package and their engagement on the friction surface of the package, for the purpose of conveniently igniting the matches, without displacing the package.

[1] The bill charges infringement only of claims 5 and 10 of the reissue. These read as follows:

"5. A match-box having a solid back, a turned-up end member rigid therewith, two side members also rigid with said back, substantially the entire front of said box being open, a match-retaining and engaging flange arranged

near one end of the box to hold a package of matches exposed to view through the open front, and a cover pivoted to the box and arranged to cover the open front."

"10. A match-box provided with a back and end member and two side members rigid and integral with said back, substantially the entire front of said box being open, a cover hinged near one end of the box, and means near the end of the box opposite the cover-hinge for engaging and retaining a comb of matches, whereby the entire comb of matches is exposed when the cover is opened and individual matches may be detached without disturbing the comb."

Confining our consideration to these claims and the boxes, "Complainants' Exhibit Complainants' Match-Box" and "Complainants' Exhibit Defendant's Match-box," one is forced to the conclusion that defendant's box is an infringement of said claims, if they are valid and entitled to a reasonable range of equivalents. Save for the fact that complainants' box is wedge-shaped—deeper at the hinged end than at the opposite end where the retaining element is found—defendant's box is substantially a duplicate. Claims 5 and 10 make no reference to this wedge-shaped form, nor to the fact that the hinged end has a greater depth, these claims differing in that respect from all the others save claim 1 of the reissue. The patentee is evidently not limited to the wedge-shaped form of construction. In his original application, as well as in the reissue, he says, with reference to this feature:

"The said pieces or lips *b* are preferably tapered so as to be somewhat wider at their ends adjacent to the part of the box to which the lid *g* is hinged than at their opposite ends."

The use of the word "preferably" indicates that he did not consider that such wedge shape was essential, but that he considered some other form of construction might be used.

Claims 5 and 10 are not limited to a holding-piece having its central portion cut away to provide an opening through which the matches may be ignited, as is shown in the drawings, which limitation is found only in claims 1 and 2 of the reissue, these latter claims being in this respect substantially the same as claims 1 and 2 of the original patent. The validity of this reissue is challenged on the file wrapper, and a consideration of such wrapper is necessary to determine that question.

The original application, as well as the grant of letters, had but two claims, which as originally presented read as follows:

"1. A match-box comprising a back, having turned-up lips to afford side and end portions for the body of the box, and having, integral with the end portions, a turned over holding-piece adapted to partly overlie a package of matches, and which holding-piece is provided with an opening through which the matches may be ignited on the friction material of the package, said box being provided with a suitable lid.

"2. A match-box provided with a hinged lid at one end and being formed deeper at the end where the lid is hinged than at its opposite end, so as to be adapted to hold a package of paper matches, and the said box having, at its end opposite the hinge of the lid, a holding-piece, as *d*, adapted to partly overlie a package of matches contained by the box."

On rejection these were amended as presently noted. No change was made in the descriptive parts of the specification or in the drawings to meet the reasons for such rejection. For the purpose of not-

ing the differences between claim 1 as presented in the original application and as actually allowed, these claims will be combined; the parts of the claim as presented which were omitted from the grant will be bracketed and the new parts italicized. It is as follows:

"1. A match-box comprising a back[,] having turned-up lips to afford side and end portions for the body of the box, and having, integral with the end portion, a turned over holding-piece adapted to partly overlie a package of matches [and which holding-piece is provided with an opening], *said holding-piece having its central portion open to provide an aperture* through which the matches may be ignited on the friction material of the package, *and* said box being provided with a suitable *hinged* lid."

These changes relate only to the holding-piece and the lid, but they narrow the claim. Under the statute (R. S. § 4888 [Comp. St. 1913, § 9432]), the applicant for a patent must so clearly and exactly describe his invention that any person skilled in the pertinent art may be enabled to reproduce the same. The disclosure of the specification did not point to as broad an invention as embodied in claim 1 as originally presented, and the examiner rejected it as too broad in view of the cited art.

Claim 2 as originally presented was amended by adding thereto the following:

"Said holding-piece having its central portion cut away to provide an opening through which the matches may be ignited on the friction material of the package."

The "holding-piece" is an essential element of the alleged invention. It was the storm center of the opposition against the alleged invention while the original application was before the examiner. In his specification the applicant said that his invention had "for its object to provide a match-box more especially adapted for the reception of small packages of safety matches made of cardboard," and in describing his box he said:

"The body of the box comprises a back portion *a*, turned-up side lips *b*, a turned-up end lip *c*, integral with which latter is a holding-piece *d*, turned over, so as to partly overlie the package of matches *e*, and which holding-piece *d* may be provided with an inturned lip *f* arranged to engage a cardboard portion *e'*, forming part of the match-package and which package is in practice provided with friction material suitable for scratching matches thereon for the purpose of igniting them. To permit of convenient access to this friction material, the holding-piece *d* is provided with an opening *d'*." Page 1, lines 37–50.

"The turned-over holding-piece *d* is not attached at the sides of the box and is sufficiently flexible so that the packages of matches may be readily inserted beneath the same, and in breaking off the paper matches the said holding-piece may be pressed by the thumb of the user against the matches and will thus serve as a breaker against which the matches may be pulled in removing them separately from the package." Page 1, lines 71–80.

This holding-piece serves three distinct purposes: (a) Holding in place the package of matches; (b) permitting a breaking away of the individual match from its fellows in the package; and (c) permitting ready access to the friction material on said package to ignite the matches. Following this particular description of his holding-piece the patentee said:

"From the foregoing it will be understood that the invention provides a cheap and convenient match-box suitable for advertising purposes and adapted for the reception of packages of paper matches such as are now extensively in use, and also provides convenient means whereby the matches may be removed separately from the packages and readily and conveniently ignited on the usual friction surfaces of the packages through the opening in the holding-piece *d*." Page 1, lines 81–91.

The reference *d* points only to that part of the drawings which pictures the "holding-piece," and the reference *d'* indicates only the cut-out central opening in such "holding-piece" through which the individual matches, after being separated from the package, might be ignited on the friction surface of the package retained in the box by said "holding-piece." From such disclosure it follows that the "holding-piece" thus described has its center portion cut out, and that, though integral with one end of the match box, it is flexible, because unattached to the sides of the box. Claim 1 as presented, however, was not so limited in terms. It covered a holding-piece, either flexible or inflexible, and with any kind of opening, without limitation as to location. On rejection this claim was amended, as before noted. With respect to the opening in the holding-piece, the change brought the claim within the recited limitation which is disclosed in the specification and drawings. That the patentee clearly understood that the amendment with respect to the holding-piece introduced an additional limitation is manifest from his written argument, under date of November 5, 1903, after such amendment had been made and the claims again rejected. This argument (in a letter to the Commissioner of Patents) reads:

"Sir: I have the honor to request a reconsideration of the above-named case. As explained to the examiner at a personal interview to-day, none of the references cited shows any part corresponding to applicant's holding-piece *d*, so located and of such a length as to partly overlie a package of matches so that it is adapted to serve as a breaker which is pressed against the paper matches by the thumb of the user when it is desired to remove such a match from the package, and which holding-piece is provided with an opening through which the matches may be ignited on the ordinary friction material of the package. The function of this novel feature of applicant's match-box is clearly set forth in the second paragraph of page 3 of his specification, and it is therefore hoped that on further consideration of the case the application will be allowed.

"Respectfully, Henry Calver, Attorney.

"Washington, D. C., Nov. 5, 1903."

Paragraph 2, page 3, therein referred to, is the one heretofore quoted, describing the holding-piece as not attached to the sides, with resultant flexibility and adaptability to serve as a breaker of matches. Whether upon an attack of this claim as originally presented, as not distinctly claiming his disclosed invention, it could be saved by confining it to the specific holding-piece described and illustrated, is not necessary to determine upon the issue now considered, as it was amended to conform to such disclosure. Claim 2 as originally presented perhaps was not faulty in respect to the holding-piece, as its references *d* and *d'* limited it to the kind of retaining means disclosed in the specification and drawings.

But the amendment thereto avoided all question in this respect, for as

noted it specifically limited such holding-piece to one "having its central portion cut away" as disclosed in said specification and drawings.

As to the reissue: Power to grant reissue patents is controlled by section 4916, R. S. (Comp. St. 1913, § 9461), which authorizes the issue of "a new patent for the same invention, and in accordance with the corrected specification," whenever the original patent "is inoperative or invalid by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention. * * *" There is no basis for a reissue on the ground that the claims covered more than the patentee was entitled to, and no such contention is made in this suit. The only ground, therefore, upon which to grant this reissue, was that the original was "inoperative or invalid, by reason of a defective or insufficient specification."

There is nothing in the specification of the original patent that suggests that the patent granted therein was inoperative or invalid by reason of any defect or insufficiency of said specification. The patented device is a simple affair and is correctly described in the specification and fully illustrated in the drawings. The claims as then allowed conformed fully to the alleged invention described in the specification and pictured in the drawings. On its face, the patent which was granted could not be held inoperative or invalid by reason of defective or insufficient specification. In the specification of the reissue patent some slight changes in phraseology were made, and a few new paragraphs were added; but none of these made any substantial change in the specification of the original patent as regards the "holding-piece," and they added nothing in the way of clarification to such earlier specification.

The oath accompanying the application for a reissue is illuminative of the mental attitude of the applicant toward the patent as granted, and of why a reissue was desired. In such oath, dated February 27, 1904, he states that he believes the original patent is—

"inoperative or invalid for the reason that the specification thereof is defective and insufficient and that such defect and insufficiency consists particularly in the failure of said specification to properly describe the function and advantages of my novel construction of match-box, and more especially the function and advantages of having one end of said box larger than the other, and in so arranging the match-retaining means and cover for said box as to permit of the matches being readily taken out of the box upon the opening of the cover, and without disturbing the base strip, and also the function and advantages of the open face of said box, and the capability of the box for re-use for new combs or packages."

None of these alleged defects existed in the original specification. He also stated in such oath that:

"Said specification is further defective and insufficient in that it fails to adequately claim the invention forming the subject-matter of the newly appended claims 3, 4, 5, 6, 7, 8, 9, and 10, which form part of my original invention" and "that the errors which render said patent inoperative or invalid arose from inadvertence, accident, or mistake, without any fraudulent or deceptive intention, and that such inadvertence, accident, or mistake arose

from deponent's failure to fully grasp the nature, scope, and extent of his invention and the importance of the same."

Of the particulars named by him, all save the one which related to the newly appended claims 3 to 10, inclusive, were properly described and illustrated in the original specification and drawings. As already stated, the newly added matters of the specification in no way aided in a better understanding of the invention as described in such original specification. The advantage of having one end of the box larger or deeper than the other, of having the retaining means and cover for the match-box so as to permit the matches to be readily taken from the box upon the opening of the cover, without disturbing or displacing the base-strip, of the open face of such box, and of the capability of the box for re-use of new combs or packages of matches, were all either clearly and fully described or were obvious to any one skilled (if any skill was needed) in that particular art. The last specified defect, viz., that the original patent failed "to adequately claim the invention forming the subject-matter of the newly appended claims 3 to 10, inclusive," would seem to be the one that induced the application for a reissue. At any rate, I am of the opinion that no reissue would have been necessary to correct any alleged defect or insufficiency of the specification to protect the invention distinctly pointed out in the claims. That the controlling purpose of the reissue was to secure enlarged claims is evidenced by the argument addressed by the patentee's counsel to the Commissioner of Patents to overcome the examiner's rejection of these newly added claims. In summing up this argument (June 20, 1904) he says:

"First. The claims numbered 3 to 10 were never embodied in the original case, even by suggestion. * * *

"Third. Applicant was clearly and undoubtedly entitled to these claims in his original case, and they should have been embodied therein.

"Fourth. The claims originally in the case (patented) or as amended were not sufficient to cover and include the structures set forth in claims 3 to 10 under discussion.

"Fifth. The reissue application was filed for the purpose of obtaining for applicant adequate protection on these novel features and the claims are such as are clearly within the provisions of the reissue law.

"In conclusion, it would appear that each and every one of these claims is allowable, even considering the examiner's position to be correct as concerns the original claims.

"For instance, if a party had a claim rejected which covered a box and match-retaining means, broadly, this would not prevent him claiming the match-retaining means just as broadly, provided he included an additional, new element, such as a pivoted cover. Now, applicant has gone a step further: He has selected something more than a retaining means; he has included a retaining and *engaging* means in combination with a number of novel structural features which were never mentioned in the original or amended claims of the first case."

The following arrangement of the several elements of claim 1 of the original as filed and as allowed (it not being necessary to analyze claim 2, as it is limited to a wedge shaped box), and of claims 5 and 10 of reissue, set up in parallel columns, will be helpful in making the comparison of these elements necessary to a determination of whether any material canceled elements of the claims as originally presented appear in the claims here alleged to be infringed:

Claim 1 of Original Application as Filed.	Claim 1 of Original as Allowed.	Claim 5 of Reissue.	Claim 10 of Reissue.
A match-box comprising	A match-box comprising	A match-box having	A match-box provided with
(1) a back, having turned-up lips to afford	(1) a back, having turned-up lips to afford	(1) a solid back,	(1) a back and
(2) side and	(2) side and	(3) a turned-up end member rigid therewith,	(3) end member and
(3) end portions for the body of the box, and having, integral with the end portion,	(3) end portions for the body of the box, and having, integral with the end portion,	(2) two side members also rigid with said back, substantially the entire front of said box being open,	(2) two side members rigid and integral with said back, substantially the entire front of said box being open,
(4) a turned-over holding-piece adapted to partly overlie a package of matches, and which holding-piece is provided with an opening through which the matches may be ignited on the friction material of the package, said box being provided with	(4) a turned-over holding-piece adapted to partly overlie a package of matches, said holding-piece having its central portion open to provide an aperture through which the matches may be ignited on the friction material of the package, and said box being provided with	(4) a match-retaining and engaging flange arranged near one end of the box to hold a package of matches exposed to view through the open front, and	(5) a cover hinged near one end of the box, and
(5) a suitable lid.	(5) a suitable hinged lid.	(5) a cover pivoted to the box and arranged to cover the open front.	(4) means near the end of the box opposite the cover hinge for engaging and retaining a comb of matches whereby the entire comb of matches is exposed when the cover is opened and individual matches may be detached without disturbing the comb.

From this comparison it will be seen that, with respect to the holding-piece element, claims 5 and 10 of the reissue and claim 1 as presented in the original application are substantially the same, but that, with respect to such element said claims 5 and 10 are broader than claim 1 as originally allowed and restated in the reissue.

The patentee, however, insists that, even if these claims are broader in respect to the holding-piece, yet inasmuch as new elements—"novel structural features which were never mentioned in the original or amended claims of the first case"—were added to these claims, he is entitled to such enlarged retaining means. The added novel structural features here referred to are italicized as follows:

(1) That the back is *solid;*
(2) That the end and side members are *rigid* with the back;
(3) That the *entire front* of the box is open;
(4) An *engaging* flange *near* one end of the box;
(5) And arranged to *cover the open front.*

None of these features was distinctly claimed. The *solidity* of the back, the *rigidity* of the end and side members, the *openness of the front,* the *nearness* of the *flange* (retaining means) to one end of the box, and its (or the lid's) adaptability *to cover the open front,* were all parts of the described and disclosed device sought to be patented. Surely the "solidity," "rigidity," and "openness" in relation to the object sought, and the depicted means whereby such object was to be attained, were not new; and, if not novel, they had no proper place in the claim. Furthermore, if all these alleged novel features, thus disclosed, were not available for the protection of the allowed claims, they must be held as either dedicated to public use or impliedly disclaimed. It is certain that they cannot be said to have been omitted from the claims by "inadvertence, accident or mistake." If this method of broadening the claim is valid, the effect is to nullify the rejection by the Patent Office without resort to the statutory method of correcting such action (Rev. St. §§ 4909–4911 [Comp. St. 1913, §§ 9454–9455]), and to overcome the deliberate and intentional acquiescence in such rejection by the patentee when his original application was pending in the Patent Office. But this, under the authorities, cannot be done.

Nothing but a clear mistake or inadvertence, and a speedy application for its correction, will authorize the enlargement of a claim. The mistake must be actual, not a mere error of judgment (for that may be rectified by appeal)—a real bona fide mistake inadvertently committed, such as a court of chancery, in cases within its ordinary jurisdiction would correct. Miller v. The Brass Co., 104 U. S. 350, 26 L. Ed. 783.

[2] A reissue cannot embrace a claim presented on the application for the original patent and rejected. The omission of such claim from the original patent "was not, and could not have been, the result of inadvertence, accident, or mistake, but was the result of design on the part of the Commissioner and acquiescence on the part of the patentee." Mahn v. Harwood, 112 U. S. 354, 359, 5 Sup. Ct. 174, 177 (28 L. Ed. 665). See, also, Corbin Cabinet Lock Co. v. Eagle Lock Co.,

150 U. S. 38, 14 Sup. Ct. 28, 37 L. Ed. 989; Toledo Computing Scale Co. v. Moneyweight Scale Co. (C. C.) 178 F. 557, 562; Boland v. Thompson (C. C.) 26 F. 633; Chicago Ry. Equipment Co. et al. v. Perry Side Bearing Co. et al. (C. C.) 170 F. 968; Specialty Mach. Co. v. Ashcroft Mfg. Co. (D. C.) 205 F. 760; Grand Rapids Show Case Co. v. Baker et al., 216 F. 341, 350, 352, 132 C. C. A. 485.

The question under consideration does not present the broad one of power to enlarge inadequate claims by a reissue, but the more limited one of overcoming by a reissue the error of acquiescing in the Commissioner of Patents' decision that the patentee was entitled only to a narrower claim. The cases cited by complainants' counsel do not touch the latter question.

The patent as originally granted was not inoperative. Nor was it invalid by reason of defective or insufficient specifications, nor because its claims were too broad. Upon the examiner's refusal to allow broad claims, the applicant was confronted with the alternative of appealing from or acquiescing in such decision. Having yielded, he is bound by it.

The defendant is entitled to a decree dismissing the bill.

DE LASKI & THROPP CIRCULAR WOVEN TIRE CO. et al. v. UNITED STATES TIRE CO.

(District Court, S. D. New York. December 8, 1915.)

1. PATENTS ⟸328—ANTICIPATION—APPARATUS FOR MAKING WHEEL TIRES.
The Thropp patent, No. 822,561, for an apparatus for making wheel tires, *held* void for anticipation by prior use.

2. PATENTS ⟸73—DATE OF INVENTION.
To carry back the date of invention of a patented combination to the time of a prior disclosure by the patentee, all of the elements of the combination as patented must have been present in the structure then disclosed.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 64; Dec. Dig. ⟸73.]

3. PATENTS ⟸16—"INVENTION."
"Invention" necessarily involves a conscious element. It is the imaginative projection as an integral idea of certain selected natural objects. The fortuitous juxtaposition of the elements, without any conscious recognition of some pragmatic relation, is sterile and valueless.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 14, 15; Dec. Dig. ⟸16.

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

In Equity. Suit by the De Laski & Thropp Circular Woven Tire Company and others against the United States Tire Company for infringement of letters patent No. 822,561, for apparatus for making wheel tires, granted to Peter D. Thropp. On final hearing. Decree for defendant.

Walter C. Noyes and E. Clarkson Seward, both of New York City, for plaintiffs.

Livingston Gifford and Ernest Hopkinson, both of New York City, for defendant.

LEARNED HAND, District Judge. This case is an effort to secure a different result from the decision of the Circuit Court of Appeals for the First Circuit by means of new testimony. It divides itself into two parts: The first, testimony leading to the conclusion that the "Goodrich use," upon which the defendants relied in that case, was in fact only an experiment, or at least was not shown to be more than an experiment; the second, testimony to carry back the date of the invention from February 1, 1905, to January, 1904. I shall consider these two efforts in the order stated.

[1] I shall start with the use of the molds to make the four 36 by 4½ inch tires which were delivered to the Baker Motor Vehicle Company on January 10, 1905. The plaintiff raises only one question regarding the deliveries of the molds before January 6, 1905, and this is that the weight of castings delivered and paid for is 854 pounds, which it says was about right for a closed mold, but nearly twice as much as enough for an open mold. I assume that somewhere in the case there is evidence that the weight in question is too great for the open molds, though I have not been referred to such testimony. Still under that assumption I think the discrepancy is immaterial. There cannot be the least doubt that open molds were delivered on January 6, 1905, and paid for on January 7th. The Goodrich Company may have paid too much, but that is beside the point.

The next question is of the manufacture of the tires. The mold books show plainly that the open molds were to be used with ring 967, which had also its complement of closed molds. Thus you might make a closed mold tire or an open mold tire on that ring. Order 1,181 is for four tires, which are to be made on ring 967 and to be "cured in open heat." Now the drawings for the open heat mold are expressly called "open heat molds" and "open heat fillets." Yet it is urged that the tires may have been produced without any molds at all, but by mere wrapping of them around the ring. If so, the beads were formed beforehand, and the order was for two-cure process and the open cure was the second part of it, during which the tire could merely be wrapped around the ring or core. Yet we find that the composition numbers for these tires are "685, 838," and that there is but one period of cure indicated; i. e., 1 hour and 20 minutes. Let us turn to the other orders: Wherever there was a double cure, two entries appear in the heating directions, calling for 3 hours, instead of 1 hour and 20 minutes, and divided into two periods, of which one is always called "open" and the other is not. Moreover, the composition is always "379, 379." This appears in orders 1,184, 1,961, 1,960, 1,834, 1,881, 1,962, 2,115, and 2,025. On the other hand, where the cure is single, the composition is always "685, 838," and there is but one period—i. e., 1 hour and 20 minutes—except in one order, where it is 1 hour and 10 minutes.

These are orders 1,182, 1,184, 1,188, 1,297, 1,307, 1,388, 1,636, and 1,308. Order 1,184 was first made out for a single short cure of 1 hour and 20 minutes, with composition 685, 838; but the first two tires of the form ordered were later changed to another mold and a 3-hour cure, and the composition 379, 379, was substituted. On this order the first intention was to cure all the tires in open heat, but this was later abandoned.

The necessary inference from these orders is that the cure in order 1,181 was single. If single, not even the plaintiff, I believe, would contend that it could have been accomplished without molds 1,008 and 1,009, or that merely wrapping it around the ring would do. This being premised, the words "cure in open heat" can mean only one thing, which is as the defendant insists. The supposed change of that entry amounts to nothing whatever, as inspection will satisfy. Now, it is true that the order does not contain the mold numbers; but that was inevitable. The order was made on December 23, 1904, before the molds had been made, though not before they were designed. They could hardly have got a mold number before they came to the factory on January 6, 1905.

The delivery of the tires need not rest upon Duffy's testimony; the best evidence is the actual payment for them upon the invoice describing them. I must confess I can hardly imagine a more complete documentary demonstration of the making and delivering of these four tires than this evidence discloses, under the necessary limitation of factory conditions.

The plaintiff answers that the sale was experimental; at least, that it might be. Everything points to the contrary. On January 20, 1905, the company paid $250 for additional complete sets of 4, 3½ or 2½ inch molds, which had all been designed in the preceding December. Why should it have thus prepared four sets to experiment with, when one was enough? The fact that no orders appear for 4-inch and 3½-inch tires does not indicate that they were experimental, but only that they were not called for commercially, a very different matter. The inference certainly is strong that the Goodrich Company was prepared to make such tires generally. Further, while we have not the drawings, we do have it upon the entry in Alkire's book that there was an equipment of open heat molds for the ring of mold 942 to make a set of 30 by 3 inch tires. I see no reason to question the entry or suspect its good faith, especially in the light of orders which I shall now consider.

All but one of the other factory orders are for 30 by 3 inch tires, and the mold for these was No. 942. All evidence is missing of the manufacture of open molds for 942, except Alkire's entry that it had an open mold equipment. Nevertheless, the orders show, first, that such molds were intended; and, second, that they were used. First, consider the order 1,307, which was never filled. It was for a single cure tire, as is proved by the time of curing and the composition to be used, and it was intended to be an open cure tire, for it says so. Consider next order 1,184 in its original form. It likewise directed the manufacture of two 2½-inch tires by a single cure in open heat, but was

afterwards changed; it also directed the manufacture of two 3-inch tires by a single cure in open heat, and the significant phrase is used, "Baker ring No. 942; see below." Why does it repeat the mold number, when the number 942 has been once already used? The words "see below" have reasonable reference to "cure in open heat," an instruction which would explain why, after the closed molds number was used, the words "Baker ring" should be added, a meaningless addendum, if the tire was to be made on a closed mold. These orders are consistent only with intended open molds for 942, but they do not show that these ever were used.

Let us now take up the other orders for 942. Order 1,188 is for a single cure tire on "Baker ring No. 942" cured in open heat, and it was filled; orders 1,297 and 1,308 are the same, though the words "Baker ring No. 942" are omitted; order 1,388 would be the same if the mold No. 942 had not been erased. Some mold must, of course, have been used, and the only known mold for 30 by 3 inch tires was 942. Now these orders amount in all to twelve other tires, and demonstrate in my judgment that Alkire was right when he said there was an open mold equipment for ring 942. It is true that in the case of the two cure 30 by 3 tires we have no proof from the order that the first or second cure was with an open mold, but we do know that there must have been such molds, if once we assume that they were necessary for a single cure tire by open heat.

We have proof, then, that the company had actually made and delivered four 4½-inch tires, that they had outfits for 4-inch, 3½-inch, 3-inch, and 2½-inch tires, that they actually made 3-inch tires on these open molds, and that they made many others on what might have been open molds. We have further the evidence of witnesses, in some instances, apparently unbiased, e. g., Mell, who says that the instances thus proved concretely in mechanical detail, and fixed absolutely in date, were not sporadic, but part of a series of commercial orders which the company was regularly filling. Admitting that memory may be unreliable as to details of manufacture and dates, it is not so as to whether a given instance was single or became part of a series. The exact details, and dates we have; the extent and provisionality of the instances is a matter which men will remember. I must confess that to extend an arid pedantry to this kind of proof does not seem to me in the interest of justice. Men's lives and liberty depend upon no such meticulous casuistry as is so often invoked to save a patent, and I can see no supreme public interest in subjecting an art to the monopoly of a supposed first inventor, by the exercise of perverse and arbitrary ingenuity to put askew all reasonable proof that others have come into the field before him.

Therefore, I agree with the Circuit Court of Appeals for the First Circuit that the patent was anticipated in January, 1905. The next question is of carrying back. I accept the plaintiffs' proof in toto that Thropp made the molds which he claims in January, 1904, and used them to hold together provisionally the bead of a tire which he was making out of a new single piece fabric, which he had found intractable under ordinary management. The heating necessary to this purpose

did not, however, semicure or cure in any way any part of the tire which the mold did not touch. Of course, a patentee is entitled to his monopoly upon all undiscovered uses of his invention, and, if Thropp completed his invention at that time, it is immaterial whether he only had in mind dealing with a difficult fabric or something else.

[3] Yet invention necessarily involves a conscious element. It is the imaginative projection as an integral ideal of certain selected natural objects. The fortuitous juxtaposition of the elements without any conscious recognition of some pragmatic relation is sterile and valueless. It was essential that Thropp should have grasped as a combination the elements which he later embodied in his patent. Once he did so, and incorporated them into physical form, he had completed his invention; but no combination will serve of less than all the elements consciously understood as related to each other. The question of what was the combination of the patent, therefore, depends upon what series of elements he selected as a structural unity, and this is unquestionably to be determined in part by the purposes for which he made it. That the unity once conceived is in no sense dependent upon the inventor's specific creative purpose is in no sense inconsistent with the necessity of some originating purpose to the satisfaction of which all the elements combine. The measure of combination may therefore be taken as the least which will answer what could have accomplished the inventor's declared purpose.

Now it is perfectly clear that in the case at bar he was concerned with an apparatus which would make a clencher tire, or, as he says, one which would hold it in position while it was vulcanized. It is quite as clear that he presupposed that the whole surface of the tire was to be contained in some manner under pressure, for he says, when speaking of the fillets, *17* and *18* (lines 65–70), "the whole is wound with a wrapping of tape *19*, the filling-pieces *17*, *18*, serving to impart the pressure of the winding tape to the sides of the tire to hold the latter in position during the vulcanizing process." Moreover, no one would think of making a tire while leaving that part of it without any support whatever. It is not necessary to consider whether some kind of tire might be made or what difficulties are inherent in the use of any such structure. If it is apparent from all the evidence that no one would in fact make a commercial tire leaving the space in question vacant, it must follow that the fillets or their equivalent were in fact a part of the actual combination disclosed. It may be that a longitudinal wrapping or straight-jacket would be the equivalent of the fillets, just as the tapering edges of the infringement are; but some equivalent is essential within the meaning of the patent. Unless some such limitation is read into claims 1 and 2, they go beyond the disclosure and claim an impractical device; in short, they are not tire-forming apparatus, because they will not form a tire which would be commercially accepted. If, therefore, these claims are to be confined to the disclosure, as they must be, they do not include the molds devised by Thropp in 1904.

Furthermore, if the invention is found in Thropp's press of January, 1904, it is antedated by the Fisk cold press of 1903 and 1904.

It can make no difference that the press was intended only as a cold press, for it is the apparatus which was patented. The sole question here is what elements are included in the apparatus. This press was amply proved to antedate January, 1904. The evidence of the first date of this device is as follows: The Fisk Company experienced difficulty in making the beads of a kind of tire known as the "Bolted-On" type. Their first expedient was to cut away that part of the closed mold which covered the tread, making an open mold like Thropp's 1904 mold, but with the sides rising higher. The date when this mold, of which one of the originals was produced in evidence, Exhibit 205, was made, is not proved by any document, though Cole says categorically that it was used in 1903, and Jameson is sure that they began to use it within 60 days after he came to the company in the early summer of 1903. Having found these molds useful for the preliminary treatment of the tires, a drawing and pattern were made for a similar mold of which an example was produced, Exhibit 206, whose sides stopped nearer the bead. This was, except for the form of the bead, precisely similar to Thropp's 1904 mold. It is quite true that the only drawing in evidence is dated June 10, 1904, but Cole is certain that a mold was in use in 1903. Moreover, he produced certain bills from the Lamb Company, the casters, showing the delivery of molds like Exhibit 206, of which the earliest was December 23, 1903. On that day were received castings from 2½-inch, 3-inch, and 3¼-inch patterns in this shape. The drawing in evidence, dated June 10, 1904, was for a 4-inch mold. The castings of that mold were delivered June 24, 1904. There is, therefore, no discrepancy in the evidence, though the drawings for the 2½-inch, 3-inch, and 3¼-inch molds, delivered on December 23, 1903, are certainly missing. I can see no reason, however, to question the credibility of Cole's identification of these castings delivered on December 23, 1903, as being in fact made like Exhibit 206, nor to doubt the date.

Having fixed the date of the earliest castings delivered like Exhibit 206, there is the strongest possible reason to suppose that the molds made in the Fisk factory by changing over the old molds antedated them. These were confessedly makeshifts, and were originally made for experimental purposes. They must in reason have preceded the order for castings made after patterns, and the substitution of Exhibit 206 reasonably marks the final termination of the experimental character of the effort. Hence we have, in my judgment, the best of reasons for supposing that Cole, Jameson, and Bennett are right in saying that Exhibit 205 was used in 1903, and that during that year they were replaced by molds designed to become a part of the standard equipment of the factory. Hence I have no hesitation in finding that the Fisk mold antedates Thropp's 1904 model. I do not, of course, mean that the Fisk mold was itself an anticipation of the patent; but, if Thropp may carry back to January, 1904, then he is met by an apparatus as near to his invention as that by which he would carry it back.

[2] It has been suggested that, even if Thropp's 1904 mold was not the actual invention, it was so near that its disclosure was in effect

a disclosure of the invention itself. Pickering v. McCullough, 104 U. S. 310, 319, 26 L. Ed. 749; National Cash Register Co. v. Lamson Consolidated Co. (C. C.) 60 Fed. 603. Those cases decide that matters of the detail of construction need not be perfected in order to constitute a disclosure of the invention; but that is far from saying that all the elements need not be present which the patentee has selected to constitute the invention. If, as I believe, Thropp chose for the elements composing his invention more than the bead molds; if he intended to be added enough more to make a curing equipment, that alone was his invention. It was his right to select, but his selection concludes him as to the scope of his combination. It does not lie with him later to say that his invention really lay in less than all the elements he selected, on the ground that one of the elements could easily have been supplied if the rest were disclosed. Having chosen to add the element in question as a necessary part of his patented invention, it included that element for purposes of earlier disclosure, as well as for everything else. That particular invention he could disclose only by an embodiment of all those elements, and it is quite immaterial whether a part of those elements also constituted a separate invention, which he might also have patented.

The bill is dismissed, with costs.

DENNY RENTON CLAY & COAL CO. et al. v. PORTLAND CEMENT PIPE & TILE CO. et al.

(District Court, D. Oregon. April 17, 1916.)

No. 6885.

1. PATENTS ⊜328—INFRINGEMENT—SEWER PIPE MACHINE.
   The Thomas patent, No. 929,898, for a machine for making cement sewer pipe provided with means for rotating the mold and core together in the same direction, and also for locking the core against revolving at a later stage of the operation, is for a combination of old elements, entitled only to a restricted construction; as so construed, *held* not infringed.
2. PATENTS ⊜245—INFRINGEMENT—PATENT FOR COMBINATION.
   In a patent for a combination, all the elements specified in the claims must be regarded as material, and the patent is not infringed, if any are omitted, unless a clear equivalent is substituted.

   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 386; Dec. Dig. ⊜245.]

In Equity. Suit by the Denny Renton Clay & Coal Company and Bruce C. Shorts, trustee, against the Portland Cement Pipe & Tile Company and C. H. Bullen. On final hearing. Decree for defendants.

John B. Cleland and Jos. L. Atkins, of Portland, Or., for plaintiffs.

Bauer & Greene, A. H. McCurtain, and J. W. Kaste, all of Portland, Or., for defendants.

WOLVERTON, District Judge. [1] Plaintiffs are the exclusive owners of letters patent No. 929,898, and of the invention and im-

provements therein described, and bring this suit against defendants to enjoin infringement. Complainants' invention relates to machines for making concrete pipes or drains, such as are employed in the construction of sewers, culverts, and the like. Among other specific objects of the invention, are stated the following·

One is:

"To provide a machine for forming the interior walls of the pipe or drain with a glazed surface, thereby to render the pipe impervious to moisture."

And another is:

"To provide a machine in which the mold and core member are mounted for rotation in the same direction and at the same rate of speed."

Complainants' device, briefly described, consists of a core loosely mounted on the lower end of a shaft, a mold so arranged as to be concentric with the core, the mold showing in the drawings a bell at the top (though no special claim is made in the patent for the bell or any bell core), all mounted on a table, which table by certain means and appliances is made to rotate. This carries with it by rotation the core and the mold. While thus in operation, the cement material, through contrivances to direct its course, is poured into the space between the mold and the core, and by certain other contrivances is tamped down as it finds its way into the interstice. When desired, the core may be locked against rotation by means devised for that purpose, and the mold, with its pipe, will continue to rotate, by which operation the tile or pipe is troweled or glazed on the inside, which gives it a smooth appearance, and renders the pipe to a greater extent, if not wholly, impervious to water.

The locking device, by which the core is locked against rotation, consists of a hook affixed to the top of the drum composing the core, which is made to engage with a collar on the shaft. The core is made collapsible, and may be again expanded, which serves the purpose of loosening the core from the pipe and putting it in position for glazing the inside of the pipe. This feature, however, has but little to do with the question involved by the present controversy. Mr. Kinealy, a consulting engineer of eminence, says:

"The characteristically novel features of the Thomas [complainants'] invention lie in providing a cement sewer pipe machine comprising a mold and a core with means whereby, during the formation of a sewer pipe, the mold and the core may be caused to rotate together, and whereby, after the pipe has been formed, the core may be held at rest while the mold and the pipe are rotated with the inner surface of the pipe in contact with the outer surface of the core."

The defendants' machine, the one which it is claimed infringes complainants' patent, consists of a core-carrying shaft, which is square and is prevented from turning about its longitudinal axis. The core is made in two parts, forming the body or main cylindrical portion of the pipe, and an upper part forming the bell of the pipe. The core is rigidly attached to the lower end of the core-carrying shaft. The bell core, when not in use, is carried up with chains, detachably attached to handles on the sides. The mold is formed in halves. When the halves are in place they rest upon a table, which latter is made

to rotate, carrying the mold in rotation also, but the core remains stationary. The core surrounds a base ring, called by some of the witnesses for the defendants a pallet. A like appliance is used in complainants' patent, but referred to as a ring, or hose ring. This ring also rotates with the mold, but the core remains stationary. When the machine is thus in movement, the cement material is fed into the interstice and tamped in the same way practically as it is fed into and tamped in the complainants' machine. When the material is filled to the offset forming the bell, the bell core is then put in place, and the chains used for lifting or lowering it are detached. The bell core is supplied with lugs intended to rest on the top of the main core. When in this position, the material is fed in so as to fill up the space left between the bell core and the bell of the mold.

The defendants claim that by using a wet mix, which they seem to think is the only kind adapted for use in their machine, it forms a pipe without a glaze on the inner side, and renders it more impervious to water than can be made on plaintiffs' machine. Mr. Kinealy is of the opinion that, in the operation of defendants' machine, the material, when fed in and tamped, adheres to the mold and the ring at the bottom, which revolves with it, and thus causes the inner surface of the pipe to move and revolve about the stationary core, which results in troweling or glazing such surface, the same as is the case with the complainants' machine. As to the bell core he maintains that by friction it is made to rotate with the mold. He further claims that, when the pipe is finished, the bell core is grasped by the handles with hook appliances, and prevented from rotation, while the mold is permitted to rotate, and thus is the inner surface of the bell troweled or glazed. The defendants seem to dispute this particular operation of their machine.

With this description of both machines, including somewhat of their operation, we will be able to advance to a discussion of the question of infringement. But the one question has been presented by the record. Other patents have been offered and admitted in evidence, but these were admitted for only one purpose, and that to enlighten the court respecting the prior state of the art.

Complainants' predecessor was not a pioneer in the art. His device consists in a combination of old elements, and complainants must be held to a largely restricted construction of their patent. Infringement is predicated of the first three claims of the patent. The first claim reads:

"In a machine of the class described, a mold carrier, a mold mounted for rotation on the carrier, a core member movable to operative position within the mold, means for tamping the material in the mold as the latter is rotated, means for rotating the mold and core in the same direction during one operation of the machine, and means for locking the core against rotation while the mold revolves at another stage of operation of the machine."

The second claim differs from the first only in that the words "means for tamping the material in the mold as the latter is rotated" are omitted; and the third differs from the first only as to the features of the tamping mechanism.

It is manifest that the defendants have combined all the elements comprised by claim 1 in their machine, unless it be the last two, namely:

"Means for rotating the mold and core in the same direction during one operation of the machine, and means for locking the core against rotation while the mold revolves at another stage of operation of the machine."

The defendants' device is supplied with no means for rotating the mold and the core in the same direction. The core is built in stationary, and the mold rotates about it at all times. So that there are no means whatever for rotating the two together, and in the very principle of the device none was intended to be. Professor Kinealy explains that defendants' machine has the means for rotating the mold and the core in the same direction during one operation in the driving mechanism, by which the table is made to revolve and carry with it the mold and the bell core. Now, the means alluded to in the claims have no relation to a bell core, but relate to the pipe core, and that it may happen that the appliance called a bell core in defendants' mechanism may be caused to rotate with the mold by friction when the mold is being filled does not answer the call—means for rotating the mold and the core together.

Plaintiffs' claim has relation to a means of rotating the core proper, whether it include a bell core or not, and not to a segregated bell core, which might operate independently of the pipe core, which in defendants' machine is always stationary. I am unable to appreciate how means for rotating a bell core, which is by friction, if it rotates at all, may comprise means for rotating the pipe core proper, which latter involves the very essence of complainants' invention, which is to have a rotating core moving with the mold while the cement material is setting, so that, when the core at the proper time is locked against rotation, the inside of the pipe may be troweled or glazed. Looking to rotation of the bell core only with the mold is taking the shadow for the substance, and does not reach the vital construction of the claim.

I place no stress on the collapsible property of complainants' core member. That is not made an element of any of the claims 1, 2, and 3, and is quite one side of the scope of present inquiry. The sixth element of claim 1 comprises:

"Means for locking the core against rotation while the mold revolves at another stage of operation of the machine."

This again has relation to the core proper; that is, the core by which the pipe is formed, and not the bell core. It follows that means for locking this core against rotation do not necessarily comprise means for locking the bell core in defendants' machine, which bell core is a distinct appliance from any that is claimed by complainants. Indeed, the locking device in complainants' machine is so designed that it locks the core proper, while the means used in the defendants' device is for locking (if used for that purpose at all) the bell core, and one, considering the purpose for which it is employed, is by no means the equivalent of the other. It is my conviction, therefore, that defendants' machine is wholly without means for locking the core proper against rotation, considered in the same relation as complainants have predicated their sixth element in claim 1 as means for locking the core against rotation.

[2] Having come to this conclusion, what is the legal effect of such finding? It is the province of a patentee to make his own claim, and his privilege to restrict it, and, as said by Mr. Justice Blatchford in Fay v. Cordesman, 109 U. S. 408, 421, 3 Sup. Ct. 236, 244 (27 L. Ed. 979):

"If it be a claim to a combination, and be restricted to specified elements, all must be regarded as material, leaving open only the question whether an omitted part is supplied by an equivalent device or instrumentality."

Stated another way:

"In patents for a combination, if the patentee specifies any element as entering into the combination, either directly by the language of the claim or by such a reference to the descriptive part of the specification as carries such element into the claim, he makes such element material to the combination, and the court cannot declare it to be immaterial." Electric Protection Co. v. American Bank Protection Co., 184 Fed. 916, 922, 107 C. C. A. 238, 244.

The latter authority announces also this principle:

"When the patent is for described means or mechanism to accomplish a specified improvement, it will be limited to the particular means described in the specification, or their clear mechanical equivalents."

Still another principle seems to be well established in patent law:

"That, as the inventor is required to enumerate the elements of his claim, no one is an infringer of a combination claim unless he uses all the elements thereof." Cimiotti Unhairing Co. v. Am. Fur Ref. Co., 198 U. S. 399, 410, 25 Sup. Ct. 697, 702 (49 L. Ed. 1100).

See, also, Boyd v. Janesville Hay Tool Co., 158 U. S. 260, 267, 15 Sup. Ct. 837, 39 L. Ed. 973.

It follows, therefore, if any essential element of the combination is omitted from the alleged infringing device, without substituting therefor its clear mechanical equivalent, the charge of infringement is not sustained. Acme Truck & Tool Co. v. Meredith, 183 Fed. 124, 127, 105 C. C. A. 414; Union Match Co. v. Diamond Match Co., 162 Fed. 148, 155, 156, 89 C. C. A. 172; Brown v. Stilwell & Bierce Manuf'g Co., 57 Fed. 731, 6 C. C. A. 528.

Applying these principles, as it is apparent that the defendants are not employing the fifth and sixth elements as set forth in complainants' claim 1, and like elements contained in claims 2 and 3, or any clear mechanical equivalents, they cannot be held as infringers of complainants' patent.

The bill of complaint will therefore be dismissed, with costs to the defendants.

BASSETT et al. v. BICKFORD BROS. CO.

(District Court, W. D. New York. March 11, 1916.)

No. 172-B.

1. CORPORATIONS ⟸553(1)—RECEIVERS—APPOINTMENT.
Where a corporation, which was unable to immediately discharge its debts, secured an extension from its creditors, and they were given representation on the board of directors, a receiver will not be appointed at the suit of a dissatisfied creditor, though the appointment was concurred in by the president of the corporation, except upon a clear showing of wrongful acts, or threatened injury to the creditors and stockholders.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2201, 2210, 2213-2216; Dec. Dig. ⟸553(1).]

2. CORPORATIONS ⟸552—PRESIDENT—POWERS OF.
The president of a corporation, who, before the corporation got into difficulties, was allowed to conduct corporate affairs, cannot, after creditors, who extended time of payment, were given representation on the board of directors, authorize the appointment of a receiver to liquidate the corporate affairs.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2201; Dec. Dig. ⟸552.]

3. CORPORATIONS ⟸547(1)—DIRECTORS—MISMANAGEMENT.
Where there is a mismanagement by corporate directors, or premature disposal of corporate property on liquidation, the creditors and stockholders liable to be injured thereby will be given relief in equity.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2178; Dec. Dig. ⟸547(1).]

In Equity. Bill by Henry Bassett and others, suing in their own behalf and in behalf of all other creditors similarly situated, against the Bickford Bros. Company. A receiver was appointed, and thereafter, on motion, the order was rescinded, the answer of the president of defendant corporation stricken, and the directors allowed to intervene for the purpose of answering the bill.

Harlan W. Rippey, of Rochester, N. Y., for complainants.
Lewis, McKay & Bown, of Rochester, N. Y., for defendant.
Stull, Shedd & Morse, of Rochester, N. Y., for stockholders of defendant.

HAZEL, District Judge. The bill of complaint filed herein by a creditor firm, suing in its own behalf and in behalf of all other creditors similarly situated, substantially avers that the defendant, Bickford Bros. Company, though solvent, owes large amounts of money, now due and payable, to many creditors scattered throughout the United States, which it is unable to pay; that a multiplicity of suits are threatened; that its assets will be dissipated; that two certain creditors, in violation of an agreement between other creditors and stockholders, have caused to be appointed a liquidating agent, who threatens to sell the real and personal property at a sacrifice, to the detriment of the stockholders and other creditors; and that preferences are likely to be secured unless receivers are appointed by this court to administer the assets, wind up the business of the defendant, and distribute the

money realized from sale of the assets among the creditors and stockholders. An answer, verified by the president of the defendant, was interposed, admitting the allegations of the bill and joining in the prayer for relief.

Thereupon solicitor for complainant, solicitor for defendant being present, moved the appointment of receivers. Such appointment being made, the assets and property of the defendant went into the possession of the receivers who have since by order of this court conducted the business. Subsequently an order was applied for and granted to show cause why the said appointment of receivers should not be vacated, and why the answer interposed by the president should not be stricken out and the proposed answer be permitted to stand in its place as requested by a majority of the directors.

It now appears that the verification of the answer by the president of the defendant company was without the authority or knowledge of a majority of the directors, and that the appearance by counsel for defendant, at the time of the appointment of the receivers, and the filing by him of an answer in the name of the company, joining in the prayer of the bill, was voluntary and unauthorized by the directors, two of whom are the creditors mentioned in the bill as having procured the appointment of a liquidating agent to dispose of the assets of the corporation.

The affidavits disclose that on March 4, 1915, the defendant, though having assets largely in excess of its liabilities, was indebted in the amount of $34,000 to numerous creditors, among them the Traders' National Bank of Rochester to the extent of $11,000, and John Boyle & Co., Incorporated, to the extent of $10,000, and in this situation the then board of directors procured from a majority of the creditors a one year's extension of time for payment in writing. In consideration of such extension by the Traders' National Bank and John Boyle & Co., Incorporated, and advances to be made by the bank, the stockholders transferred to them a majority of the capital stock, and, as three members of the board of directors resigned, one Marks, vice president of the Traders' National Bank, Fredericks, a director thereof, and one Randall, treasurer of John Boyle & Co., Incorporated, were elected in their places. According to the terms of the agreement the stock was to be transferred to permit the transferees as trustees "to support and maintain the business of said company in the interest of all parties interested in said corporation as creditors, stockholders, or otherwise," and at its termination was to be reassigned to the owners. On February 10, 1916, the said directors determined to liquidate the affairs of the defendant company, and pending such liquidation efforts were at once made, with fair success, to procure from the creditors further extensions of time for payment. The affidavits submitted on behalf of the directors deny that suits are threatened by creditors, that the extension agreement has been violated by them, that preferences have been given, or that the sale of real estate at a sacrifice is impending, and assert that the company in the year 1915 lost in its business nearly $8,500, and the directors, a majority being present and voting, at a meeting presided over by the president of the

defendant, determined that it would be for the best interest of all concerned to liquidate the affairs of the company.

[1] Thus it appears that at the time of filing the bill the defendant company was practically in control of directors elected under an agreement of which the stockholders and creditors had notice, and representing the creditors in their conduct and management of the business. In these circumstances in my opinion a court of equity should not interfere to take from the directors the management and control of the business, thus entailing expenses of litigation and receivers' fees, save upon a clear showing of wrongful acts or threatened injury to the creditors or stockholders. Certainly it should not do so upon the concerted action of the complainant, a contract creditor, and the president of the company, who evidently is dissatisfied with the proposed liquidation by the directors and trustees for the stockholders.

This action was not brought to abrogate the trust agreement by which the directors acquired their stock, or to enjoin them from threatened acts of mismanagement, but was brought to conserve the assets of the defendant for the benefit of contract creditors who had not reduced their claims to judgment; and receivers should not be appointed herein merely upon the consent of the president or other officer of the corporation regardless of the wishes of the stockholders or directors of the corporation.

[2] Upon this point the complainant urges that as the corporation has permitted its president for many years to conduct its affairs and employ counsel to institute and defend litigations, his authority to answer in this action, admitting material allegations and joining in the prayer of the bill, may be implied, that such exercise of power was customary, and being without the dissent of the company was presumably with its acquiescence. But with this contention I do not agree. The power and authority of a president of a corporation, true enough, may be practically unlimited in the general management of the ordinary affairs of the corporation; but I am totally unaware of any case holding that the president of a corporation, without the consent or acquiescence of the directors or their subsequent ratification, may do an act which will operate to deprive the directors of the management of the corporation and place it in the hands of receivers for the purpose of winding up its affairs. Walters v. Anglo-American Mortgage Co. (C. C.) 50 Fed. 316; Nesbit v. North Georgia Electric Co. (C. C.) 156 Fed. 979; In re Jefferson Casket Co. (D. C.) 182 Fed. 689.

The latter case though in bankruptcy is not inapt, Judge Ray therein holding that the president of a corporation has no inherent power to take the requisite steps to have the corporation declared a bankrupt; that a voluntary petition in bankruptcy filed on behalf of a corporation failing to show any corporate action by the board of directors authorizing the president to file such petition or to execute it in the name of the corporation was not enough to warrant adjudging the corporation bankrupt. The fact that in the case at bar the president for many years had personal charge of the business does not suffice to empower him to take the steps he did, for his control and management were plainly curtailed by the present directors immediately following

the agreement to which I have referred. Recently, in the case of Picher Lead Co. et al. v. U. S. Light & Heat Co., a conservation action in which no opinion was written, I had occasion to examine the precise question here considered, resulting in the vacation of the appointment of receivers, and a re-examination confirms the view held by me at that time.

It is true that in Walters v. Anglo-American Mortgage Co., supra, and in Nesbit v. North Georgia Electric Co., supra, the facts were differentiable. Indeed, the court held in the one case that the bill was entirely without merit, and that the action was instituted for the purpose of wrecking the company and obtaining control of its business, and in the other that the president, with whose consent the receiver was appointed, had an interest adverse to the corporation; but nevertheless the broader rule controlled the decisions, namely, that the admission of the averments of the bill by the president of a corporation, accompanied by his consent to the appointment of a receiver to wind up its affairs, was not notice to the corporation, since it did not appear that the president had authority to do so, or that the stockholders of the corporation acquiesced therein or affirmed his action.

[3] If, however, there really is mismanagement by the directors to the prejudice of complainant, relief, in a proper case, may be had by injunction, or at the instance of any party aggrieved; and if the interests of the stockholders or creditors are likely to be prejudiced by premature liquidation or by sacrifice of properties, no doubt resort may be had to the injunctive power of a court of equity. But no such remedy is asked, nor is it now available, as this action, as heretofore stated, was not instituted for any such purpose.

The answer interposed by the president of the defendant corporation is stricken out, the order of February 23, 1916, appointing receivers, is vacated, and leave is given the directors to intervene for the purpose of answering the bill. Provision for the payment of the fees and other expenses of the receivership may be included in the order of vacation.

In re WISTER et al.

(District Court, E. D. Pennsylvania. May 22, 1916.)

No. 3902.

1. BANKRUPTCY ⊂=342½—PROCEEDINGS—PETITION TO REVIEW.

A petition for review of an order of a referee, which under General Order 27 (89 Fed. xi, 32 C. C. A. xxvii) is necessary to review and must under the rules of court be filed with the referee within 10 days after the order, is to all intents and purposes an appeal, and the petitioner is an appellant for whose benefit it alone inures; therefore the petitioner is entitled to dismiss, in case he deems it to be to his benefit.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 530; Dec. Dig. ⊂=342½.]

2. BANKRUPTCY ⊂=342½—PETITION TO REVIEW—RIGHT TO FILE.

One who filed no petition to review an order of a referee, but relied on a petition of another, is not, the original petitioner desiring to dismiss,

entitled to intervene for that reason; the time for the petition having expired, for, while no particular delay would result, the original petitioner is entitled to treat the petition as an appeal taken for his own exclusive benefit.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 530; Dec. Dig. ⟸342½.]

In Bankruptcy. In the matter of the bankruptcy of Rodman Wister and others. The referee allowed the claim of Mrs. Sabine W. Wister, and Mrs. Betty Black Wister filed a petition for review of the order. Thereafter she petitioned to dismiss, and J. N. M. Shimer petitioned to intervene. Petition to intervene denied, and petition to review dismissed.

John S. Freeman, of Philadelphia, Pa., for petitioner and intervening petitioner.

Thomas Stokes, of Philadelphia, Pa., for claimant.

DICKINSON, District Judge. The salient facts may be thus grouped:

Mrs. Sabine W. Wister made a claim as creditor of the bankrupt estate. To this objections were interposed by the trustee and by Mrs. Betty Black Wister. The trustee became convinced the claim was a just one and withdrew his objections. The referee allowed the claim. Mrs. Betty Black Wister persisted in her objections, and filed a petition for review. Since then she has likewise become convinced of the justness of the claim as allowed, and has sought to withdraw her petition. If withdrawn, the order of the referee stands.

The situation presents as an outcome a petition to dismiss the appeal and a petition by J. N. M. Shimer for leave to intervene and thereby become the petitioner for the review. It should perhaps be added, both in justification of the legal right of Shimer to intervene, and as bearing upon the attitude of the other parties, that the condition of the estate is such that creditors will be paid by the acceptance of securities in full and a surplus left for the partners, of whom Shimer is one.

There are three questions possibly involved, two of which may be grouped in one: (1) Should the petition be dismissed, or the petitioner, Shimer, be permitted to intervene and to prosecute the appeal? (2) Should the order of the referee be affirmed?

[1, 2] Under General Order 27 (89 Fed. xi, 32 C. C. A. xxvii), which has all the force of statutory law, no review can be had of an order, except upon petition filed with the referee. Under the rules of this court, such petition must be filed with the referee within 10 days after order, and, without this, a review cannot be had, except upon allowance by the court after notice and cause shown, etc.

It is clear, therefore, that, if so allowed, a review may be had; but it is recognized that rights of other parties may arise out of an existing condition which the courts, because of this, will not disturb. A petition to review is to all intents and purposes an appeal, with a recognized appellant, to whose benefit it alone inures. This is involved in the ruling in Re Cohn (D. C.) 171 Fed. 568.

The only reason advanced for what is in effect the allowance now of a review is that the petition filed raised all the questions which could be raised by another petition, and the petitioner was advised that no petition by him was necessary to obtain a ruling by the court. The present petitioner in consequence relied upon the appeal, which had been taken, being pressed. There is an appealing naturalness in acting upon this expectation, and, in a sense, no blame can properly attach to the present petitioner for taking this view. Moreover, the interest which he has, although a different individual interest, is legally the same interest which the original petitioner has. More than this, no further delay results than would have followed the appeal of the original appellant. All of these considerations move to a compliance with the request now made.

On the other hand, he placed his reliance upon the petition filed with the consequences plainly before him, and there is no suggestion of bad faith or deception on the part of the original petitioner. If persuaded, as she evidently is, that it is to her interest to abandon the appeal, it must be admitted that it is her right to do so. It appears from what was disclosed at the argument that she has carefully weighed her present inclinations, and what now appears to be her interests against what she owed to the present petitioner, and the loyalty which she owed to counsel acting for her on the appeal, and has decided what, under all the circumstances, was best to do. We think this was again her right, although the exercise of this does not necessarily control the present petitioner or the court. In addition to this, there is that in the questions raised on the appeal which inclines us (after we admit some hesitation) to hold all parties to adherence to the line of the assertion of their strict rights. The view taken relieves us of the necessity of discussing the questions raised by the appeal sought to be pressed.

The Shimer petition to intervene is denied, and the Wister petition for review dismissed. This leaves the order made by the referee in force and effect.

SUSTOCK v. SHENANDOAH ABATTOIR CO.

(District Court, E. D. Pennsylvania. May 5, 1916.)

No. 3490.

1. MASTER AND SERVANT ⇐228(2)—MASTER'S LIABILITY FOR INJURY TO SERVANT—UNGUARDED MACHINERY—EFFECT OF STATUTE.

A failure to comply with the requirements of the Pennsylvania statute of 1905 (P. L. 355, § 11), requiring dangerous machinery to be guarded, is negligence, or at least may justify a finding of negligence, and, while the statute does not shut out the defense of contributory negligence, the negligence of an injured plaintiff must be negligence in fact, and consent to work at an unguarded machine is not negligence per se, but may or may not justify a finding of negligence in fact.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 671; Dec. Dig. ⇐228(2).]

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2. MASTER AND SERVANT ⊂⊃121(2), 286(22)—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY.

Evidence in an action for injury to an employé from an unguarded machine, which was required by statute to be guarded, *held* sufficient to justify the submission of the case to the jury, both upon the question of negligence of the defendant and of contributory negligence of plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 229, 1028; Dec. Dig. ⊂⊃121(2), 286(22).]

At Law. Action by William Sustock against the Shenandoah Abattoir Company. Sur rule for new trial. Rule discharged.

Clarence H. Goldsmith, of Philadelphia, Pa., and John C. Robinson, of New York City, for plaintiff.

Edward M. Biddle, of Philadelphia, Pa., and M. M. Burke, of Shenandoah, Pa., for defendant.

DICKINSON, District Judge. The disposition of this rule was withheld, owing to a misunderstanding as to the submission of paper books. The complaint of the defendant could be best voiced in a rule under the Pennsylvania statute for judgment n. o. v. It is voiced here by a motion for a new trial. A verdict in favor of defendant would have been consistent with the charge of the court. The case was, however, left to the jury, who found for the plaintiff in a sum which as an assessment of damages is without criticism. The reliance of plaintiff in his assertion of a right to recover is wholly upon those provisions of the Pennsylvania statutes which require dangerous machinery to be properly guarded. In the absence of this legislation, defendant's request for binding instructions should have been affirmed, because there would have been nothing upon which to base a finding of negligence. The case was ably defended, and this rule as ably argued. It is by no means wholly clear that the trial judge was justified in submitting the case to the jury. It is close to the line. We feel, however, that the general proposition is clear.

[1] The requirement of guards is within the power of the state to make. A failure to comply with such requirements is negligence, or at least may justify a finding of negligence. These laws do not, of course, shut out the defense of contributory negligence. The negligence of plaintiff must, however, be negligence in fact. Consenting to work at an unguarded machine is not negligence per se. It may or may not justify a finding of negligence in fact. A machine might be of such construction that it would be clearly a reprehensible act to put any one at work at it when unguarded. Another machine, although unguarded, might be safely operated with the exercise of a not exacting degree of care. In the former case the attempt to operate such a machine might well be so imprudent as to call for a refusal by the workman to expose himself to such a risk. In the latter case he could not fairly be charged with negligence if he exercised that degree of care which the conditions demanded. There is no difference in the principle of the obligation resting upon employer and employed. Each is held to the exercise of due care under the operating conditions, and each is alike answerable for consequences to which

his negligence contributed. This would mean they are alike negligent or free from negligence in the mere act of operating an unguarded machine. The mere presence of risk of injury, however, does not necessarily imply negligence.

[2] There is in this case ample room for a finding that this machine, although dangerous in the sense that every machine with exposed moving parts is dangerous, might nevertheless be operated without charge of negligence in so doing. If this were all the case disclosed, the verdict could not be sustained. Neglect of a duty, however, is of the very essence of negligence. This applies as well to a duty imposed by positive law as well as to one which may be termed a natural duty. The act of assembly of Pennsylvania (P. L. 1905, p. 355, § 11), required the plaintiff to guard this machine. This forbade the operation of it without a guard. If the defendant so operated it, a conviction of negligence would be justified. This statement of defendant's liability is not controverted. It is urged, however, that the plaintiff, by consenting to operate the machine, was himself guilty of negligence. This presents the first proposition upon which defendant relies. It is that such act is negligence per se. This the trial judge declined to hold to be the law. On the contrary, he held the presence of negligence to be a fact to be found. If the operation of the machine was so obviously fraught with danger that ordinarily and reasonably good judgment would condemn its operation, the plaintiff was bound to refuse, and operating it without protest would be negligence. If, on the other hand, the exercise of such a judgment would pronounce the machine safe to operate provided due care was used, and the degree of care called for could well be used, and such care was used, there was no imperative duty on the part of the plaintiff to quit the work. To hold otherwise would be to nullify the legislative requirement, or at least make compliance turn, not upon the command of the Legislature, but the demand of the employé. In this view of the case the trial judge was required to submit the question of negligence to the jury, if the employer required the machine to be operated without a guard. The employer in this case had, however, provided a proper guard. The proviso of the statute, and indeed its plain meaning, would make its requirements applicable only to machines in ordinary operation. The statute would have no application to machines being operated as part of the act of repair.

This brings us to the main position of the defense. The trial judge submitted the case to the jury in a charge, the turning point of which was the fact left to the jury to find whether the machine was ordered by the defendant to be operated as in its ordinary business operation, or merely as part of the work of repair. In the latter case the jury were instructed there could be no finding against the defendant. The jury found this turning fact in favor of the plaintiff. The question is whether this fact has been found without evidence. If it has, there was error in the submission. This is the question already adverted to as a close one. The case for the plaintiff is by no means a strong one. We are unable to say, however, that there was no evidence to support the verdict. The jury gave a patient and intelligent hearing to the case. The verdict is doubtless due as much to the evidence

submitted by the defendant as to that of the plaintiff. The testimony of defendant's foreman might have given an impression favorable to the plaintiff, although not so intended. This was due more to his manner of testifying than to what he said. It was perhaps owing to the fact that he had difficulty in expressing himself in English, and perhaps in quickly grasping the import of questions asked him. Whatever the real fact may be, the observation obtrudes itself that, if there was evidence to submit, it is the province of the jury to weigh and pass judgment upon it. It cannot be said there was no evidence, and no such aggressive difference of opinion as to the proper inference to be drawn as to shut out the conviction that there is room for a fair difference of judgment.

The rule for a new trial is discharged, and plaintiff may enter judgment on the verdict.

In re WEST.

(District Court, M. D. Pennsylvania. May 20, 1916.)

No. 2899.

1. BANKRUPTCY ⟸262(3)—SALES OF PROPERTY—AUTHORITY OF COURT.
   The bankruptcy court may sell property of the bankrupt discharged of liens.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 365; Dec. Dig. ⟸262(3).]

2. BANKRUPTCY ⟸474—AUTHORITY OF COURT—JURISDICTION.
   Where a bankrupt's property is sold free from liens with the consent of the lienholders, necessary costs of sale, including commissions of the referee and trustee, may be allowed, regardless of whether there is a surplus above the amount of the lien.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 878–884; Dec. Dig. ⟸474.]

3. BANKRUPTCY ⟸474—SALE OF PROPERTY—LIENS.
   Where holders of liens against property of a bankrupt made no protest at its sale discharged of liens, and bought it in, their consent is presumed from their acquiescence, and reasonable and necessary costs incurred in the sale should be paid out of the proceeds, though the amount realized be insufficient to satisfy the lien.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 878–884; Dec. Dig. ⟸474.]

4. BANKRUPTCY ⟸368—SALES—COMMISSIONS OF TRUSTEE.
   Where a trustee in bankruptcy sold property free from liens, and the lienholders who bought it in paid only part of the purchase price in cash, the remainder being credited upon the amount of their liens, the trustee is entitled to commissions computed on the sale price, and not the price paid in cash.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 571; Dec. Dig. ⟸368.]

5. BANKRUPTCY ⟸474—SALES—COUNSEL FEES.
   Where property of the bankrupt is sold free from liens, reasonable counsel fees may be allowed out of the proceeds, though they did not equal the amount of the liens; the lienholders acquiescing.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 878–884; Dec. Dig. ⟸474.]

In Bankruptcy. In the matter of the bankruptcy of Thomas West. Exceptions to referee's report of audit and petition for review. Report of audit referred to referee, with instructions to modify.

J. Q. Creveling and H. L. Freeman, both of Wilkes-Barre, Pa., for trustee.

G. J. Clark, A. H. James, and W. A. Millard, all of Wilkes-Barre, Pa., for creditors.

WITMER, District Judge. The request for review of the order of the referee was not in time or in proper form. However, considering the matter on its merits, the action of the referee must be chiefly sustained. The trustee sold the real estate of the bankrupt discharged of the mortgage liens, which exceeded the total realized. The lienors, not having actually consented to the order, nevertheless attended the sale and became the purchasers. On auditing the account of the trustee, the referee allowed the following credits: Commissions of referee, $407.61; trustee, $885.61; attorney for trustee, $200; and receiver's costs, $264.88. This action of the referee was assigned as error and is to be reviewed.

[1, 2] The authority to sell discharged of liens is undoubted, and it is equally well settled that, under certain circumstances, the necessary costs of sale, including the commissions of referee and trustee, with reasonable counsel fees, are allowed. In the controlling case, In re Vulcan Foundry & Machine Co., 180 Fed. 671, 103 C. C. A. 637, Judge McPherson in delivering the opinion of the Court of Appeals, said:

"It is no doubt true that the federal tribunals support the power of the District Court to sell a bankrupt's real estate discharged of liens—and to that extent the position of a lien is undoubtedly affected—but care is always taken to protect the liens by transferring them to the fund produced by the sale, and their virtual ownership of the property is thus effectively admitted. It is also true that in some cases certain expenses have been charged against lienholders, for example, the expense of selling the incumbered property, and such a charge may no doubt be warranted under some conditions. It would certainly be warranted if the lienholders came into the District Court (as they did in several reported cases) and asked that the sale might be made by that tribunal, for otherwise they would themselves be put to a similar expense in proceeding upon their liens in another forum. But where it is sought to charge a lienholder with the cost of preserving and administering the incumbered property, as distinguished from the cost of its sale, it becomes necessary to consider the particular situation with great care, paying due regard to the rights of those who are in equity part owners of the property, for they cannot be deprived of their valuable interest, except in strict accordance with legal or equitable rules. Especially is this true when a lienholder stands upon his lawful rights, and does not assent, expressly or by necessary implication, to the acts for which he is afterwards asked to pay. To make such charges a prior lien upon the fund produced by a sale in effect compels an owner to pay for what he has never ordered—may, indeed, have strenuously opposed—and, under the guise of protecting his interests, may perhaps impair them seriously."

[3] Applying the principle here laid down, it may be conceded that the administration of the estate by the receiver, and the sale by the trustee, was solely with a view of realizing for the general creditors, and not for the benefit of the lienholders. Having failed in

this, there would be no reason why the experiment should be charged up to the lienholders, and the expenses deducted from their securities, had they not participated in the same. There is, however, no evidence here that such participation extended to the costs incurred by the receiver, and in the absence of good reason why they should bear the same, such costs are disallowed. Referring to the expenses of sale, it may be said that, while they did not affirmatively assent to the order entered by the referee, yet they made no protest, and actually became the purchasers of the property sold. By their acquiescence and participation in such sale, their consent is assumed, and it is presumed that they intended that reasonable and necessary costs incurred in the sale of the estate should be paid out of the proceeds realized, even though their liens be postponed thereby.

[4] It appears that of the purchase price of the real estate, $42,325, only $5,111.61 was actually paid to the trustee, and that the balance was credited to the liens of the purchasers, and therefore, it is argued by counsel, commissions should not be allowed on the money that did not pass between the parties. To this I cannot assent. The arrangement was for the benefit of the lienholders, and, while a nominal sum only was passed, the actual amount bid to redeem their security is the amount which the trustee constructively disbursed. In re Sanford Co. (D. C.) 126 Fed. 888; In re Cramond (D. C.) 145 Fed. 966, 17 Am. Bankr. Rep. 22; Varney v. Harlow, 210 Fed. 824, 127 C. C. A. 374, 31 Am. Bankr. Rep. 339. The reasoning of Judge Rose in the latter case applies here with force. It was there said:

"It would hardly seem that the referee's rights should be different merely because, for the convenience of the bondholders, they were excused from paying $90,000 and getting $87,955 back. The payment of the latter sum was as effectually made to them by crediting it on their bonds as it could have been in any other form. It does not seem wise to make substantial rights depend upon such unessential differences. The way of making payments adopted in this case is far the simplest and most convenient for everybody. Nothing is to be gained by holding that if it be adopted the referee will lose what would come to him if the more roundabout and troublesome method of doing the same thing were employed. The learned judge below recognized that the trustee was entitled to commissions on the full amount of the purchase price, as being a sum disbursed by him or turned over to lienholders."

[5] Commissions will be allowed on the entire amount of the purchase money, but the amount of the trustee's commissions, reported by the referee, $885.61, is in excess of the statutory allowance, and must be reduced to $563.25. Since reasonable counsel fees are allowed as a proper expense of sale and in raising a fund (In re Torchia [D. C.] 26 Am. Bankr. Rep. 189, 185 Fed. 576), the allowance to counsel will not be disturbed.

The report of audit is referred back to the referee, with instructions to make distribution in accordance herewith.

WATSON v. PENNSYLVANIA R. CO.

(District Court, M. D. Pennsylvania. May 22, 1916.)

No. 783.

1. PLEADING ⊂⊃154—AFFIDAVIT OF DEFENSE—TIME FOR FILING.

Act Pa. June 13, 1836 (P. L. 572, 578; Purd. Dig. [13th Ed.] pp. 243. 244, pars. 36, 38–40), provides that personal actions shall be commenced by summons and shall be made returnable to the first day of the next term of court. Practice Act Pa. May 14, 1915 (P. L. 485) § 12, declares that the defendant shall file an affidavit of defense to the statement of claim within 15 days from the date when the statement is served. Summons and statement of claim were served on defendant January 20th, and notice was indorsed on the statement requiring defendant to file an affidavit of defense within 15 days from service. The return day at which plaintiff was required to appear and answer was nearly a month later. *Held* that, as the latter statute did not repeal the first, the two should be construed together as requiring defendant, after he appears, to follow the Practice Act of 1915, and therefore the service of statement should be set aside.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 308; Dec. Dig. ⊂⊃154.]

2. PROCESS ⊂⊃152—SERVICE—DEFECT.

That a notice on the back of plaintiff's statement of claim was not signed by counsel is a defect which may be corrected.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 206; Dec. Dig. ⊂⊃152.]

At Law. Action by William R. Watson against the Pennsylvania Railroad Company. On motion to quash service of summons and statement. Motion denied as to summons, and service of statement set aside.

Earle E. Renn, of Harrisburg, Pa., for plaintiff.

J. E. B. Cunningham and Charles H. Bergner, both of Harrisburg, Pa., for defendant.

WITMER, District Judge. The plaintiff brought this action of trespass on the 17th day of January, 1916, filing on the same day his statement of claim, whereon was indorsed a notice to defendant requiring it to file an affidavit of defense to this statement within 15 days from service. The summons and statement were served on the defendant January 20th. Thus the notice required the filing of an affidavit on February 4th, although the summons required the defendant to appear and answer the plaintiff on the fourth Monday of February; the return day, by the rules of court, being on Monday, the 28th.

The contention of the defendant is that this statement was improvidently filed, and that the attempt to require the defendant to file an affidavit of defense within 15 days after the service of the statement, and prior to the return day of the summons, is irregular. In part the contention of defendant must be affirmed. The time of filing the statement is not of so much concern to a defendant, but it is of very great importance to him when and how he is required to

answer. Surely, when he is summoned to appear on a day certain and there to answer, he may not also at the same time be required to answer before such day.

[1] The plaintiff was endeavoring to follow the so-called Practice Act of 1915 (P. L. 1915, p. 483), where it is required (section 12) that "the defendant shall file an affidavit of defense to the statement of claim within fifteen days from the date when the statement is served upon him." The act of June 13, 1836 (P. L. 572, 578; 1 Purdon, 243), providing that personal actions shall be commenced by summons, and shall be made returnable to the first day of the next term thereafter, is not repealed, and the former act must be so construed as to harmonize and form one sane and uniform system of procedure. It was no doubt the purpose of the makers to read it in connection with the act of 1836 and with the common-law rules of practice. The conclusion follows that it was intended that a summons should issue, and, after the defendant is thereby required to appear in court, he shall proceed as required by the act of 1915.

[2] The notice appearing on the back of plaintiff's statement was not signed by counsel. This is an omission that may be cured.

The motion to quash is denied, but the service of the statement is set aside.

NATIONAL CIRCLE, DAUGHTERS OF ISABELLA, v. NATIONAL ORDER OF THE DAUGHTERS OF ISABELLA.

(District Court, N. D. New York. May 19, 1916.)

1. JUDGMENT ⟸815—EFFECT.

A decision of the state court that complainant order had first adopted a particular name and was entitled to use it, and that defendant order was not entitled to establish branches within the state under a similar name, is local, and of no extraterritorial effect.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1445–1448; Dec. Dig. ⟸815.]

2. INSURANCE ⟸692—FRATERNAL ORDERS—INCORPORATION.

A fraternal order incorporated under the laws of New York, whose business was the installation of subordinate branches, is entitled to establish such branches outside of the state, even in the absence of express or explicit authority.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1832; Dec. Dig. ⟸692.]

3. CORPORATIONS ⟸49(2)—NAMES—MUTUAL INSURANCE COMPANIES.

The complainant order first adopted the name National Circle, Daughters of Isabella. At that time it was a voluntary association existing in Connecticut. Thereafter the order was incorporated. Prior to its incorporation the defendant order, under the name National Order of the Daughters of Isabella, was incorporated in the state of New York. Defendant's articles of incorporation recited that the territory in which its operations were to be principally conducted was the United States of America and the Dominion of Canada. Defendant first began to establish branches of the order, and even invaded complainant's domiciliary state. After an adjudication by the Connecticut court that complainant was entitled to priority in the use of the name, complainant began to establish branches in other states. *Held* that, as it did not appear that defend-

ant was guilty of misrepresentations, it would not be enjoined from establishing or maintaining branches in territory not pre-empted by complainant, for complainant's rights did not extend beyond the state lines of Connecticut, where it had priority; it being unknown outside of the state, and the incorporation in Connecticut not giving it the right to exclude defendant from other states.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 137; Dec. Dig. ⊂⊃49(2).]

4. INJUNCTION ⊂⊃145—INJUNCTION PENDENTE LITE—RIGHT TO.

An injunction pendente lite, restraining the defendant order from using a name similar to that of complainant, which would affect a great number, will not be granted on averments on information and belief that defendant was guilty of fraud in representing that it was the same order as complainant.

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

In Equity. Bill by the National Circle, Daughters of Isabella, against the National Order of the Daughters of Isabella. On application by complainant for an injunction pendente lite. Application denied.

This is an application by the National Circle, Daughters of Isabella, for an injunction, pendente lite, enjoining and restraining the defendant, the National Order of the Daughters of Isabella, its subordinate branches, lodges, members, and agents, etc., from "establishing any further or other branches of the National Order of the Daughters of Isabella in any part of the United States, and from establishing or organizing any branch, lodge, circle, or other subsidiary organization under any name or title in which the words 'Daughters of Isabella' shall appear, and from using in the organization or establishment of any branch, lodge, circle, or other subsidiary organization any name, title, or emblem so similar to the words 'Daughters of Isabella' as to be likely to create confusion, or to deceive or induce persons to treat with the same as if such branches, lodges, circles, or subsidiary organizations were in fact part of or connected with the National Circle, Daughters of Isabella, or with its legally constituted branches, and from using or continuing to use such name, title, or emblem, or any name, title, or emblem so similar thereto as to be likely to create confusion, or to deceive the public, or to induce persons to join or treat with the same as if such branches, lodges, circles, or other subsidiary organizations were in fact branches, lodges, circles or subsidiary organizations of the said National Circle, Daughters of Isabella." The object of the order applied for shows the purpose and object of the suit. The bill of complaint prays an accounting also.

Mills & Mills, of Albany, N. Y. (C. F. Roberts, of New Haven, Conn., of counsel), for complainant.

P. H. Fitzgerald, of Utica, N. Y. (Richard R. Martin, of Utica, N. Y., of counsel), for defendant.

RAY, District Judge (after stating the facts as above). The bill of complaint alleges that the complainant, National Circle, Daughters of Isabella, came into existence as follows: That in May, 1897, a voluntary fraternal secret benefit organization was formed in the city of New Haven, county of New Haven, state of Connecticut, and that it adopted a constitution and ritual based upon and drawing moral lessons from the historical connection of Isabella, the queen of Spain, with the dispatch of Christopher Columbus upon the voyage which resulted in the discovery of America. That in the year 1900 this organization adopted, and that its members publicly wore, a society pin upon the face and front of which appeared certain letters and symbols by

which such members were known to each other and to the public as "Daughters of Isabella," and that said name became the name by which said members were known among themselves and to and by many persons not connected with such association. That on the 12th day of February, 1904, the members of said voluntary organization passed a vote that they should become incorporated, and March 4, 1904, passed a vote to become incorporated under the name and title of "Daughters of Isabella, No. 1, Auxiliary to Russell Council, No. 65, Knights of Columbus." That March 7, 1904, said organization became incorporated under said last-mentioned name under and pursuant to the laws of the state of Connecticut. That for the seven years prior to this time said organization had been carrying on its said work under the name "Daughters of Isabella," and by said name was publicly known, and also among the members thereof. That said corporation, without capital stock, was duly organized as a secret fraternal benefit society for women of the Catholic faith under the same constitution and using the same pin, ritual, etc., as had been used by said association prior to said incorporation, and that the members of the said association became members of such corporation, which succeeded to all the rights, etc., of such association. That no other corporation or organization at such times had acquired the right to use as a designating part of its name the words "Daughters of Isabella." That November 5, 1904, the said articles of incorporation were so amended under the laws of the state of Connecticut as to allow the said corporation to form and establish subordinate branches and lodges thereof, and to give to them and to the members thereof the name and title "Daughters of Isabella." That between March 7, 1904, and July 25, 1907, under and pursuant to such articles of corporation and the amendments thereof, said corporation established "in the state of Connecticut and elsewhere" subordinate lodges or branches thereof under the name and title of "Daughters of Isabella" and that such subordinate lodges or branches had a membership of more than 1,500. That in January, 1907, the General Assembly of the state of Connecticut, at the request of said incorporators and of the duly accredited representatives of such subordinate branches, and on application therefor, granted a special charter to the complainant by which the said incorporators and those to be associated with them were created a body politic and corporate under the name and title, "the National Circle, Daughters of Isabella," with authority to establish branches "in Connecticut and elsewhere." That such charter was accepted and the organization was perfected, and the original organization, corporation, and subordinate branches became and now are a part of and affiliated with said complainant, "the National Circle, Daughters of Isabella." The bill of complaint then alleges as follows:

"12. Your orator further alleges that under and pursuant to the provisions of said charter granted to the plaintiff by the General Assembly of Connecticut as aforesaid, said corporation was given power to locate and establish state and district circles, as local or subordinate circles, or other branches or divisions thereof, under the name of 'Daughters of Isabella,' composed of members of the order in any town or city in the state of Connecticut, or in any other state of the United States, or in any other country,

and said state, district, or local circles, or other branches or divisions, when so established, to be governed and managed by such laws, by-laws, rules, and regulations as said corporation shall determine, and further providing that said corporation may enforce such laws, by-laws, rules, and regulations against any such state, district, or local circle or circles, or other branches or divisions, in any court of this state, or of any other state of the United States. A copy of said charter is attached hereto as Exhibit A and made a part hereof.

"13. Your orator further alleges that, under and pursuant to the authority conferred by said charter, your orator has established many subordinate lodges or branches in the following states: Connecticut, Illinois, Massachusetts, Rhode Island, Wisconsin, Indiana, Kansas, and Nebraska."

Defendant's Incorporation and Acts.

The bill of complaint then alleges and states that June 24, 1903 (prior to the date of complainant's incorporation), John E. Carberry and seven others, as incorporators, were granted articles of incorporation under and pursuant to the laws of the state of New York (General Incorporation Laws [Consol. Laws, c. 23]) under the name and title "Daughters of Isabella," which articles of incorporation were amended August 7, 1905, by which amendment the title of said New York corporation was changed to "the National Order of the Daughters of Isabella," under which name and title it has ever since been known. The bill of complaint also alleges: That said New York corporation as originally incorporated had no authority under its said articles of incorporation and has acquired no power since, under the laws of the state of New York or of any other state, to establish subordinate branches or lodges in the state of New York or any other state of the United States or elsewhere. That the defendant, the National Order of the Daughters of Isabella, has established in Massachusetts, Rhode Island, Indiana, Pennsylvania, New York, Michigan, Illinois, Wisconsin, Iowa, New Jersey, Maryland, District of Columbia, Georgia, and other states of the United States local lodges or branches of said (defendant) corporation, the members of which are women known among themselves and to the public at large as "Daughters of Isabella," and that said local lodges or branches are known to the members thereof and to the public as "the Daughters of Isabella," and are not known or designated by any other name, except by a distinguishing name adopted by each branch. The bill of complaint further alleges:

"17. Your orator further alleges that said the National Order of the Daughters of Isabella has designated said local or subordinate lodges or branches and claims the right to designate said local and subordinate lodges or branches and the members thereof as 'Daughters of Isabella,' and said lodges, and the members thereof, as hereinbefore set forth, are now known among themselves and to the public under the name and title of 'Daughters of Isabella,' and claim the right to be known under said name and title, thereby causing, in all places in which your orator, in the exercise of its corporate rights and the use of its corporate name, has established local or subordinate lodges or branches under said name and title, 'Daughters of Isabella,' because of the identity of the name used by the subordinate branches of the defendant with the name used by the subordinate branches of your orator and the members thereof, and it has created and is likely to create great confusion and uncertainty in the minds of many persons, and has deceived and operated to induce many persons to join or treat with the National Order of the Daughters of Isabella and its subordinate branches under the

belief that the same is your orator, or a subordinate branch of your orator, to the irreparable injury of your orator.

"18. Your orator further alleges that on divers days since the 7th day of March, 1910, down to the date of this complaint, your orator has been requested by many persons to establish lodges and subordinate branches in a large number of towns and cities in the states of Michigan, Wisconsin, Illinois, Indiana, Kansas, Nebraska, Iowa, Minnesota, Ohio, Pennsylvania, District of Columbia, and other states of the United States, but because of the false and willful misrepresentations on the part of the officers of the National Order of the Daughters of Isabella, and its servants and agents, that your orator was merely a local organization and without authority or power to establish said branches under the name or title of Daughters of Isabella, and was without lawful right to said title, the efforts of your orator to establish said branches under said name and title have been, and are now, and threaten to hereafter be, thwarted and defeated, to the great loss of membership of your orator, and to the further irreparable injury of your orator.

"19. Your orator further alleges that the National Order of the Daughters of Isabella, through its officers and agents, by speeches, advertisements, arguments, the circulation of literature, and the holding of public meetings, is seeking to organize other subordinate lodges or branches of the National Order of the Daughters of Isabella within said states mentioned aforesaid, and other states of the United States, under said name and title of 'the Daughters of Isabella,' to the further irreparable injury of your orator.

"20. Your orator further alleges that the National Order of the Daughters of Isabella by itself, and through its servants and agents, in the states aforesaid, and in other states of the United States, has been and is now engaged in all the ways above set forth in causing great and irreparable injury to your orator, and by the continued use of said name 'Daughters of Isabella' as aforesaid have caused, are now causing, and threaten to hereafter cause great confusion and annoyance, loss, and irreparable injury to your orator. And because of the similarity and practical identity of the name used by the National Order of the Daughters of Isabella, and by the branches thereof, with the name of your orator, and of the subordinate branches and members thereof, many persons eligible for membership in your orator's organization have been, are now, and hereafter may be led to believe that the defendant is in fact your orator, to the great and irreparable injury of your orator."

The allegations of the complaint are largely on information and belief. The complainant has also filed the affidavit of Josephine C. Curran, the national secretary of the National Circle, Daughters of Isabella, in which she gives the number, location, membership, and date of institution of the subordinate circles of the complainant. It appears from this affidavit that the total number of subordinate circles is 45, of which 7 are in Connecticut, 6 in Massachusetts, 6 in Rhode Island, 18 in Illinois, 4 in Indiana, 2 in Wisconsin, 1 in Missouri, and in the case of the other circles the state is not given. The earliest subordinate circles established in Massachusetts and Rhode Island were so established in 1912. The earliest circles established in Illinois were so established in 1911. The earliest circles established in Indiana, Wisconsin, and Missouri were established in 1915. Of the circles established in Illinois, 14 are located in the city of Chicago, 1 at Alton, 1 at Lemont, 1 at Odell, 1 at Collinsville, 1 at Bloomington, and 1 at Maywood. Seven of these subordinate circles were established in 1916, 18 in 1915, 5 in 1914, 5 in 1913, 5 in 1912, 3 in 1911, 1 in 1905, and 1 in 1897. The subordinate circles established in Massachusetts are located at Springfield, Holyoke, Worcester, Pittsburg, North Attleboro, and Webster. Of the 6 subordinate circles located in Rhode Island, 1 is at Riverside, 1 at Pawtucket, 1 at Ashton, 1 at Woonsocket,

and 2 at Providence. The 4 in Indiana are located at Indianapolis, East Chicago, Terre Haute, and Connorsville.

The defendant, the National Order of Daughters of Isabella, files an affidavit showing that it has 276 subordinate courts, many of which have a membership of 150 or more, and some have a membership in excess of 300. These courts or subordinate bodies are scattered through 33 different states, viz., New York, Pennsylvania, Georgia, Wisconsin, Iowa, Kansas, New Jersey, South Carolina, Florida, Illinois, Mississippi, Virginia, Louisiana, Oklahoma, Missouri, Indiana, Wyoming, Rhode Island, Texas, Oregon, South Dakota, California, Massachusetts, Ohio, Idaho, New Hampshire, North Dakota, Vermont, Minnesota, Montana, Maryland, Arizona, Nebraska, and 1 in the District of Columbia. The earliest subordinate court was established in Illinois in 1905, in Massachusetts in 1909, in Rhode Island in 1909, in Indiana in 1908, in Missouri in 1907, and in Wisconsin in 1911.

The defendant in its answer denies that the establishing of subordinate lodges by the defendant has deceived and deceives and operates to induce persons to join or treat with the defendant or its subordinate branches in the belief that the defendant or its branches is the complainant or its branches. In fact the defendant in its answer puts in issue substantially all the material allegations of the complaint. The defendant admits and avers that for more than 10 years prior to the commencement of this action the defendant, under the name of "Daughters of Isabella" and under the name of "the National Order of Daughters of Isabella," has been in active operation and engaged in the lawful prosecution of its lawful activities, with its principal office at the city of Utica, N. Y. The defendant also files the affidavit of one Michael F. Kelly, who says that he has been a member of the body known as "Knights of Columbus" since 1896, and that during the year 1901 he, with others, "conceived the idea of organizing a similar society among women of the Catholic faith, designed to promote the social and educational interests of women of the said faith, and in some degree to assist its members in a financial way as necessity might require, which said organization would have branches in the various cities and towns of the United States and be known as 'Daughters of Isabella.'" He also says that in February, 1902, it was publicly stated in the public press that such a project was on foot and that the name of the organization was "Daughters of Isabella." He also says:

"The selection of the name 'Daughters of Isabella' by deponent and those associated with him, both men and women, in the organization of said society, was had solely in view of the connection in history of Queen Isabella of Spain with the efforts of Columbus to make his voyage for the discovery of America, and without any knowledge or information whatsoever that said name was anywhere in use by any organization for any such purpose or any purpose; that in the development of the plans for the said organization in the latter part of the year 1902 there was prepared by-laws for said organization, in which said by-laws the organization was named 'Daughters of Isabella,' and in which said by-laws it was provided that such organization should comprise a central body at the city of Utica, N. Y., and also branches or courts to be organized where practicable in various cities and towns of the United States and the Dominion of Canada."

He also says that the aggregate membership of the various courts of the defendant is now in excess of 25,000. Mr. Kelly also says that the

right of the defendant to pursue its purposes as set forth by him has never been challenged, except within the state of Connecticut.

It appears and is not disputed that in October, 1907, "Daughters of Isabella, No. 1, Auxiliary to Russell Council, No. 65, Knights of Columbus, and the National Circle, Daughters of Isabella," commenced an action against the National Order of Daughters of Isabella and others in the superior court of the state of Connecticut, county of New Haven, for the purpose of seeking a temporary injunction, and also a permanent injunction, restraining the defendant, said New York corporation, from establishing any further branches within the state of Connecticut under said name or title "Daughters of Isabella," and also restraining all subordinate branches of the said New York corporation now (1907) in existence within the state of Connecticut from continuing to use said name or title. The action appears to have been based on the fact that the Connecticut corporation was entitled to the name "Daughters of Isabella" in the state of Connecticut in preference and to the exclusion of the defendant, the New York corporation, by reason of the fact that the Connecticut organization and corporation first took and used the name in that state. Demurrers were interposed, but the cause came on to be heard finally, and resulted in a judgment or decree against "the National Order of the Daughters of Isabella, a corporation organized under the laws of the state of New York and doing business in the state of Connecticut," and the various subordinate circles situate in the state of Connecticut as follows, viz.:

"Whereupon it is adjudged that the defendant, the National Order of the Daughters of Isabella, and its servants and agents, be and it is hereby enjoined, under a penalty of $1,000 from establishing any further branches within the state of Connecticut under said name or title 'Daughters of Isabella,' and that all subordinate branches of said National Order of the Daughters of Isabella now in existence within the state of Connecticut be and the same are hereby forever prohibited and enjoined under a similar penalty of $1,000 from using said name or title, and that the plaintiffs recover of the defendants $25 damages and the costs taxed at $———.

"By the court: John Currier Gallagher, Clerk."

This judgment has remained in full force and effect and has been obeyed by the defendant.

[1] There can be no question that the judgment in the state of Connecticut just recited, in view of the pleadings, was and is res adjudicata between this plaintiff and defendant that the name "Daughters of Isabella" in an organization of the description given was first used and adopted by an organization unincorporated in the state of Connecticut, in that state. The decision of the Connecticut courts went upon that theory, and in legal effect the court so adjudged. That was the judgment of a state court, and had and has no extraterritorial effect, except in so far as it establishes that in the state of Connecticut the complainant here and its predecessors first used the said name and became entitled to use it in said state of Connecticut, and that the defendant had no legal right to establish subordinate courts or branches in that state using the name. It was local in its effect and operation.

[2, 3] It is seen that to grant the injunction pendente lite prayed for in the bill of complaint in this action would be far-reaching in its effect and break up and put out of business 276 subordinate branches or courts and affect about 25,000 women. In Hanover Star Milling Co. v. D. D. Metcalf, and in Allen & Wheeler Co. v. Hanover Star Milling Co., 240 U. S. 403, 36 Sup. Ct. 357, 60 L. Ed. ——, causes argued and decided together, decided by the Supreme Court of the United States, March 6, 1916, we have a decision which in my judgment is determinative of this application for a preliminary injunction. That is a trade-mark or trade-name case, but is, I think, in many of its aspects on all fours with this.

The defendant, since the commencement of the suit in the superior court of the state of Connecticut, has been active in many of the states of the United States in establishing branches or courts, and until now its right so to do has not, so far as appears, been challenged. This has not been done secretly, and the evidence now before this court, consisting of the verified bill of complaint and affidavit of Josephine C. Curran, on the one hand, and of the verified answer, supported by the affidavit of Mr. Kelly, on the other, makes it doubtful whether the complainant can show that the establishment of these subordinate courts by the defendant has been with intent or purpose to interfere in any way with the business of the complainant or its establishment of subordinate circles. So far as appears, the defendant has operated largely and almost entirely, excluding from consideration the state of Connecticut, where the rights of the parties have been determined, in new and unoccupied territory. Massachusetts, Rhode Island, and Illinois are exceptions in a way; but in each of these states the defendant first established subordinate courts. In Illinois, as early as 1905, the defendant established courts in Chicago. The complainant established its first circle there, Calumet Circle, No. 22, November 12, 1912, and this has a membership of 285. In 1913 it established Auburn and Hyde Park Circles in Chicago, with a membership of 168 and 101, respectively. Defendant established Court 41 in Chicago July 5, 1905; Court 62 in Chicago, Ill., February 10, 1907; Court 84 at Rock Island, Ill., April 26, 1908; Court 89 at Chicago, Ill., August 31, 1908; Court 112 at Chicago, Ill., June 27, 1909; Court 120 at Chicago, Ill., October 24, 1909; Court 124 and Court 125 at Chicago, Ill., March 6 and May 1, 1910, respectively; Courts 135 and 136 at Chicago, Ill., March 19, and March 26, 1911, respectively; Courts 143, 144, 145, and 147 at Chicago, Ill., June 11, May 7, June 4, and May 28, 1911, respectively; Court 148 at Springfield, Ill., June 11, 1911; and Court 153 at Chicago, Ill., September 10, 1911 —all prior to the establishment of any circle in that state by the complainant.

Unless the prior and first use of the name "Daughters of Isabella" by complainant in the state of Connecticut, and the want of an express provision in the statutes of the state of New York authorizing defendant to establish subordinate courts in states other than New York, the state of its incorporation, legally debarred the defendant from establishing such courts in the state of Illinois, the defendant, by reason of first having occupied that territory, has the prior right thereto, or at least

its occupation of that territory was and is not unlawful. Hanover Star Milling Co. v. Metcalf and Allen & Wheeler Co. v. Hanover Star Milling Co., supra. That the prior and first use of the name by the organization, unincorporated, which later became incorporated, gave a right to the use of the name in the state of Connecticut, may be conceded, and it has been so adjudicated. But before that organization became a corporation, a similar organization with similar objects and purposes, and using as part of its corporate name the words "Daughters of Isabella," was incorporated in the state of New York under and pursuant to its laws. There is no substantial or convincing evidence that this was done for the purpose of interfering with the Connecticut organization, and Mr. Kelly says, in substance, the organizers of the New York Association and corporation were ignorant of the use of the name "Daughters of Isabella" by the members of the Connecticut association or any other association. In the absence of some adjudication or satisfactory evidence to the contrary, this statement under oath must be assumed to be true. Aside from general allegations in the bill of complaint, made on information and belief and wholly unsupported by affidavits as to any act of interference, it appears from the affidavit of Josephine C. Curran that up to March, 1911, only Russell and San Salvadore Circles were instituted by complainant, both at New Haven, Conn., and that in March, 1911, Isabella Circle was instituted at New Britain, Conn., and that in June, 1911, Silver City Circle was instituted at Meriden, Conn., and that in October, 1911, Kennedy Circle was instituted at Naugatuck, Conn. All the other circles, wherever located, were instituted in 1912 and later. No affidavit of any person is presented showing any act of interference or the making of any misrepresentation or misstatement by any person. In the meantime the defendant, having incorporated as stated, seems to have been active in organizing and instituting subordinate courts in many different states outside of New York and Connecticut. There is no evidence before the court that any person on his or her own motion, or any person representing the defendant corporation, has interfered with the work of the complainant in organizing circles outside of Connecticut and in states where the field was open to both. Regarding and treating the use of the name "Daughters of Isabella" as on the same footing before the law as the use of a trade-mark or a trade-name it is plain, in view of the last utterance of the Supreme Court of the United States, that, in the absence of acts showing the use of unfair means, or unfair competition, the defendant has, so to speak, pre-empted the territory in all the states mentioned outside of Connecticut. Even in Rhode Island the defendant established a court at Newport in June, 1909, while the complainant did not enter that state until July, 1912, when it established Riverside Circle at Riverside in that state, and this was followed by Pawtucket Circle at Pawtucket, R. I., in May, 1913. In Massachusetts, May 2, 1909, the defendant established a court at Stoneham, and followed this by Court No. 138 at Cambridge, Mass., on the 23d day of April, 1911. The complainant established its first circle in Massachusetts at Springfield on the 21st day of January, 1912, and followed this by another at Holyoke in that state April 21, 1912.

I am not aware of any rule of law or equity which gives to the general Legislature of the state of Connecticut power to incorporate such a body as the complainant, and by conferring on it power to establish subordinate bodies in Connecticut "and elsewhere," or "in the other states of the United States," debar a similar body or organization incorporated in the state of New York under its general corporation laws from organizing subordinate bodies "elsewhere," or in the other states of the United States, so long as those states do not act and recognize the one corporation and refuse to recognize the other by statute or decisions of the courts. The corporation laws of the state of New York require that the articles of incorporation state where the corporation proposes to do or carry on business, and this requirement was complied with by naming the entire United States and the Dominion of Canada. "The territory within which its operations are to be principally conducted is the United States of America and the Dominion of Canada" is the statement in the articles of incorporation. I know of no case which holds that a New York corporation organized under its general corporation laws may not carry on its business in any state of the Union, unless such state in which it proposes or undertakes to do business by statute or court action interferes. It appears that the installation of subordinate courts is a part of the business of the defendant, and I do not think the absence of express or explicit authority to do such an act outside of New York in any way impairs defendant's power in this respect. It is true, probably, that, should the defendant here enter a state in which the complainant has first established circles, thus occupying and, so to speak, appropriating that territory, the defendant would have no right to there establish subordinate branches or courts. Clearly defendant would invade the complainant's rights, should it use false representations or statements orally or in writing to induce persons to join its branches or courts in the belief they were joining a branch or circle of the complainant corporation or organization. The names are so similar that false statements and representations might easily lead to confusion.

In Salvation Army in the United States v. American Salvation Army, 135 App. Div. 268, 120 N. Y. Supp. 471, it appears that as early as 1878 the "Salvation Army," an organization conducting a religious, charitable, and benevolent work, was organized in England. In 1880 General Booth, who organized that society, sent a small band of followers to the United States, and established a branch in the United States, and the movement gradually spread through the United States until in October, 1884, there were over 80 posts in various states of the United States, with 300 officers and several thousand members and soldiers. It spread all over the civilized world. This organization had a publication, "War Cry," and a distinctive uniform for all its members. April 28, 1899, a special charter was granted to the Salvation Army by the Legislature of the state of New York, and all its temporalities and property were vested in such corporation. August 27, 1896, the defendant "American Salvation Army" was incorporated in the state of Pennsylvania. The members of this corporation wore distinctive uniforms similar to those of the Salvation Army in the United States,

and also published a paper at irregular intervals named "American War Cry," and later "American Salvation Army War Cry." It operates in 71 places in 12 states, and has 300 officers and 2,500 members. The court found that many of the employés and agents of the said American Salvation Army falsely represented themselves to be connected with and operating for the Salvation Army in the United States. The defendant American Salvation Army did not undertake to operate in the state of New York until April, 1907. The Appellate Division said:

"It is so clear as to hardly justify discussion that the purpose of the defendant in assuming the names 'American Salvation Army' for its organization and the 'American War Cry' for its paper, and its adoption of the military titles and the uniforms, and its whole scheme of procedure, was to take advantage of the long-established and wide-spread public knowledge of the Salvation Army, and to receive for itself whatever benefit might flow therefrom. While its object in organizing may have been entirely laudable, its assumption of the *physical attributes of its predecessor in the field*, with slight and colorable differences, was obviously an imitation, and calculated, if not deliberately designed, to deceive."

It is already seen that in the case now before this court there has been no assumption by the defendant of the physical attributes of the Connecticut organization or corporation, and that, aside from the state of Connecticut, the defendant has been the *"predecessor in the field."* Aside from general allegations in the bill, made on information and belief, without stating the sources of such information or the grounds of belief, and which general allegations are denied, and which general allegations are wholly unsupported by an affidavit showing false or misleading statements, there is nothing before this court to show fraud or deception. This court does not know what will be the proof on the trial, but as fraud and deception cannot be assumed, and must be proved, this case now stands on the fact of similarity of names, "Daughters of Isabella," the main feature of the name of both parties, and on the prior or first use of that name by the Connecticut organization in that state solely. In all other states the defendant was first to occupy and appropriate the field and establish subordinate branches, or so-called courts. And this prior occupation and appropriation of territory has been going on for more than ten years, and for some six years since the final decision of the suit brought in the state of Connecticut, without interference or molestation, and resulting in the establishment of more than 300 courts in 33 different states of the United States, with some 25,000 members.

In Higgins Co. v. Higgins Soap Co., 144 N. Y. 462, 39 N. E. 490, 27 L. R. A. 42, 43 Am. St. Rep. 769, the court said:

"It is well settled that an exclusive right may be acquired in the name in which a business has been carried on, whether the name of a partnership or of an individual, and it will be protected against infringement by another, who assumes it for the purposes of deception, or even when innocently used *without right* to the detriment of another."

This is, of course, common sense, and ought to be sound law; but it does not follow that a person, or a firm, or a corporation, may use a name as a trade, or trade-mark, or business name in a limited territory only, not extending his or its business or the use of the name

beyond that limited territory, and then enjoin and restrain all other users of the name, who have adopted and first used it in new and unappropriated territory for years, without interruption or complaint or interference by the one who first used such name. Of course, in using the name in such new and unoccupied territory, the second user must not represent himself or itself to be such other person or copartnership or corporation, for this would be a fraud and more or less injurious. This is the doctrine enunciated and these the principles declared in Hanover Star Milling Co. v. Metcalf and Allen & Wheeler Co. v. Hanover Star Milling Co., supra. As Mr. Justice Holmes well says:

"As the common law of the several states has the same origin for the most part, and as their law concerning trade-marks and unfair competition is the same in its general features, it is natural and very generally correct to say that trade-marks acknowledge no territorial limits. But it never should be forgotten, and in this case it is important to remember, that when a trade-mark started in one state is recognized in another it is by the authority of a new sovereignty that gives its sanction to the right. The new sovereignty is not a passive figurehead. It creates the right within its jurisdiction, and what it creates it may condition, as by requiring the mark to be recorded, or it may deny. The question, then, is what is the common law of Alabama in cases like these. It appears to me that, if a mark previously unknown in that state has been used and given a reputation there, the state well may say that those who have spent their money innocently in giving it its local value are not to be defeated by proof that others have used the mark earlier in another jurisdiction more or less remote. Until I am compelled to adopt a different view I shall assume that that is the common law of the state. It appears to me that the foundation of the right as stated by the court requires that conclusion. See further Chadwick v. Covell, 151 Mass. 190, 193, 194. Those who have used the mark within the state are those who will be defrauded if another can come in and reap the reward of their efforts on the strength of a use elsewhere over which Alabama has no control. I think state lines, speaking always of matters outside the authority of Congress, are important in another way. I do not believe that a trade-mark established in Chicago could be used by a competitor in some other part of Illinois on the ground that it was not known there. I think that, if it is good in one part of the state, it is good in all. But when it seeks to pass state lines, it may find itself limited by what has been done under the sanction of a power co-ordinate with that of Illinois and paramount over the territory concerned. If this view be adopted, we get rid of all questions of penumbra, of shadowy marches, where it is difficult to decide whether the business extends to them."

And in the main opinion in that case Mr. Justice Pitney says:

"To say that a trade-mark right is not limited in its enjoyment by territorial bounds is inconsistent with saying that it extends as far as the sovereignty in which it has been enjoyed. If the territorial bounds of sovereignty do not limit, how can they enlarge, such a right? And if the mere adoption and use of a trade-mark in a limited market shall (without statute) create an exclusive ownership of the mark throughout the bounds of the sovereignty, the question at once arises, 'What sovereignty?' So far as the proofs disclose, the Allen & Wheeler mark has not been used at all, is not known at all, in a market sense, within the sovereignty of Alabama, or the adjacent states, where the controversy with the Hanover Star Milling Company arose. And so far as the controversy concerns intrastate distribution, as distinguished from interstate trade, the subject is not within the sovereign powers of the United States. Trade-Mark Cases, 100 U. S. 82, 93 [25 L. Ed. 550]."

In Talbot et al. v. Independent Order of Owls et al., 220 Fed. 660, 136 C. C. A. 268, it is held:

"An established voluntary association for religious, fraternal, benevolent, or social purposes is entitled to an injunction against the use by another person, association, or by any corporation, of its name or emblem, and of any name or emblem so similar to it as to be likely to create confusion, or to deceive, or induce persons to join or treat with the latter as the former, because such a use of such a name or emblem in effect perpetrates a fraud upon the former, and upon the persons confused or deceived."

[4] In that case it is seen by reference to the facts that there was a plain purpose or intent by defendants to defraud, and use the name "Order of Owls," as against the rights of the first user of the name and in the same territory. It is not intended to hold or intimate that, should it appear on the trial of this action that defendant has interfered with the complainant by misrepresentations or unfair means in its attempts or efforts to establish circles in states where the complainant had first gained a right, if any, to occupy the territory, this court cannot or will not grant appropriate relief. Before an injunction pendente lite of the sweeping character prayed for is granted, sworn statements on knowledge should be presented which at least show it reasonably probable, if not reasonably certain, that the complainant will be successful on a trial in open court.

Since writing the above the complainant has filed the affidavit of Mary E. Booth, of New Haven, Conn., and she differs from others as to the pin worn by members of the organization, and says that on its face was the figure of a bell, at its head the letters "IS," and underneath the said letters was the letter "A," all signifying "Is a bell." This is different, far, from the words "Daughters of Isabella." She says she read advertisements of social events in the public press, speaking of the "Daughters of Isabella," down to 1905, when she became a member of the organization at New Haven, Conn., known as the "Daughters of Isabella, No. 1, Auxiliary to Russell Council, No. 65, Knights of Columbus." She further says that at the time she became a member in 1905, and for some time prior thereto, she knew that an organization at Utica, N. Y., styling themselves "Daughters of Isabella," was organizing courts or branches in the state of Connecticut, and that one Wm. J. Neary, of Connecticut, and John G. Coyle, of New York City, were territorial regent and deputy, respectively, of said Utica organization (the defendant), and were active in forming courts or branches of said Utica organization *in the state of Connecticut;* that she has letters written by said Neary in January, 1904, to one Anna M. Rourke, of New Haven, then secretary of the New Haven voluntary organization, asking that a committee be sent to assist in the formation of a "branch thereof" at Naugatuck. She then says that she is informed and verily believes that the members of said voluntary organization at New Haven did assist "in promoting" the formation of a branch at Naugatuck, Conn.; but when the membership roll thereof was complete said branch was not in fact organized as a branch of the New Haven organization, but was in fact formed as a court or branch of the New York corporation in April, 1904, and under the supervision of the said Neary as an officer and agent of such New York corporation; that Neary acknowledged writing the letters, and that same are written upon the stationery of

the Daughters of Isabella, the New York corporation, and that the said Neary is designated thereon as territorial regent of said organization. She further says that Neary, as she verily believes, in January, 1904, was an officer and agent of the Daughters of Isabella of Utica, N. Y., and knew of the existence of the voluntary organization operating at New Haven, Conn. This, of course, tends to show that Neary knew there was a voluntary organization bearing the name "Daughters of Isabella" in Connecticut as early as 1904, but has no tendency to show any fraud or fraudulent practices on the part of Neary, or of the Utica corporation through any of its officers or members. Mrs. Booth was not present at the organization, and no affidavit from any source is produced indicating or tending to show that those who joined the Naugatuck organization supposed or were led to believe they were joining a branch or council of the Connecticut organization. Mrs. Booth then says that she is informed and verily believes that the court now attached to the National Order of the Daughters of Isabella at New Haven, Conn., known as Court Santa Marie, No. 40, etc., was organized in 1904, and formed a part of the complainant's organization, but was subsequently induced by officers and agents of the Utica corporation, of which Neary was an officer, to withdraw from the complainant's organization and affiliate with the defendant. This is mere information and belief, without even stating the source of such information and the grounds of such belief, and, even if true, it all relates to a Connecticut organization, and there is no statement that Neary, or any one else, made any false or fraudulent statements in inducing the Santa Marie branch to affiliate with the Utica branch. However that may be, the defendant was long ago enjoined from doing business in the state of Connecticut, and all Daughters of Isabella in that state are at liberty to affiliate with the Connecticut organization. Mrs. Booth further states that branches or circles of the Connecticut or National Circle to the number of 64 have been organized since she joined the organization, and that these have remained branches of the National Circle, "except in the cases of such circles as have been induced to withdraw and join the defendant organization, or such as have become defunct or withdrawn for other reasons, and that the National Circle now has in existence 46 circles, located in Connecticut, Rhode Island, Massachusetts, Illinois, Wisconsin, Indiana, Missouri, and other states of the United States."

The complainant has filed the affidavit of Josephine C. Curran, the secretary of the National Circle, and who knows where all existing circles are located, and I have already given the states in which they are located and the date of their organization. Mrs. Booth gives no instance where a circle has been induced to withdraw from the complainant organization and join the defendant organization, and even if such a thing has occurred there is no evidence before this court that such action was induced by false or fraudulent representations of any character. The affidavit of Mrs. Booth, while adding information on the subject, fails to strengthen in any way the claim of the complainant to the preliminary injunction prayed for.

The final judgment in the suit in equity brought in the state of Connecticut was rendered at the October term, in 1910, on appeal

from the decision of the court below. That was nearly six years ago and since that time, as already appears, the New York corporation has been operating and first establishing courts in at least 33 of the states of the Union without interruption. I do not find that the complainant corporation has any organization in the state of New York. There is no judgment of any court to the effect that the defendant organization has no right to operate in any state outside the state of Connecticut.

It is not necessary at this time to pass upon the question of complainant's laches, or its effect on the rights of these parties; but in view of the recent utterance of the Supreme Court of the United States, and of the absence of affidavits showing some acts of actual interference, or the making of some false or fraudulent statements or statement, it seems to me clear that the complainant has failed to make a case for the granting of a preliminary injunction. The action may be speedily tried, if the parties so will, and all the facts developed.

The motion for a preliminary injunction pendente lite is therefore denied.

JENNINGS et al. v. SMITH et al.

(District Court, S. D. Georgia, N. E. D. April 28, 1916.)

(Syllabus by the Court.)

1. COURTS ⟸272—FEDERAL COURTS—JURISDICTION—RESIDENCE OF PARTIES.
The residence and citizenship of one necessary defendant in the judicial district and the appropriate division will, at the suit of a citizen of another state, draw to the court there the rights of all concerned, if essential to complete determination.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 811; Dec. Dig. ⟸272.]

2. EQUITY ⟸22—JURISDICTION—ADMINISTRATION OF ESTATE.
On the death of the decedent, where the state law authorizes administration by next of kin, or, in their absence, creditors, and before nightfall, without notice to any one, the dead man's bookkeeper and a neighbor, not a creditor, and another, not a creditor, and a judge of a superior court, all unrelated to decedent, apply for and obtain administration, equity will interpose to protect the endangered property rights of the citizens of another state.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 51–62; Dec. Dig. ⟸22.]

3. EQUITY ⟸22—JURISDICTION—ADMINISTRATION OF ESTATE.
This is especially true where the bookkeeper, after he is enjoined from changing the status of the estate, enters on the books of the deceased in his own favor a claim for back salary for $24,000, and the manager and judge are both heavily indebted to the estate; and appeal to equity is the more justified where one of the debtors obtaining administration in such manner on the day of death is a judge of the superior court, a court of general jurisdiction having power to redress such wrongs.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 51–62; Dec. Dig. ⟸22.]

4. EXECUTORS AND ADMINISTRATORS ⊂=17(6)—RIGHT TO APPOINTMENT AS ADMINISTRATOR—CREDITORS—UNLIQUIDATED CLAIM.

An unliquidated claim of a superior court judge for alleged professional services to the decedent, in a state where such judicial officers are prohibited to practice law, such services rendered during the incumbency of such judge, will not be recognized in equity as a basis for the pretense that such judge was a creditor of decedent, and therefore entitled to administration.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 53-56; Dec. Dig. ⊂=17(6).]

5. EXECUTORS AND ADMINISTRATORS ⊂=20(7)—DISQUALIFICATION OF ADMINISTRATORS—PROOF.

This is especially true where the decedent held the judge's promissory note for a large amount, and when application was made on the day of death for temporary administration on the ground that the applicants were creditors, proof prima facie must be submitted to the probate judge of the existence and genuineness of the debts upon which such claim is based, and this was not done.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 96; Dec. Dig. ⊂=20(7).]

6. EXECUTORS AND ADMINISTRATORS ⊂=32(1—APPOINTMENT OF ADMINISTRATOR—VALIDITY—EQUITY.

Where the statute law of the state provides, "No person shall be appointed administrator who is neither of kin to the intestate nor a creditor, or otherwise interested in the grant of administration," such prohibition is imperative; and an order disregarding it is null and void, and may be so declared at the suit of any one lawfully concerned.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 191-200; Dec. Dig. ⊂=32(1).]

7. EXECUTORS AND ADMINISTRATORS ⊂=32(1)—APPOINTMENT OF ADMINISTRATOR—VALIDITY—EQUITY.

This is especially true where the order is obtained by deceitful statements that the applicants were within the eligible classes, when in fact they were not.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 191-200; Dec. Dig. ⊂=32(1).]

8. EXECUTORS AND ADMINISTRATORS ⊂=32(1)—APPOINTMENT OF ADMINISTRATORS—FRAUD—JURISDICTION IN EQUITY.

Such averments are jurisdictional, and, if false, they must be declared fraudulent. Myers v. Cann, 95 Ga. 385, 22 S. E. 611. And a court of equity in Georgia has jurisdiction to set aside the grant of letters of administration obtained by such fraud. McArthur v. Matthewson, 67 Ga. 134.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 191-200; Dec. Dig. ⊂=32(1).]

9. EXECUTORS AND ADMINISTRATORS ⊂=32(1)—FRAUDULENT ADMINISTRATION—EQUITABLE RELIEF—DEFENSE—KNOWLEDGE OF ORDINARY.

That the ordinary knew the falsity of such jurisdictional averments, but nevertheless granted administration on the day of the decedent's death, without notice to the next of kin, is no defense, and is to add collusion to fraud.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 191-200; Dec. Dig. ⊂=32(1).]

10. EXECUTORS AND ADMINISTRATORS ⊂=538—PERSONS MEDDLING WITH DECEDENT'S PROPERTY—LIABILITY.

"If any person, without authority of law, wrongfully intermeddles with the personalty of the deceased individual whose estate has no regular representative, he should be held and decreed an executor in his own

wrong, and as such should be liable for double the value of the property so possessed or held by him." Park's Code Ga. § 3886.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2582–2589; Dec. Dig. ⊂⊃538.]

11. EQUITY ⊂⊃22—JURISDICTION—FRAUDULENT ADMINISTRATION.
The duty of a court of equity to interpose in such a case is intensified when it appears that the administrators thus appointed were the open partisans of certain parties claiming inheritable rights, and the antagonists of the plaintiffs; also where the administrators thus appointed indorsed the notes of the claimants they favor, and take liens on their distributive shares in the entire estate, in order to obtain funds to conduct the litigation of the resident claimants, and defeat the claims of the citizens of other states.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 51–62; Dec. Dig. ⊂⊃22.]

12. EQUITY ⊂⊃22—JURISDICTION—FRAUDULENT ADMINISTRATION.
It is an additional ground for the interference of equity, when the judge of the superior court and others not entitled to administration represented to the ordinary that the personalty of the estate was worth $25,000, and gave bond in the sum of $50,000, when they all knew that such personalty was worth much more than $1,000,000, which was the fact, and the law obliged a bond of $2,000,000.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 51–62; Dec. Dig. ⊂⊃22.]

13. EQUITY ⊂⊃22—JURISDICTION—FRAUDULENT ADMINISTRATION.
The law of Georgia (Park's Code, § 4596) providing that equity will not interfere with the regular administration of an estate except "upon the application of any person interested in the estate where there is danger of loss or other injury to his interests," affords in such a case statutory right for equitable relief.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 51–62; Dec. Dig. ⊂⊃22.]

14. EQUITY ⊂⊃22—JURISDICTION—WRONGFUL ADMINISTRATION OF ESTATE.
Where, under the law of Georgia, the superior court judge of a judicial circuit has, as in this case, become disqualified, any other superior court judge of the state may grant the relief in equity provided by the Code section above cited.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 51–62; Dec. Dig. ⊂⊃22.]

15. EQUITY ⊂⊃22—JURISDICTION—WRONGFUL ADMINISTRATION.
Where such a judge, on a bill with proper averments and prayers, appoints receivers and enjoins administrators unlawfully appointed from further interference with the estate, it is an additional ground for equitable relief that the parties defendant wholly refused to comply with such order and injunction, and for equitable action by the United States court to protect the alleged property rights of a citizen of another state thus endangered. This is especially true where the probate judge of a court of record and the sheriff of the county where decedent died appear as witnesses for the wrongdoers, one of them the judge of the superior court.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 51–62; Dec. Dig. ⊂⊃22.]

16. EQUITY ⊂⊃22—EXECUTORS AND ADMINISTRATORS ⊂⊃122(2)—JURISDICTION—WRONGFUL ADMINISTRATION OF ESTATE.
Under the law of Georgia, temporary administrators have only the right to collect and preserve the estate. Where such administrators, appointed as above stated, pay the claims, lease or loan out mules and other live stock, lease large bodies of land in the highest state of cultivation, pay

alleged debts of the decedent, and enter a charge of $24,000 on the books of the decedent in favor of one of their number, who had been working for years at a monthly salary of $125, and made other expenditures in considerable amount, it will justify the interposition of equity with the administration. Park's Code Ga., 3935; Baumgartner v. McKinnon, 137 Ga. 166, 73 S. E. 518, 38 L. R. A. (N. S.) 824.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 51–62; Dec. Dig. ⊂⊃22; Executors and Administrators, Cent. Dig. §§ 495, 495½; Dec. Dig. ⊂⊃122(2).]

17. EXECUTORS AND ADMINISTRATORS ⊂⊃116—WRONGFUL ACTS OF ADMINISTRATORS—ADMINISTRATORS' BOND—PLEDGE OF PROPERTY OF ESTATE.

Where the administrators thus appointed, after the bill in the District Court of the United States was filed, sought to give bond in the sum of $1,000,000 to secure the personalty, and deposit, in order to obtain surety thereon, stocks and bonds of the estate in the value of $500,000, under the joint control of a surety company, such action was in violation of their trust and contrary to public policy. Fidelity & Deposit Company v. Butler, 130 Ga. 225, 60 S. E. 851, 16 L. R. A. (N. S.) 944.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 484; Dec. Dig. ⊂⊃116.]

18. COURTS ⊂⊃490—EQUITY ⊂⊃44—EXECUTORS AND ADMINISTRATORS ⊂⊃32(1)—FRAUDULENT APPOINTMENT OF ADMINISTRATOR—JURISDICTION IN EQUITY—"COMITY."

"Comity" is courtesy, and courtesy cannot be available as a cloak for fraud; besides, comity is no shield for those who, as in this case, claim to be, but are not, officers of a court. A judgment of the probate court in Georgia granting permanent letters of administration to one who is neither next of kin nor a creditor, nor otherwise entitled to administration under the provisions of the Civil Code, may be set aside in a direct proceeding in equity at the instance of heirs at law on the ground that there was a false and fraudulent representation in the application that the applicant was next of kin to the decedent. Wallace v. Wallace, 142 Ga. 408, 83 S. E. 113. The same power of redress in equity obtains against a false and fraudulent averment that the applicants are creditors. In all cases of fraud, except in the execution of a will, equity has concurrent jurisdiction in Georgia with the courts of law. Park's Code Ga. § 4621.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1343, 1344; Dec. Dig. ⊂⊃490; Equity, Cent. Dig. §§ 141–145; Dec. Dig. ⊂⊃44; Action, Cent. Dig. § 144; Executors and Administrators, Cent. Dig. §§ 191–200; Dec. Dig. ⊂⊃32(1).

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

19. COURTS ⊂⊃371(2)—JURISDICTION—FEDERAL COURTS.

The remedies in equity afforded by state statutes may, with the proper parties and averments, be made available in the equity courts of the United States.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 907, 973; Dec. Dig. ⊂⊃371(2).]

20. EQUITY ⊂⊃22—JURISDICTION—FRAUDULENT ADMINISTRATION OF ESTATE.

When a judge of the state superior court, having jurisdiction in equity, is appointed administrator in the manner above described, and as such, shortly after his appointment, confers with the leading counsel of the administrators, and of the claimants whose cause they advocate, and after such conference such judge, on promise of the counsel that he will be "taken care of," resigns the judgeship, another person is the next day appointed as judge of the circuit, and the latter, on the application of the ex-judge thus resigning, now acting as solicitor, at once vacates the orders for the protection of the estate theretofore passed by the other

state court judge who had jurisdiction, the gravity of the appeal to the national court, by the citizens of other states, for the protection of their alleged property rights, seems enhanced.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 51–62; Dec. Dig. ⊂⊃22.]

21. EQUITY ⊂⊃363—JURISDICTION—SCOPE OF INQUIRY—FRAUDULENT ADMINISTRATION OF ESTATE.

On this preliminary hearing the disputed right to inheritance cannot be settled, but the plaintiffs, citizens of other states, have the right to be heard, and to have the evidence taken according to the established procedure in equity, and in the meantime to have the estate preserved. In its present condition, the estate is seriously in danger, it is largely in cash or its equivalent, and, since it is not in lawful judicial possession, it has not the protection which the law provides. The motion to dismiss is denied, and decree allowing injunction and appointing the receivers may be taken.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 762–766, 768; Dec. Dig. ⊂⊃363.]

Suit by one Jennings and others against one Smith and others. Motion to dismiss denied, injunction granted, receivers appointed, and an order made that the cause proceed in equity.

Callaway & Howard, of Augusta, Ga., John J. & Roy M. Strickland and E. K. Lumpkin, all of Athens, Ga., P. Cooley, of Jefferson, Ga., F. H. Colley, of Washington, Ga., and S. C. Upson, H. S. West, and T. J. Shackelford, all of Athens, Ga., for plaintiffs.

Hamilton McWhorter, of Athens, Ga., Sibley & McWhorter, of Lexington, Ga., Horace M. Holden and Cobb, Erwin & Rucker, all of Athens, Ga., E. F. Noel, of Lexington, Miss., Tye, Peeples & Tye, of Atlanta, Ga., D. W. Meadow, of Elberton, Ga., and Paul Brown, of Lexington, Ga., for defendants.

J. S. James and J. R. Bedgood, both of Atlanta, Ga., U. V. Whipple, of Cordele, Ga., Sam Swilling, of Royston, Ga., J. N. Talley, of Macon, Ga., C. F. Rhodes, of Yazoo City, Miss., and H. H. Perry and W. A. Charters, both of Gainesville, Ga., for interveners.

SPEER, District Judge. [1] The federal question in this case exists because the judicial power of the United States extends to controversies between citizens of different states. Plaintiffs are citizens of Louisiana, the defendants of Georgia, and many of the latter reside in the Southern district and in the Northeastern division, in which the bill was filed. The jurisdiction of this court, because of diversity of citizenship, is therefore clear. Jurisdiction in the territorial sense is equally clear. The residence of one necessary defendant in the district, in the appropriate division, will in proper case draw to the court there the rights of all concerned, if essential to complete determination; that is, to final decree.

Is there also jurisdiction in equity? The undisputed facts will answer. James M. Smith, on the 11th day of December, 1915, was visited by sudden death. Unmarried, a man of mysterious origin, abnormal methods of life, of strong and dominating mind, he had accumulated a fortune which many termed millionaire might well covet. As a peddler among a people in their utmost penury, he had

acquired the means of collegiate education. From the seat of his peddler wagon he stepped to the head of his class. His degree won, he repaired to the mountains where he was known, to borrow a paltry sum with which to buy the first acres of that landed domain which at his death a prince might have envied. The remorseless beneficiary of the intolerable system by which a state, founded to relieve the victims of legal oppression, for years farmed out to selfish greed the labor and the lives of its wayward, its unfortunate, its erring, and its felons, he drove his serfs in stripes and chains as the taskmasters of Egypt drove the ancient people of God. His whipping boss was a material witness.

With such unresisting, such frantic labor, in recurring harvests for all the years of his manhood life, his broad acres were white with the snowy luxuriance of cotton, or golden with corn and grain. Shrewd, economical, from the teachings of thrifty trade in the days of poverty, he well knew the value of every penny, and his amassment of wealth was sure, steady, and swift. While no adequate estimate had yet been possible, that his accumulations may be counted by millions may not be doubted. But the inevitable hour came. The strong man fell, and on that day the shades of night had scarcely fallen when his millions were in the hands of four men, two his salaried servants, one a neighbor without right, and yet another the judge of the only state court of general jurisdiction with power to resist the wrong and to protect those entitled to inheritance from loss and injury. These men are termed temporary administrators. They are Mitchell, the dead man's bookkeeper, Arnold, his neighbor, Holder, his manager, and Meadow, judge of the superior court.

To the dead man not one of them was even remotely related. While there were that day in the house of the dead, and about his corpse, those who it is now contended were of his inheritable blood, they were kept in utter ignorance of the scheme to seize administration. The four sped away after dark, found the ordinary, and obtained the appointment. The pretense for this precipitate action was the fear on the part of those acting that an illegitimate mulatto on the plantation (who claimed to be the son of James M. Smith), who at the time was under the influence of drink, would bring about a revolt or insurrection. To those who know the intrepid character of the white men of that section, this statement will not be impressive. Certainly it does not appreciably affect the mind of the court.

[2-5] Now by the state law certain classes are entitled to administration. One is the next of kin. The four men appointed were not kin at all. The same Code section (3943) provides that, where no application is made by the next of kin, a creditor may be appointed. We have seen that the next of kin had no opportunity to apply, and the appointees applied as creditors. But they were no more creditors than kin. One, Arnold, testified that Smith owed him nothing, and he owed Smith nothing. Mitchell, who had long before answered an advertisement for a bookkeeper, but who could not come until Smith had paid his board bill and bought his railroad ticket,

had annually received for his services the sum of $500 and his room and board. This man now (and after he was enjoined by this court from changing the status of the estate) entered on the account books of his dead employer a charge in his own favor of $24,000. A part of this he states was made up by "tacit" promises of Smith to pay him a yearly salary of $6,000. As a witness he is incompetent, for Smith is dead; but, if competent, his testimony would not seem probable. Against Meadow, Smith held a promissory note of $4,000, and against Holder, similar notes of more than $20,000. Meadow's alleged claim against Smith is an unliquidated and indefinite demand for professional services rendered while himself a judge of the superior court. Since 1824, a superior court judge in Georgia is prohibited to practice law. Code, § 4837. He, too, as a witness, is incompetent. No proof was made before the ordinary that any of these men were creditors. They must offer proof before the probate court that they are creditors. Schouler on Wills, Executors & Adm'rs (5th Ed.) par. 1115. In fact, they were nothing of the sort, and two, at least, were heavily indebted to the estate.

[6] Another provision of Code section 3943, supra (clause 8): It provides:

"No person shall be appointed administrator who is neither of kin to the intestate, nor a creditor, nor otherwise interested in the grant of administration, except in the cases before provided."

[7-9] These men are within no exception. This prohibition is imperative, an order disregarding it is a transgression of authority, is utterly null and void, and may be so declared at the suit of any one lawfully concerned; especially null and void would be such an order when by fraud, without evidence or hearing, the order is obtained by deceitful statements that the applicants were within the eligible classes, when in truth and in fact they were not. The averment is jurisdictional. If false, it must be declared fraudulent, and the judgment thereby contained wholly void. The judgment of a court having no jurisdiction of the person and subject-matter, or void for any other cause, is a mere nullity, and may be held in any court when it becomes material to the interest of the parties to consider it. Code, § 5964. See, also, Myers v. Cann, 95 Ga. 385, 22 S. E. 611. There the president of a grocery company, which was a creditor, was adjudged ineligible, because not a creditor himself. The appointment of an administrator, not a creditor or next of kin, pronounced fraudulent, and sale by him set aside as void: Daniel v. Sapp, 20 Ga. 514. In McArthur v. Matthewson, 67 Ga. 134, Associate Justice Speer, for the unanimous court, declares that the grant of letters of administration by the ordinary may be set aside for fraud. "To do this equity has jurisdiction." The court cites Mobley v. Mobley, 9 Ga. 247, Wallace v. Walker, 37 Ga. 265, 92 Am. Dec. 70, and Markham v. Angier, 57 Ga. 43. In the more recent case of Neal v. Boykin, 129 Ga. 678, 679, 59 S. E. 912, 121 Am. St. Rep. 237, the doctrine is reasserted. The court quotes with approval the language of the learned and careful Mr. Justice Cobb in Jones v. Smith, 120 Ga. 642, 48 S. E. 134:

"If it could be made to appear that the judgment of the court of ordinary appointing the * * * administrators was the result of a fraud perpetrated upon that court by a false representation, * * * it may be that the defendants would have a remedy by a direct proceeding in equity to set aside this judgment on the ground of fraud."

The court concludes that, if the letters of administration were the result of a fraud perpetrated on the court by false representation that the necessary jurisdictional facts did exist, a court of equity would have power to set aside the judgment on the ground of fraud in its procurement. That the ordinary knew the falsity but aggravates the wrong. Then collusion would be added to fraud.

[10, 11] These men are not administrators; they are not officers of the state court. The ordinary was prohibited to appoint them. Three days later two other administrators were appointed on the petition of the invalid appointees. One of these is a debtor and a stranger to the estate, the other is said to be next of kin, but neither the application, the method of appointment, the record, or the order is such that manifests in the ordinary jurisdiction to add either name. The estate, then, has no legal representative. This conclusion is inevitable, and the Code section 3886 declares:

"If any person, without authority of law, wrongfully intermeddles with * * * the personalty of a deceased individual whose estate has no legal representative, he shall be held and decreed an executor in his own wrong, and as such shall be liable * * * for double the value of the property so possessed or converted by him."

From the order of the ordinary, void for fraud as to the jurisdictional averment, fraud which plaintiffs and interveners had no chance to meet, void because the ordinary exceeded his power (and the rule of eligibility extends to the appointment of administrators of "any sort"), void for reasons of public policy, because an appointee was a judge from whom relief might have been sought (2 Shouler on Executors and Administrators [5th Ed.] par. 1114), the plaintiffs and interveners are nevertheless denied all right of appeal. This order of appointment, then, unless the relief here sought is granted, has placed the vast power and influence of the decedent's millions, of his lands, of his counsel, his employés and agents in the hands of men who, so far from being disinterested as the statute requires, are the avowed and immovable partisans of one class of claimants.

In their sworn answer they declare that the incontestable evidence shows the title in this class. It is composed of the descendants of Zadoc Smith. But this avowal in their answer, and this unequivocal declaration in favor of Zadoc Smith's descendants, is not all; nor indeed the most potent and dangerous partisanship, their conduct has disclosed. Money, much money, was essential to support the claim of those whose cause these illegally appointed administrators had espoused. How was this to be obtained? A committee of ways and means, composed of the self-appointed administrators and certain potential counsel, was convened. One of the administrators is a Mr. Arnold. He is a rich man, but does not esteem the possibility of dying rich as in even a slight degree a reproach upon his name and

fame. A proposal that he should finance the litigation of Zadoc Smith's progeny by two of his wives was greeted with Mr. Arnold's unwavering disapprobation. He, however, indorsed their notes of hand. The other appointed administrators also added their personal guaranty to negotiable paper, which otherwise might have been unmerchantable as the I. O. U.'s of Wilkins Micawber. But this financial expedient did not suffice. Mr. Andrew Erwin, with Mr. L. K. Smith, had been added to the list of temporary administrators. Mr. Erwin is a banker. Through his bank he arranged another loan for the descendants of Zadoc. This was for several thousand dollars, and was secured by liens on their distributive shares in the entire estate. If their right thereto is established, the security cannot be challenged; but can as much be said for the disinterestedness of these administrators?

The relating testimony of Mr. Erwin is as follows:

"Q. Now, Mr. Erwin, tell us what, if anything, you have done as temporary administrator to finance these people who claim this estate by reason of being descendants of Zadoc Smith? A. Well, I have indorsed note for Zadoc Smith for $350. I have indorsed note for Mr. Green and Henry Smith for $600. Q. Each? A. No, sir; $600 together. I secured loan for them, for the Mississippi heirs. Now, I don't remember how much I got for each one. Q. You say you secured, that you made yourself personally liable? A. No, sir; they put up their interest in the estate as security. I negotiated the loan for them. Q. What form is that security in? A. It is a first lien on their interest, as I understand it. I never saw the papers. Q. Who holds them? A. The Commercial Bank holds some, and the Georgia National Bank. Q. For how much? A. I cannot say. Q. In your opinion? A. They aggregate in the neighborhood of $3,000 or $4,000. Q. That goes to the Mississippi heirs, Mississippi claimants? Any other than the Phœby Smith descendants? I take it for granted that, when you speak of the Mississippi claimants, you mean those descended from Robert Smith. Now, then, are any others included in that arrangement, except those descended from Robert Smith? A. Yes; Zed Smith. I do not know who he is descended from. I do not know what the name of his father was; but Zed Smith, and Henry, and I believe John L. over there. * * * I have never seen that paper, drawn by attorneys of bank and turned over to officer of bank. I understand that it is a first lien on their interest in the estate. Q. And you secured that? A. Yes, sir. Q. Are you indorser on that in any way? A. No, sir; not on that. * * * I am vice president of the Commercial Bank. Q. Now, then, is there any other arrangement for paying or advancing money to any of these claimants? A. No, sir; not that I know of. Q. What hope or prospect have you to be reimbursed in the instances in which you became personally liable, in the event these persons for whom you indorsed do not recover this estate? A. In some instances I will get my money; in others, I will not. Q. You and they, in common, look forward to the recovery of this estate as the means of paying you, and reimbursing you? A. Yes, sir. Q. These obligations made to the bank, in which they have given a first lien on their interest in the estate, in the event they fail to recover their interest there, what is the prospect of the bank's collecting on that? A. Where secured by first lien only, I think it would be very slim. Q. So that the security of the bank there, of which you are vice president, is also largely dependent on their success in this litigation? A. Yes, sir. Q. Now, something has been said, Mr. Erwin, about advancing money to pay traveling and time, per diem, to various people who have attended as witnesses at Augusta and here. Tell us, please, just what that arrangement is? A. That is a note signed by the attorneys and administrators and heirs of Zadoc Smith's descendants for $2,000, made to the Georgia National Bank, out of which we pay their expenses and per diem. Q. (by the Court). You disburse the fund? A. Yes; I disbursed the fund myself. Q. You disburse the fund for the conduct of their litigation? A. That part of the $2,000 that has been expended. Q. (by Mr. Howard). Will

you say just who are the parties to that note or obligation? A. N. D. Arnold— Q. N. D. Arnold is now temporary administrator? A. Yes, sir. Q. Is he one of the persons selected by the same claimants for permanent administrator? A. Yes, sir. Q. You are also selected for permanent administrator by them? A. Yes, sir. Q. Who else is selected for permanent administrator? A. L. K. Smith. Q. And this note for $2,000, for that purpose, that is in the national bank? A. The Georgia National Bank. Q. (by the Court). I would like to ask if the fund raised in the manner which you stated, where that fund is? A. It is in the Georgia National Bank, that portion that has not been expended. Q. All funds which have been raised for the purposes of the litigation, in the way you have mentioned, were deposited with the Georgia National Bank? A. Yes, sir. Q. Subject to whose check? A. Subject to my check, as agent. Q. As agent for the Zadoc Smith heirs? A. As agent for that fund, as I understood it. Q. Well, in whose interest are you agent? A. That is in the interest of the heirs. Q. The fund itself has no concern— A. That is in the interest of the heirs, the Zadoc Smith heirs."

Not without significance are the large credits the persons assuming to be administrators now accorded the descendants of Zadoc Smith. Some lived in a remote section of an adjoining county; some in distant states. If these newly discovered, these voluntary, philanthropists had ever loaned them, or either of them, a penny in all the past, the evidence does not disclose it.

[12] In the meantime other claimants of the vast inheritance appeared. They are the descendants of William and Lucinda Smith, late of Cobb county, Ga. They contend that James M. Smith is the son of William and Lucinda; that he left home early in life, enraged at the opposition of the family to his attachment to, and his desire to make his wife, a Miss Bullard, a girl of the neighborhood. These claimants live in Georgia and other states. They have intervened in the original bill before the court. They pray for the relief therein sought, and have submitted many affidavits and other proof. Uncontradicted, these would seem prima facie to support their claims. Through their counsel they became aware of the extraordinary proceedings in Oglethorpe county. They learned that Judge D. W. Meadow, through whose court they must seek redress, had himself gone with the others in decedent's care, and at 7 p. m. on the day of death, secured his appointment as administrator; that a debtor, he declared himself a creditor; that, with the others, he had stated to the ordinary that the personalty of the estate was $25,000, and then they had given a bond of $50,000, when the personalty in value was more than $1,000,000, and the bond should have been more than $2,000,000. Of these values Meadow, Mitchell, Holder, and Arnold must have had substantial knowledge. Meadow was for many years the decedent's special and confidential counsel. He had negotiated loans yet outstanding, nearly, if not quite, ten times the value of personalty he gave to the court. Mitchell, the dead man's bookkeeper, had also accurate knowledge. Holder, his manager, was himself a debtor in nearly the amount given the ordinary; and Arnold, probably the richest man in the county, save Smith, knew approximately the accumulations of his rival plutocrat. But we are not left to conjecture. Each of these men testified that they knew at the time they made out the application that the personal estate was more than $1,000,-

000, and in a short time (but not until the bill was filed in this court) they gave bond in that amount.

Other facts of grave import came to the knowledge of other claimants. Hopeless in that famous Northern circuit, whose renown has been made enduring by Toombs, the Stephenses, Hill, Lewis, Reese, Billups, Reed, Thomas, Andrews, and many another on the bead roll of Georgia's illustrious sons, they had to look elsewhere for initial justice—indeed, for the primal right to cross the threshold of a court of competent power.

[13, 14] When T. R. R. Cobb undertook the codification of the laws of Georgia, he included therein this salutary provision:

> Section 3999, Code of 1895 (Park's Code, § 4596): "Equity will not interfere with the regular administration of estates, except upon application of the representative, either, first, for construction and direction; second, for marshalling the assets; or upon application of any person interested in the estate, where there is danger of loss or other injury to his interests."

To this remedy, these interveners here, who claim to be the heirs of William and Lucinda Smith, and through their inheritable blood entitled to the estate of their alleged brother, James M. Smith, now resorted. The record bristles with facts tending to show danger of loss and injury to those entitled.

[15] Judge Meadow, the judge of the Northern circuit, including Oglethorpe county, as we have seen, was now disqualified. By the laws of Georgia, any other superior court judge might act, and a bill to enjoin the amazing proceedings in that county with regard to this estate was presented to Judge Fite, of the Cherokee circuit. The averments of the bill were ample, injunction was granted, and receivers appointed. The receivers, one of whom was a solicitor general of the state, another an assistant United States attorney, and all men of character, hastened to Smithonia, which had been the home of the dead. The decree of the court was read to one of the administrators there, Mr. Mitchell. He also read the bill. He consulted by telephone with the leading counsel for the administrators, whose son-in-law had now been added to the list, now six in all. Mitchell, as he states, was advised to disregard and defy the decree of the state court of general jurisdiction, fully empowered to act. In any event he did this. The receivers of the state court were not only refused possession of the assets, but they were treated with marked personal disrespect. The hospitality at Southern plantations is widely known. The weather was freezing. When the receivers of the state court would shut a door to exclude the bitter cold, again and again it was violently slammed open. They were in an insolent way charged for their board and lodging, and yet the facts disclose that one of the illegal administrators has been removed from an adjacent county, has been quartered with his family, without any charge for rent, in the home of the decedent, that some expenditures from the estate have been made for his comfort, and that he is to be maintained there at the expense of the estate. They could not obtain any conveyance, and, though one of them had passed three score and ten, they were forced to walk four miles to reach the nearest train. But this is not all. When the sheriff was

asked to serve the decree of the superior court of the Cherokee circuit on the illegally appointed administrators, he obstinately refused, and left for his home. This official now appears as a witness for the defense!

The ordinary, judge of a court of record, is not content with exemplifications therefrom, but is also a deponent for the defense. It was then, perhaps, not wholly without justification, when the counsel for the receivers, a member of the bar of such distinction that he had been United States attorney for half of the state of Georgia, remarked to one of the servants of the administrators that the law made for all should control, this man replied: "That don't go in this county, when Marse Hamp says 'No.'" As the soldiers of Lee termed their hero chieftain "Marse Robert," so some of their sons and grandsons, it seems, there addressed the virile and versatile leading counsel for the defendants as "Marse Hamp."

But the men who had resolved to control the estate of the dead millionaire were now not without apprehension. The resolute character of the judge who had enjoined them was well known. He indeed at once instituted proceedings to punish the contemptuous treatment of his decree. It was seen that something must be done. In a neighboring city, but in another judicial circuit, lived Judge Charles H. Brand. He was awakened at 2 o'clock in the morning by counsel for the illegal administrators. They now prayed for an injunction to forbid their own clients from turning over the assets to the receivers of Judge Fite. The injunction was granted. It is not surprising that during the hearing before this court the counsel for the administrators should disclaim any defense or benefit flowing from the injunctive order of Judge Brand. It is, however, before the court, and we cannot shut out the light it affords on the daring purpose of those who sought it to hold in this astonishing way the vast possessions of the decedent, to win the hundreds of thousands involved in commissions, fees, and the like, with the probable effect of making a just and righteous inquiry, in the local courts, as to who are the lawful inheritors, utterly impossible to the plaintiffs, who are citizens of other states.

[16] Notwithstanding the injunction Judge Brand had granted in some "wee short hours ayont the twal," the forebodings of the subtle mentalities guarding and guiding the pseudo administrators were not altogether allayed. Judge Meadow had spiked his own battery. He was yet, however, the judge of the superior court of the Northern circuit, and of Oglethorpe county. It was thought necessary to get him out of the way. In this crisis he came, or was induced to come, to Athens. There he found the strong and resourceful mind of the leading counsel for the administrators. A brief consultation ensued between this gentleman and Judge Meadow. The latter in his testimony informs us it was agreed that a place would be found for him in connection with the estate. The promise was indefinite, but satisfactory. The judgeship he agreed to resign; but the judge and the ex-judge must now make haste. They had but a few minutes to spare. They caught the Seaboard Air Line for Atlanta. When they reached the

capitol, it was night. They had their supper, and sought the Executive. His Excellency was accessible. The situation was fully explained. The Governor acted doubtless with grave, but surely with brief, deliberation. With the speed of electricity a message was sent from the executive mansion to Mr. Worley. He was invited to come at once to Atlanta. But everything must be done decently and in order. It was concluded that the resignation of Judge Meadow could take full force and effect only under the dome of the capitol itself. Next morning the consummation ensued. Meadow put off the ermine, and Worley put it on. The new judge then homeward took his way, but not wholly unattended. Ex-judge (now Counselor) Meadow, and other counselors for the Zadocs and the administrators, were of the party. In accordance with the Napoleonic maxim, that victories must be swiftly followed up, in successive orders, all ex parte, the new judge and the gifted members of his bar fell upon Fite. The orders of the latter were "modified"; that is to say, they were annulled. Now, these decrees of the judge of the Cherokee circuit, in the orderly administration of justice, were of force until they were modified by himself or reversed by the proper appellate authority. They were, however, in this way set at naught. The pseudo administrators, wholly unembarrassed, paid claims, leased or loaned out the mules and other live stock, leased large bodies of land in the highest state of cultivation, paid alleged debts, one to a member of the illegal board, in whose favor, as we have seen, a charge of $24,000 was also entered on the books of the estate, and made expenditures in considerable amounts. None of these things could temporators lawfully have done. Code, § 3935; Baumgartner v. McKinnon, 137 Ga. 166, 73 S. E. 518, 38 L. R. A. (N. S.) 824. Their sole duty is to collect and take care of the effects of the deceased. Code, § 3935. In the meantime, no bond to secure the vast personalty of the estate had been taken.

[17] But now the bill before this court, at the instance of citizens of other states, was filed. It was instantly perceived that it was judicious to furnish some sort of protection to the large volume of liquid assets. To do this the putative administrators gave bond in the sum of $1,000,000. Their surety was a great bonding company. It is gravely to be doubted whether any state in their equivocal conduct was more hazardous or more abhorrent to public policy than the means by which the signature of the security on the bond was obtained. Among the other assets in the hands of the administrators were stocks and bonds of unquestionable value, to the amount of $500,000. Had these men been administrators de jure, with the possession of these securities, they could not part, save after formal proceedings, with public notice, and due order of the court. In fact, they placed them under the joint control of the surety company and themselves, and on special deposit in the National Bank of Athens. In this way the trust was made to become surety for itself. These large values of the estate were pledged as security against the misconduct or the mismanagement of the administrators. In 130 Ga. 225, 60 S. E. 851, 16 L. R. A. (N. S.) 994, in the case of Fidelity & Deposit Co. v. Butler, it has been held that such disposition of the assets of an estate to secure the bond

of a fiduciary agent is contrary to public policy. Indeed, so unequivocal was their misuse of these valuable assets that the bonding company, by formal offer in judicio pending the trial, asks and submits to the direction of the court with regard thereto.

[18-20] It is, however, insisted that this court is powerless to grant the relief sought by citizens of other states, because of their constitutional right to have their controversy determined here. It is urged that the doctrine of comity between the state and the United States courts will prevent it. Comity is courtesy, and courtesy cannot be available as a cloak for fraud. Besides, comity is no shield for those who, as in this case, claim to be, but are not, officers of a court. The principles of equity confer upon this court the power to enjoin such wrongs, and to take order to protect the assets in hazard "ratione materiæ," set forth in the averments of the plaintiffs' bill and amendments. It is an ancient doctrine of equity that the most solemn documents, even the judgments of a court, are vitiated for fraud, and no state has surpassed Georgia, either in its statutes as expressed in the Code sections, or in the decision of its highest appellate tribunal, in the maintenance of this doctrine. It is urged with great pertinacity that this doctrine does not apply to the administration of estates. It has, however, been expressly held by the Supreme Court of Georgia, in Wallace v. Wallace, 142 Ga. 408, 83 S. E. 113, that a judgment of the court of ordinary granting permanent letters of administration to one who was neither next of kin, nor a creditor, nor otherwise entitled to administration under the provisions of Civil Code, § 3943, "may be set aside in a direct proceeding in equity at the instance of heirs at law, on the ground that it was falsely and fraudulently represented in the application for letters of administration that the applicant was next of kin to the decedent." The same power would redress in equity a false and fraudulent averment that the applicants are creditors.

Great reliance was placed by counsel for the respondents on the line of authorities, beginning with the case of Broderick's Will, 21 Wall. 503, 22 L. Ed. 599, to the effect that a judgment probating a will could not be assailed for fraud. But even in that case it was held that, while equity would not disturb the operation of a will, it would give relief to parties injured, against those who are in possession of the decedent's estate or its proceeds mala fide, or without consideration.

The learned counsel for the administrators can perceive no distinction between a proceeding in equity against the probate of a will and one to restrain the action of administrators who secured their appointment by fraud and to the injury of the heirs at law. They contend that the administration of assets and the probate of wills stand upon precisely the same footing. The state of Georgia, however, has in a statutory way pointed out the distinction. Section 4621 of the Code of 1911 declared:

"In all cases of fraud (except * * * in the execution of a will) equity has concurrent jurisdiction with the courts of law."

The same Code section (4596), as we have seen, bestows upon equity the jurisdiction "to interfere with the regular administration of estates

upon the application of any person interested in the estate, where there is danger of loss or other injury to his interest." A fortiori, would this power be effective where the appointment of the administrator and the administration of the estate is irregular beyond precedent. Besides, the case of Broderick's Will is one of a long line of authorities, announcing the principle that, while alterations in the jurisdiction of the state courts cannot affect the equitable rights themselves remain, yet an enlargement of equitable rights by the state may be administered by the United States courts as well as by the courts of the state. It follows that whatever may be the rule in regard to a will, as we have seen, administration is placed by the law of the state on a different footing, and the remedy in equity afforded by the state statutes, with proper parties and averments, may be made readily available in the equity courts of the United States. Besides this, a long line of authorities, beginning with Ann Payne v. Zadoc Hook, 7 Wall. 425, 19 L. Ed. 260, and ending with Simon v. Southern Railway, 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492, confers the general equity jurisdiction, irrespective of statute, to afford such relief in the courts of the United States, even where the state has conferred exclusive jurisdiction of administration on its probate court.

[21] It is, however, urged that we should deny jurisdiction because in the present state of the case the heirs of Zadoc Smith show the stronger claim or right of inheritance. It would be surprising, in view of the financial and other assistance afforded them by the pseudo administrators and their counsel, was this otherwise. On this preliminary hearing, this right of inheritance cannot be settled. The plaintiffs, citizens of Louisiana, for the purposes of this hearing, show a sufficient claim. They show their right to be heard, and to have the evidence taken according to the established procedure in equity. We cannot close the doors of the court to their prayers for relief. Others, interveners, in varying degree, show an equal right. They, too, are entitled to be heard. It may not be doubted that many powerful influences combined to strengthen the claim of the heirs of Zadoc Smith. But it is the duty of a court of equity to bend the listening ear, and hear the plaint of the humblest and most obscure.

In the meantime the estate should be preserved. For the reason, then, that the appointment of the temporary administrators on the 11th of December, 1915, was procured by fraud, and that the ordinary, because of the prohibition of the statute, had no power to appoint them, it is for the purposes of this case held that they are not temporary administrators, or officers of the court, and that their possession of the estate of the late James M. Smith is not the possession of the state court, or its officers, but is the possession of executors de son tort. The appointment of the additional administrators, made on December 14th, is less culpable; but the record does not disclose their right to administration. They were added at the request of the first appointed, who are not administrators at all. One was not a creditor, but a debtor. Other reasons for the equitable relief sought are scarcely less cogent. In its present condition, the estate is seriously endangered. It is largely in cash, or its equivalent, and it has not the pro-

tection which the law provides. For these reasons, and for others that might be pointed out, the motion to dismiss is denied, and a decretal order may be taken, granting the injunction and appointing receivers in accordance with the prayers of the bill, the amendments, and interventions. The possession of such receivers will, in our judgment, be the first judicial possession of the assets of the decedent.

It is further ordered that the cause proceed as is usual in equity.

CENTRAL TRUST CO. OF ILLINOIS v. CHICAGO, A. & N. RY. CO. (ILLINOIS CENT. R. CO., Intervener).

(District Court, N. D. Iowa, E. D. April 3, 1916.)

No. 7.

1. RECEIVERS ⟸152—CLAIMS ENTITLED TO PREFERENCE—TRUST FUNDS.
A sum due from one railroad company to another for traffic balances on interchange of business on account of items omitted from its reports to the other company, and which sum was retained and used in the operation and maintenance of its road, cannot be recovered from its receiver as a trust fund, to take precedence over its bonded indebtedness, where it cannot be traced into any specific property.
[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 272–275, 278; Dec. Dig. ⟸152.]

2. RECEIVERS ⟸152—INSOLVENT RAILROAD COMPANY—CLAIMS ENTITLED TO PREFERENCE.
Where, however, the bondholders were in control of and operating the road when such sums were withheld, and they were necessary and used to keep the road in safe operating condition, the claim therefor is entitled to preference over the indebtedness to the bondholders.
[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 272–275, 278; Dec. Dig. ⟸152.]

3. RECEIVERS ⟸152—CLAIMS ENTITLED TO PREFERENCE—OPERATING EXPENSES OF RAILROAD.
The rule usually applied, limiting preferential claims against the receiver of an insolvent railroad company for operating expenses to those arising within six months prior to the receivership, is not arbitrary, but the giving of such preference rests in the discretion of the court.
[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 272–275, 278; Dec. Dig. ⟸152.]

In Equity. Suit by the Central Trust Company of Illinois against the Chicago, Anamosa & Northern Railway Company. On intervening petition of Illinois Central Railroad Company. Decree for intervener.

Charles L. Powell, of Chicago, Ill., and Glenn Brown, of Dubuque, Iowa, for complainant.

Walter S. Horton, of Chicago, Ill., and Helsell & Helsell, of Ft. Dodge, Iowa, for intervener.

REED, District Judge. This suit is by the complainant, an Illinois corporation, to foreclose two certain mortgages or trust deeds

made by the defendant railway company, an Iowa corporation, upon its railroad property in Iowa and the income thereof, to the complainant, December 1, 1904, and April 7, 1913, both of which mortgages are to secure the payment of 350 interest-bearing bonds of said railway company for $1,000 each, dated December 1, 1904, which mortgages were duly recorded in the proper records.

The bill was filed February 21, 1914, and it is alleged therein that the defendant had defaulted in the payment of the principal and interest upon said bonds, except the interest falling due December 1, 1913, and that the railway company is insolvent. Application is made in the bill for the appointment of a receiver, and in an answer filed by the defendant with the bill its allegations are admitted, and consent is given to the appointment of a receiver, and G. E. Farmer, who was then superintendent and manager of the defendant's railroad was appointed receiver of the railroad property.

In March, 1914, the Illinois Central Railroad Company, whose railroad in Iowa is crossed by that of the defendant company at Coggon, in that state, and there connects with that road, filed its petition of intervention, claiming that it is entitled, for various alleged reasons, to priority in payment of some $12,300 from the property of the defendant railway company in the custody of the receiver, alleged to be due the intervener for traffic balances upon interline freight, per diem accounts, and other indebtedness arising out of the exchange of business between the two railroads as connecting carriers, since the fall of 1911, to the time of the appointment of the receiver, and asks that said amount be allowed and paid to the intervener from the property of the defendant in the custody of the receiver, prior to the payment of the claims of the bondholders secured by the mortgages in suit. The defendant and complainant separately answered the intervener's petition, denying its right to priority of payment of its indebtedness in preference to the claims of the bondholders, but not denying the indebtedness claimed, except certain items thereof, which are disputed. Upon the issues so formed a large amount of testimony has been taken, from which and the admissions of the pleadings the ultimate facts deemed material are found to be substantially as follows:

The defendant Chicago, Anamosa & Northern Railway Company (hereinafter called the Anamosa Company) was incorporated under the laws of Iowa prior to 1904, by Peter Kiene, Henry Kiene, and Paul Keine, of Dubuque, Iowa, and others, for the purpose of building and equipping a standard gauge steam railroad from Anamosa, in Jones county, Iowa, in a northwesterly direction to some other point in that state, or beyond, as it might later be determined. To aid in the construction of such railroad the Anamosa Company originally issued $150,000 of its authorized capital stock and $350,000 of interest-bearing bonds, dated December 1, 1904, due in 15 years, interest payable semiannually on the 1st days of June and December in each year following until fully paid, which bonds were secured by the mortgage or trust deed of December 1, 1904, first mentioned in the bill of complaint. With the money derived from the issue of such

stock and bonds the Anamosa Company completed its road prior to 1906 from Anamosa to Coggon, in Linn county, Iowa, some 20 miles from Anamosa, where it crosses and connects with the road of the intervener. In August, 1911, for the purpose of paying a balance owing for building the road to Coggon, and to extend the same beyond that place, the Anamosa Company authorized an increase of its capital stock to $1,500,000 and a new issue of interest-bearing bonds in the same amount, to be secured by the mortgage or trust deed mentioned in the bill upon its railroad property from Anamosa to Coggon, and the extension thereof to Quasqueton, in Buchanan county, 15 miles from Coggon. The company then issued $450,000 of additional stock, increasing the total amount of stock to $600,000. From the new issue of bonds so authorized, when issued, the bonds of December 1, 1904, were to be paid, and the remainder were to be sold or otherwise used to complete the road to Quasqueton or beyond; but none of the new issue of bonds so authorized was ever issued. After the increase of the capital stock, and the authorized issue of new bonds, Louis E. Meyer and George B. Caldwell entered into a written contract with Peter Kiene, Henry Kiene, and Paul Kiene, three of the five authorized directors of the Anamosa Company, to loan to that company $250,000, the estimated cost of extending its road from Coggon to Quasqueton, for which notes of the Anamosa Company were to be made in amounts advanced by Myers and Caldwell as needed for building the extension of the road, to be secured by a pledge of the $600,000 of stock and of the $350,000 of bonds dated December 1, 1904. Myers and Caldwell then formed a syndicate, so called (not incorporated), as agreed with the Kienes, to furnish said loan of $250,000.

After so arranging for such loan the Anamosa Company entered into a contract with the L. E. Myers Company, a construction corporation of which the said Louis E. Myers was president, to construct the road from Coggon to Quasqueton. That company did build the road to Quasqueton, and the $250,000 loan to the Anamosa Company was advanced by Myers and Caldwell, "managers of the syndicate," from time to time, to the "L. E. Myers Company," as the building of the road progressed, upon certificates of Henry Kiene, the then president of the Anamosa Company, and notes of that company, indorsed by the Kienes, were made to Myers and Caldwell, "managers of the syndicate," for the loan of $250,000 to the Anamosa Company, and the $600,000 of stock, and the $350,000 of bonds of December 1, 1904, were then pledged and delivered to Myers and Caldwell as security for said loan.

The L. E. Myers Company, a corporation, of which L. E. Myers is or was president, and the builder of the road from Coggon to Quasqueton, has no connection, it is claimed by Myers, with Myers and Caldwell as managers of the "syndicate"; but who were the members of said "L. E. Myers Company," if any, other than Louis E. Myers, its president, does not appear from the testimony. The construction of the road from Coggon to Quasqueton was begun in September, 1911, and in the building thereof differences of some sort

arose between Myers and Caldwell and the Kienes over its construction, or the management thereof, as a result of which the Kienes, who then were three of the five directors of the Anamosa Company, and a majority thereof, retired from such directorate, and Louis E. Myers, George B. Caldwell, and others, acting with them and in their interests, were elected directors of the Anamosa Company, and constituted a majority thereof. Mr. Myers was then elected vice president, and latter chosen president, of the railway company. The extension of the road from Coggon to Quasqueton was completed during the year 1912, and it developed in the fall of that year that the Kienes were then insolvent.

After the Kienes retired from the control and operation of the Anamosa road, Myers and Caldwell, as "managers of the syndicate," being then in control of the board of directors of the Anamosa Company, and holders of the stock and the $350,000 of bonds of that company so pledged to them, took possession of all of the railroad property of that company, as it was agreed in the contract for the loan they might do, and through its agents and employés managed and operated the road, received the income thereof, and also the traffic balances, per diem accounts, and other items of indebtedness owing to the intervener for its share of the carriage of the interline traffic to and from its road as a connecting carrier. Of the earnings of the Anamosa Company while Myers and Caldwell were so in possession and control of the road, also the traffic balances and per diem accounts due to the intervener, which were received, the earnings of both companies were applied to the payment of the improvement of the roadbed, bridges, railroad tracks, and other structures of the Anamosa road to keep it in a safe condition to be operated, and to protect the business of the Anamosa Company, and such improvements were an ordinary current expense of operation, necessary to keep the road in an operative condition, and enable it to perform its duties to the public.

April 7, 1913, Louis E. Myers and those associated with him still being in control of the board of directors of the Anamosa Company, and Mr. Myers its president, that company made to the complainant the second mortgage or trust deed set out in the bill of complaint, upon all of the property of that company from Anamosa to Quasqueton, to further secure the $350,000 of the bonds so pledged to Myers and Caldwell as security for said loan of $250,000. Who the members of the so-called syndicate are, or were, does not appear from the testimony; but, whoever they are or were, Myers and Caldwell acted for them in all these transactions.

In the fall of 1913, Louis E. Myers and George B. Caldwell, in their own names, and not as managers of "the syndicate," brought suit in this court to foreclose their lien upon the stock and bonds of the Anamosa Company so pledged to them as security for said loan of $250,000, and such proceedings were had therein that in December, 1913, they recovered a decree against the Anamosa Company, foreclosing their lien upon said stock and bonds for the amount due upon said loan of $250,000, which, with interest, was then about $250,000,

and an order directing the sale thereof, but no personal judgment against the Anamosa Company. Under such decree the said stock and bonds were sold by a special master of this court to Myers and Caldwell for the amount claimed by them to be due upon said notes, turning in said notes as payment of their said purchase, which sale was duly confirmed in January, 1914.

This suit was then brought by the complainant February 21, 1914, as before stated, to foreclose the mortgages of December 1, 1904, and April 7, 1913. Mr. Farmer, the receiver, who was superintendent in charge of the Anamosa Company while it was in control of and being operated by Myers and Caldwell, testified that, in reporting to the intervener from time to time the amount of its traffic balances, he withheld from such reports a considerable part of the amount so earned by the intervener, but denies any intentional wrong in so doing, and said it was done because the earnings of the road, aside from such traffic balances, were insufficient to pay the necessary operating expenses of the road, and that he retained and so used such traffic balances to keep the railroad property in a safe condition to be operated and protect the business of the road, and that if he had not done so the operation of the road could not have been continued. He also testified that approximately 70 per cent. of the earnings of the Anamosa road, while he was managing the same prior to the appointment of the receiver, came from interline freight, and other traffic carried to and from that road by its connecting carriers, and that approximately 40 per cent. of its entire earnings were carried by the intervener alone; that, if he had been required to make junction settlements with said connecting carriers, he could not have continued the road in operation. During the taking of the testimony the parties stipulated the following facts:

(1) That the bonds of the Anamosa Company, secured by the trust deed and supplement thereto to the complainant, are dated December 1, 1904, and the amount outstanding of said bonds, exclusive of interest, is $350,000, no part of which has been paid; that the trust deed of said defendant railway company to the complainant, securing said bonds and now being foreclosed in this proceeding, is dated December 1, 1904, and was duly recorded in that month, and covers all of the property of every kind of the defendant railway company, and all subsequently acquired property, and the supplemental trust deed of said defendant railway company to said complainant, given to further secure the holders of said bonds, was made and recorded in April, 1913, and said trust deeds cover all the property of defendant railway company of every kind in possession of the receiver herein.

(2) That the complainant's bill was filed, and the receiver appointed and took possession of all the property of the said defendant railway company, February 21, 1914.

(3) That both the defendant Anamosa Company and the intervener the Illinois Central Railroad Company were, at all times when the transactions were had out of which the indebtedness hereinafter mentioned arose, engaged in the operation of lines of railroad, and each of them were common carriers of freight and passengers.

(4) That the railway lines of the intervener Illinois Central Railroad Company and the defendant Anamosa Railway Company cross at Coggon, Iowa, at which point there is a junction and track connection between said two lines.

(5) That in the carrying on of their business it has been and was customary for each of said railroads to deliver to the other at said junction point freight in carload and in less than carload lots, destined to points on or reached through the line of the receiving company, the freight charges, when not prepaid, to be collected at the point of destination by the company making final delivery to the consignee, such freight so collected to be apportioned between the various carriers in the respective amounts to which each carrier was entitled thereto, and payment made therefor by the carrier collecting the freight charges; such items being hereinafter referred to as "interline freight accounts." That since the 1st day of March, 1912, the division of freight between the Anamosa Company and the Illinois Central Company has been that said first-named party received 25 per cent. and the Illinois Central Company received 75 per cent. of the freight charged; but in making this stipulation it is understood and agreed that neither the complainant nor the Anamosa Company in this court, or any other court, in this or any other proceeding, bind themselves to any admission that said division, 25 per cent. and 75 per cent., is a fair or equitable division between said roads of interline freight receipts.

(6) That in carrying on the business it has been, and was, customary for each road to charge to and receive from the other compensation at an agreed price per day for the use of its freight cars while on the line of the other road; such items being hereinafter referred to as "per diem accounts."

(7) That in the carrying on of said business and the interchange of business between the roads there were various bills of one against the other, resulting from work done by one for the other, or from articles furnished by one to the other, or for loss or damage claims, paid by one and chargeable to the other, such items being hereafter referred to as "bills for collection unpaid," and there were some other transactions between the companies, the items of which, hereinafter set out, show for themselves what they were.

(8) That in order to avoid the taking of evidence and accounting on the various claims set out in the petition of intervention, and amendment thereto, the parties hereto have agreed, and do hereby agree, that (figuring the division of interline freight on the basis of 25 per cent. and 75 per cent.) there was at the time of the appointment of the receiver herein, and still is, due to the intervener from the defendant Anamosa Company the various items as hereinafter set out under the head of "interline freight accounts," "per diem accounts," "bills for collection unpaid," "freight charges on contractor's outfit," "claim authorized," and "for account Y. & M. V. R. R. Company," all aggregating the sum of $11,675.64, less the credits shown in the sum of $35.43 due from intervener to said Anamosa Company, making the net balance due to the intervener the sum of $11,640.21. That

the various items of said indebtedness and of said credits arose and occurred at the various dates as shown in said tables, to wit:

On Interline Freight Accounts.

From June, 1910, to June, 1913, inclusive, correction items		$ 494.82
From September, 1913, to February 21, 1914, correction items		67.65
Regular items		9,406.81
Total		$ 9,969.28

On Per Diem Accounts.

From August, 1911, to July, 1913, inclusive		$ 329.75
From August, 1913, to February 21, 1914, inclusive		468.45

On Bills for Collection Unpaid.

Total amount	$243.78	
Freight charges on contractor's outfit for months of August, September, and October, 1911	647.45	
Claim authorized for December, 1913, but unpaid	1.62	
Yazoo & Mississippi Valley Railroad Company, for April, 1913	9.60	
Correction claim, August 1913	5.71	908.16
Total		$11,675.64
(9) Less amount due from the Illinois Central Company to the Anamosa Company		35.43
Balance due the intervener from the Anamosa Company		$11,640.21

Of this amount $52.75 accrued before Myers and Caldwell took possession and assumed control of the Anamosa road, and should be deducted therefrom, leaving as the actual balance due and owing to the intervener the sum of $11,584.46. Other matters deemed material may be noticed in the course of the opinion.

[1] In behalf of the intervener it is urged that the Anamosa Company, in withholding from its reports to the intervener of the amount of the interline freight and other items of indebtedness due the intervener growing out of the interchange of business between the two roads as connecting carriers, and applying the same to the improvement and betterment of its road, track, and structures, to keep them in a safe condition of operation, was such fraud upon the intervener as makes its share of the earnings so retained and applied a trust fund traceable to the property of the Anamosa Company in the hands of the receiver, from which it is entitled to receive payment of such funds in preference to the claims of the bondholders. Admitting, without deciding, that the retention and application by the Anamosa Company of the indebtedness so due the intervener was in fact such fraud upon the latter as would make its share of the earnings a trust fund in the hands of the Anamosa Company as claimed, the question remains: Has such fund been sufficiently traced into the property in the custody of the receiver? It may be conceded, admitting the facts to be as claimed by the intervener, that many cases may be cited in support of its contention, among them Independent District v. King, 80 Iowa, 497, 45 N. W. 908; Davenport Plow Company v. Lamp, 80 Iowa, 772, 45 N. W. 1049, 20 Am. St. Rep. 442; District Township v. Farmers'

Bank, 88 Iowa, 194, 55 N. W. 342; Peak v. Ellicott, 30 Kan. 156, 1 Pac. 499, 46 Am. Rep. 90; McLeod v. Evans, 66 Wis. 401, 28 N. W. 173, 214, 57 Am. Rep. 287; Bircher v. Walther, 163 Mo. 461, 63 S. W. 691. But there has been some modification of these cases in later decisions, in Iowa and Wisconsin, at least. See Jones v. Chesebrough, 105 Iowa, 303, 75 N. W. 97; Bradley v. Chesebrough, 111 Iowa, 126, 82 N. W. 472; Nonotuck Silk Co. v. Flanders, 87 Wis. 237, 58 N. W. 383. Whatever may be the rule in Iowa or other state courts upon this question, the rule for which intervener contends is not generally held in the federal courts. See note to Lowe v. Jones, 7 Ann. Cas. 553, 558.

In Empire State Surety Co. v. Carroll County, 194 Fed. 593, at page 604, 114 C. C. A. 435, at page 446, the Circuit Court of Appeals for this circuit, upon a full consideration and citation of authorities upon this question, said:

"It is indispensable to the maintenance by a cestui que trust of a claim to preferential payment by [an assignee or] receiver out of the proceeds of the estate of an insolvent that clear proof be made that the trust property or its proceeds went into a specific fund, or into a specific identified piece of property, which came to the hands of the receiver, and then the claim can be sustained to that fund or property only and only to the extent that the trust property or its proceeds went into it. It is not sufficient to prove that the trust property or its proceeds went into the general assets of the insolvent estate and increased the amount and the value thereof which came to the hands of the receiver [citing many authorities]."

See, also, Macy v. Roedenbeck, 227 Fed. 346, —— C. C. A. ——.

There is no sufficient testimony that the traffic balances due the intervener from the Anamosa Company have been traced into certain identified property in the hands of the receiver, unless it be the tracks or roadbed and some of the bridges for the improvement and betterment of which the balances were used; but the parts of the roadbed or track and bridges so improved and the extent or value of the improvement has not been definitely shown. The above cases are, of course, controlling upon this court, and put the question at rest here. The contention of the intervener in this regard cannot, therefore, be upheld.

[2] For the complainant it is earnestly insisted by its counsel that the case of Chicago & Alton Railroad Co. v. United States & Mexican Trust Co., 225 Fed. 941, 141 C. C. A. 64 (8th C. C. A.), is applicable to the facts upon the other contention of the intervener, and controls its determination by this court. It is true that in that case it is held that it is only when current gross income of a railroad property in active operation has been diverted from the payment of the necessary current expenses of operation and applied to the payment of interest on the bonded or other secured indebtedness of the road, or upon claims for construction or for improvements and betterments of the property not necessary to keep the road in an operative condition, and leaves unpaid ordinary current expenses necessary to keep the road in a safe condition to be operated, that the court administering the property through a receiver may order the payment of such unpaid expenses from the proceeds of the property, in preference to the pay-

ment of prior recorded liens thereon; but, if there has been no diversion of current income, there can be no restoration, and the amount of the restoration cannot exceed the amount of the diversion. But this is said of facts wholly unlike the case before us; for here Myers and Caldwell, as managers of the "syndicate" and the holders and equitable owners of the entire bonded indebtedness of the Anamosa Company secured by the mortgages in suit, and in control of the board of directors, had taken actual possession of the entire railroad property in question, from Anamosa to Quasqueton, shortly after they made said loan, and thereafter operated the same and received the income thereof up to the time of the appointment of the receiver, and used the amounts so due the intervener for the improvement and betterment of the road, to keep it in a fit and safe condition to be operated, and refused to pay the intervener for its share of the interline traffic. Though there may have been no diversion by the Anamosa Company of its own current income during the time Myers and Caldwell were so operating the road, it is not disputed that it did during such time receive and use the intervener's share of its earnings and appropriate the same to the improvement and betterment of the Anamosa road to keep it in a safe condition for operation.

In Illinois Trust & Savings Bank v. Doud, 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481, the Court of Appeals for this circuit, reviewing with much care the decisions of the Supreme Court of the United States upon the question of the right of an unsecured creditor of a railroad corporation to a preference in payment of his claim out of the net income, or the corpus of the property, over creditors secured by recorded liens thereon, deduced therefrom the following, among other, conclusions, viz.:

"A court of equity, engaged in administering mortgaged railroad property under a receivership in a foreclosure suit, may prefer unpaid claims for [necessary] current expenses of the * * * operation of the railroad, incurred within a limited time before the receivership, to a prior mortgage lien in the distribution of the [net] income, or of the proceeds of the mortgaged property."

This rule was reaffirmed in Rodger Ballast Car Co. v. Omaha, K. C. & E. R. R. Co., 154 Fed. 629, 83 C. C. A. 403, and other cases. It is true that it is said in the Rodger Ballast Car Company Case, and in the Chicago & Alton Railroad Company Case above, that the rule of the earlier cases in the Supreme Court has been narrowed by the decision in Gregg v. Metropolitan Trust Co., 197 U. S. 183, 25 Sup. Ct. 415, 49 L. Ed. 717. But in none of these cases has it been denied that the ordinary current expenses of operation necessary to keep the road in a safe condition to be operated and protect the business of the road may be paid from the corpus of the property when the income thereof is insufficient to pay such expense in preference to prior recorded liens thereon. Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 311, 1 Sup. Ct. 140, 27 L. Ed. 117. And see Shugart & Barnes Bros. v. A., N. & S. Ry. Co., 161 Iowa, 351, 361, 143 N. W. 90. And see Love v. North American Surety Co., 229 Fed. 103, —— C. C. A. ——.

No authority has been cited or principle of equity suggested by counsel for the complainant that will permit the bondholders of an insolvent

railroad company who are themselves in possession of its property, operating the road and receiving the earnings of connecting carriers, as was done in this case, to defeat recovery by connecting carriers of such earnings by a foreclosure and sale of the mortgaged property securing the bonds.

The complainant urges, however, that Myers and Caldwell, as managers of the syndicate, held the stock and bonds of the Anamosa Company only as a pledge or security, and acquired the legal title in January, 1914, when they purchased them at the master's sale under the decree of foreclosure and surrendered the notes of the Anamosa Company in payment of such purchase. But this is a matter of form only, and not of substance, for the pledge of the bonds and stock to them as security is as effectual to protect them in their actual right to the pledge as if they had been the holders of the legal title thereto; and a court of equity will so construe the transaction, if necessary, to protect the rights of others in the proceeds of the property, especially when the share of the earnings of the intervener has been so used as to inure to the benefit of Myers and Caldwell as effectually as if they had been the holders of the legal title of the pledge. Who the members of the syndicate, other than Myers and Caldwell, are or were, does not appear from the testimony; but, whoever they are or were, Myers and Caldwell were acting for them in all of these transactions, and they are bound by such action. The conclusion, therefore, is that the intervener is entitled to an order or decree directing the receiver to pay from the proceeds of the railroad property in his custody, its claim against the Anamosa Company accruing from the time Myers and Caldwell took possession of the railroad property to the appointment of the receiver on February 21, 1914, in preference to the claims of Myers and Caldwell as holders of the bonds of the railroad company.

[3] The fact that some of the items stipulated as due to the intervener accrued more than six months prior to the appointment of the receiver has not been overlooked. Such limit, however, is not arbitrarily fixed, but rests in the discretion of the court; and when the bondholders are themselves in possession of and operating the road, or some other circumstances so warrant, the rule ought not to be followed. The amount the intervener is entitled to recover in this case was not a voluntary loan or advancement to the Anamosa Company, but was an appropriation by that company, while the road was in control of the bondholders, of the earnings of the intervener as a connecting carrier to the payment of the necessary and ordinary expenses of operation during the entire time they were operating the road. The bondholders, and the complainant who brings this suit for their benefit, are therefore estopped from denying the equitable right of the intervener to be paid in full from the corpus of the property the amount of its earnings so applied in preference to the payment of the bonds.

The intervener, by an amendment to its petition, asks that the receiver be required to install an interlocking switch or crossing of the two roads at Coggon as a necessity for the safe use of the crossing by each of the roads, and that it be done at the expense of the receiver as agreed between the two companies prior to the receiver-

ship. There has been no testimony called to the attention of the court in regard to this matter. The condition of the road is such that the matter will not now be considered, but will be left until the final settlement of the receivership.

The intervener has also filed an amendment or supplemental petition of intervention, in which it asks that the receiver be required to pay the traffic balances due to the intervener and received during his operation of the road, and has failed to pay to the intervener. Traffic balances due the intervener and collected by the receiver during his administration of the road, and not accounted for to the intervener, are expenses of administration, that will be included in the final settlement of the receiver's accounts.

A decree may be prepared by counsel of the respective parties in accordance with the views herein indicated, which shall provide for the sale of the property in the custody of the receiver, and submit the same to the court for approval. It is accordingly so ordered.

UNITED STATES v. PHILADELPHIA & R. RY. CO.

(District Court, E. D. Pennsylvania. May 26, 1916.)

No. 18.

1. COMMERCE ⟸33—"INTERSTATE COMMERCE"—WHAT CONSTITUTES.
   The essential character of the commerce and the real and ultimate destination of the shipment, and not the billing, determines whether it is "interstate commerce."

   [Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 26, 81; Dec. Dig. ⟸33.

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

2. CARRIERS ⟸38—INTERSTATE CARRIERS—OFFENSES.
   An indictment, charging that the defendant carrier participated in the interstate transportation of coal over a route partly by rail and partly by water without having filed with the Interstate Commerce Commission tariffs for the rate of water transportation, averred that a shipment of coal from a point in Pennsylvania to a port in that state was from thence shipped by water to a point in a foreign state. The indictment further averred that defendant owned the railroad and the barge line by means of which the coal was transported. It was averred that the coal was rebilled at the port to the point of ultimate destination, but no consignor or consignee at that point was stated. *Held* that, while the mere billing would not determine the character of the shipment, yet the indictment was insufficient to show an interstate shipment of coal over a route partly on land and partly by water; for, there being no averments showing that there were not two separate shipments, the original shipment between the two points in Pennsylvania may be taken as an intrastate shipment.

   [Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 96, 97; Dec. Dig. ⟸38.]

3. CARRIERS ⟸38—CARRIAGE OF GOODS—DISCRIMINATION—INDICTMENT.
   An indictment charged that defendant, which operated a line of railroad and a barge line by means of which coal was carried from Pennsylvania to adjoining states, gave special privileges to a particular shipper

of anthracite coal, in that the rates for the barge line transportation of anthracite coal had been fixed and unchanged for more than five years, while the rates for the transportation of bituminous coal had been subject to frequent fluctuation; that other coal shippers than the one favored were required to make special arrangements as to each shipment; that the favored shipper was given facilities for securing information concerning shipments of coal by other shippers; and that such shipper was also favored in the assignment of barges and barge space. Act Feb. 4, 1887, c. 104, § 6, 24 Stat. 380, as amended by Act June 29, 1906, c. 3591, § 2, 34 Stat. 586 (Comp. St. 1913, § 8569), declares that no carrier shall engage or participate in the transportation of property unless the rates have been filed and published, nor shall it extend to any shipper or person any privileges or facilities except such as are specified in the tariffs. *Held*, that the indictment was insufficient to charge a discrimination, not showing the filing of tariffs or why the rates for shipments of anthracite coal should not have been stationary while those for shipments of bituminous coal fluctuated.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 96, 97; Dec. Dig. ⟸38.]

4. CARRIERS ⟸38—CARRIAGE OF GOODS—DISCRIMINATION—INDICTMENT—CONCLUSIONS.

In such case, the indictment is insufficient to charge any offense with respect to assigning barge space or divulging information to the favored shipper; there being no averments of facts in respect thereto.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 96, 97; Dec. Dig. ⟸38.]

At Law. Indictments against the Philadelphia & Reading Railway Company for offenses in connection with interstate carriage. On demurrer to indictments. Demurrers sustained.

Alexander H. Elder, Sp. Asst. U. S. Atty., of Washington, D. C., Robert J. Sterrett, Asst. U. S. Atty., and Francis Fisher Kane, U. S. Atty., both of Philadelphia, Pa.

Wm. Clarke Mason and Charles Heebner, both of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. Indictment No. 18 contains 60 counts. Fifty-nine counts charge the defendant as a common carrier with engaging and participating in interstate transportation of anthracite coal over a route partly by rail and partly by water without having filed with the Interstate Commerce Commission tariffs showing the rates for the water transportation, and are practically identical in form and substance, except for the changes necessary to identify a different shipment under each count. The sixtieth count charges the defendant with extending to a shipper privileges and facilities in interstate transportation not specified in tariffs filed.

The first count charges:

(1) That the defendant from Otcober 1, 1913, to March 25, 1915, was a common carrier engaged in the transportation of anthracite coal shipped from divers mines via St. Clair and Schuylkill Haven, Pa., wholly by railroad and waybilled and transported from St. Clair and Schuylkill Haven to Port Richmond Piers, Philadelphia, Pa., another point on its route, where it connected with a barge line known as the Philadelphia & Reading Transportation Line.

(2) That the name "Philadelphia & Reading Transportation Line" is applied to a line of barges and tugs operated by the defendant, and that, through the instrumentality of the barge line, the defendant was engaged in the transportation of anthracite coal by water from Port Richmond Piers, Philadelphia, to New England points, including East Cambridge, Mass.

(3) That during the said period the defendant was also engaged in the transportation partly by rail and partly by water in interstate commerce under a common control, management, and arrangement for the continuous carriage and shipment of anthracite coal waybilled and transported from St. Clair and Schuylkill Haven to Port Richmond Piers, Philadelphia, by rail, and thence transported to East Cambridge and other New England points through the instrumentality and by the means of the transportation line by water, and that so it had established during the said period through routes for the transportation of property in interstate commerce partly by rail and partly by water under a common control, management, or arrangement for a continuous carriage and shipment from St. Clair and Schuylkill Haven, Pa., to East Cambridge, Mass.

(4) That on December 3, 1913, the defendant engaged and participated in transportation as defined by the act to regulate commerce under a common control, management, and arrangement for a continuous carriage and shipment partly by rail and partly by water from St. Clair to East Cambridge of a carload of anthracite coal, which had been transported by the defendant from St. Clair to Port Richmond Piers, Philadelphia, in a railway car initialed "P. & R." and numbered "31719," and was at Port Richmond Piers, Philadelphia, dumped by the defendant from the said car into a barge known as the "Coleraine," by transporting the coal in the said barge over its water route from Port Richmond Piers to East Cambridge at some rate and charge, the amount of which is to the grand jury unknown, and this without the rate and charge or any rate and charge for the water transportation service having been filed with the Interstate Commerce Commission, that is to say, without the defendant or any other person or corporation having filed with the commission any schedules showing any separately established rate or charge, any joint rate or charge, or any evidence of concurrence by the defendant in or acceptance of any rate or charge applicable, or, by the defendant applied jointly, to such rail and water transportation, or separately to such water part of such through transportation of the property by means of the barge line. That the property then and there was anthracite coal consigned by the Philadelphia & Reading Coal & Iron Company to Metropolitan Coal Company at East Cambridge.

The defendant demurs for the following reasons:

(a) Because it is not averred in the indictment that the carload of coal in question was consigned at the point of origin as a continuous shipment for continuous carriage over a through route partly by rail and partly by water to the point of destination at the terminus of the water part of the transportation, but it is averred, on the contrary, that the carload of coal was waybilled from St. Clair, Pa., to Port Richmond

Piers, Pa., and there is no averment that it was waybilled from St. Clair to East Cambridge.

(b) That there is no averment that the carload in question moved either as a continuous shipment or on a through consignment over a through route at the direction of the consignor or consignee by rail to Port Richmond Piers, and thence to East Cambridge by means of the barge line operated by the defendant, and without passing into the possession or custody of either the consignor or consignee at Port Richmond Piers, the point of transshipment.

(c) That it is not averred in the indictment that the question whether the defendant should file tariffs for the barge line rates has been submitted to and passed upon by the Interstate Commerce Commission.

[1, 2] The question is whether the pleader has set out in the indictment, with certainty and particularity, all of the essential facts which it would be necessary to prove in order to convict. In testing the sufficiency, certainty, and particularity with which it is undertaken to charge an offense, the pleader cannot be helped by implication or intendment.

It is alleged that during the period in question the defendant was engaged in the transportation of anthracite coal partly by rail and partly by water in interstate commerce under a common control, management, and arrangement for continuous carriage and shipment of coal waybilled and transported from St. Clair to Port Richmond Piers by rail, and thence transported to East Cambridge through the instrumentality and by means of the barge line, and so had established through routes for such transportation.

The fact that the defendant was a carrier in interstate commerce over through routes part rail and part water is not sufficient to establish the fact that the certain carloads involved in this indictment were carried in interstate commerce. If, for instance, a shipment were made over the defendant's road from the coal regions in Pennsylvania to a point in New Jersey to a certain consignee, and that consignee, after delivery, reshipped from the point in New Jersey to another point in New Jersey under a new consignment to a different consignee, the interstate through rate from the coal regions in Pennsylvania to the second point in New Jersey would not apply, but the intrastate rate would apply from the first to the second point in New Jersey. Gulf Colorado & Santa Fé Ry. Co. v. Texas, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540; Chicago, Milwaukee & St. Paul Ry. Co. v. Iowa, 233 U. S. 334, 34 Sup. Ct. 592, 58 L. Ed. 988; Pennsylvania R. Co. v. Mitchell Coal & Coke Co., 238 U. S. 251, 35 Sup. Ct. 787, 59 L. Ed. 1293.

The facts and circumstances set out applying to the specific shipments under each count must be examined to determine whether an interstate shipment is sufficiently stated. First, billing and transportation from St. Clair to Port Richmond Piers are alleged as the circumstances of the rail part of the carriage. No consignor from St. Clair or consignee at Port Richmond Piers is mentioned. It is not alleged, however, that there was any billing from Port Richmond Piers to East Cambridge, but merely that the coal was thence—that is, from

Port Richmond Piers, Philadelphia—transported by means of the barge line to East Cambridge. It is alleged that the property was anthracite coal consigned by the Philadelphia & Reading Coal & Iron Company to the Metropolitan Coal Company at East Cambridge, but it is not alleged from what point it was consigned by the Coal & Iron Company, and neither the consignor nor the consignee for the rail transportation is connected by any allegation in the indictment with the Philadelphia & Reading Coal & Iron Company, consignor from an unnamed point to East Cambridge. To summarize the specific facts as to this shipment, the coal was waybilled and transported by rail from St. Clair to Philadelphia. It was transported by water to East Cambridge by means of the barge line, and it was coal consigned by the Philadelphia & Reading Coal & Iron Company to Metropolitan Coal Company at East Cambridge.

From the indictment, therefore, it appears that the shipment from St. Clair to Port Richmond was an intrastate shipment by an unnamed consignor to an unnamed consignee, and the shipment from Port Richmond Piers to East Cambridge was a shipment entirely by water, and the two shipments, representing respectively the rail and water parts of the transportation, had no relation or connection through billing, consignment, ownership, possession, or control of the coal or otherwise, but only through the physical fact that the same coal which started from St. Clair was transported by rail and water to East Cambridge. It was urged by counsel for the government at the argument that the question of interstate shipment cannot be determined merely by billing. That is undoubtedly correct.

"The essential character of the commerce, not its mere accidents, should determine," says the Supreme Court in the case of Texas & New Orleans Railroad Co. v. Sabine Tram Co., 227 U. S. 111, 33 Sup. Ct. 229, 57 L. Ed. 442. The question is: What is the real and ultimate destination of the shipment? But there must be some fact or circumstance to show that. There is nothing in the allegations of facts and circumstances in the present case to show that when the shipment left St. Clair its ultimate destination by direction of the consignor, or by any of the practices which prevail in shipment of merchandise, was East Cambridge. For all that appears in the indictment, the original consignee received delivery at the terminus of the rail part of the shipment, and the water part of the journey constituted a new and independent shipment. Gulf, Colorado & Santa Fé R. Co. v. Texas, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540; Chicago, Milwaukee & St. Paul Ry. Co. v. Iowa, 233 U. S. 334, 34 Sup. Ct. 592, 58 L. Ed. 988.

Therefore, while it may be sufficiently alleged that the defendant was, during the period covered by these counts, engaged in transportation by a continuous route partly by rail and partly by water from Schuylkill Haven or St. Clair to East Cambridge, the allegations in relation to the specific carload of coal described in any count do not sufficiently state as to it transportation and shipment which would come within the provisions of the act, relating to continuous carriage partly by rail and partly by water under a common control, manage-

ment, and arrangement, requiring a rate for the water transportation of the shipment to be filed with the commission.

[3, 4] The sixtieth count, after charging that the defendant, under the circumstances and conditions set forth in paragraphs 1, 2, and 3 of the first count, and during the period of time mentioned in count 1, engaged and participated in transportation of anthracite coal which had been shipped by the Philadelphia & Reading Coal & Iron Company from numerous mines and was waybilled and transported by the defendant from St. Clair and Schuylkill Haven to Port Richmond Piers and dumped at Port Richmond Piers by the defendant into barges, the railway and barges being operated by the defendant under a common control, management, and arrangement for continuous carriage and shipment, partly by rail and partly by water, from St. Clair and Schuylkill Haven to the respective destinations in the states of Massachusetts and Maine, the said coal being thus transported in the said barges by the defendant over its water route from Port Richmond Piers to the destinations in Massachusetts and Maine, at some rate and charge, the amount of which is to the grand inquest unknown, alleges that the Reading Company owned substantially all of the stock of the defendant and of the Philadelphia & Reading Coal & Iron Company; that the Philadelphia & Reading Coal & Iron Company was engaged in shipping and selling anthracite and bituminous coal; that nearly all the anthracite coal carried in the barge line was shipped by the Philadelphia & Reading Coal & Iron Company, and nearly all the bituminous coal was shipped by shippers other than the Coal & Iron Company.

The bill then charges extension of privileges, not named in defendant's tariffs, to the Coal & Iron Company. It is then alleged: (1) That the rates for the barge line transportation of anthracite coal enjoyed by the Coal & Iron Company have been fixed and unchanging for more than five years, while the rates applying to the barge line transportation of bituminous coal have been subject to frequent fluctuation and have, at most times, been higher than those concurrently applying on anthracite shipments per ton. (2) That while the defendant has required coal shippers other than the Coal & Iron Company to make a special arrangement as to rates for each lot of coal shipped on the barge line, no special arrangements as to rates were required to be made by the Coal & Iron Company as to each lot of coal so shipped. (3) That it has been the practice of the defendant to give to the Coal & Iron Company, and not to other shippers, privileges and facilities for securing information concerning the shipments of coal by the barge line by other shippers. (4) That the defendant has accorded to the Philadelphia & Reading Coal & Iron Company privileges not enjoyed by other coal shippers in the assignment of barges and barge space in connection with transportation over the routes aforesaid. By these practices, the defendant is charged with having extended to the Coal & Iron Company privileges and facilities in the transportation of property which were not specified in its lawfully established tariffs.

The count is drawn under section 6 of the Act to Regulate Commerce, as amended, which provides that:

"No carrier * * * shall engage or participate in the transportation of * * * property, * * * unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act; * * * nor extend to any shipper or person any privileges or facilities, in the transportation of passengers or property, except such as are specified in such tariffs." Comp. St. 1913, § 8569.

It is difficult to perceive how these allegations can be held to state a charge of extending privileges not specified in the tariffs filed. It is not alleged that any tariffs were filed. In describing the first privilege extended, no facts are set out from which a court and jury could determine whether there should have been a change during the five years in rates upon anthracite coal, or that there should not have been constant fluctuations in the rates upon bituminous shipments. It is not alleged as to the second privilege what facilities were given, or what information concerning the shipments of coal was given, nor what bearing the facilities and information referred to have upon the transportation of property in interstate commerce. There is no allegation concerning the third privilege as to what the special arrangement as to rates consisted of, nor to what connection such arrangement had with transportation in interstate commerce. There is no allegation concerning the fourth privilege as to what privileges the defendant has accorded the Coal & Iron Company not enjoyed by other coal shippers in the assignment of barges and barge space in connection with transportation.

The defendant is entitled to some certain and definite information as to what charges it is to meet upon a trial before it can be required to plead to an indictment. It is not even informed of the time when the practices are alleged to have been carried on, except that it was during a period of five years. The allegations are so lacking in certainty and particularity that the count cannot be sustained.

The effect of charges of this sort in criminal prosecutions would be to submit to a jury the determination of the question of comparison of rates upon shipments of anthracite coal with those of bituminous coal, and to permit it to pass upon questions of reasonableness of rates and all the circumstances affecting differences in rates and practices at different periods of time and under different circumstances not covered by any tariff. It is doubtful whether these questions are not primarily for the determination of the Interstate Commerce Commission, rather than for the determination of a common-law jury in a criminal trial. United States v. P. & A. Railway & Navigation Co., 228 U. S. 87, 33 Sup. Ct. 443, 57 L. Ed. 742; Minnesota Rate Case, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1151, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18; Loomis v. Lehigh Valley R. Co., 240 U. S. 43, 36 Sup. Ct. 228, 60 L. Ed. ——, opinion by Mr. Justice McReynolds, January 24, 1916.

As it is held, however, that the indictment does not, in any of its counts, with sufficient certainty and particularity set out the offenses which it has been attempted to charge, the determination of other questions raised is not necessary.

Upon the other grounds stated, the demurrer is sustained.

UNITED STATES v. PHILADELPHIA & R. RY. CO.

(District Court, E. D. Pennsylvania. May 26, 1916.)

Nos. 19, 20.

1. CARRIERS ⟸38—CARRIAGE OF GOODS—DISCRIMINATION—INDICTMENTS.
The tariffs filed by defendant railroad company, an interstate carrier, with the Interstate Commerce Commission, provided for demurrage charges of one dollar per day for each car for each day's detention after 15 days from the date notice of arrival of coal cars should be sent to the consignee. The indictment, charging that defendant knowingly granted concessions to consignees in respect to interstate commerce shipments of coal, averred that coal cars were held up at a point some miles from point of destination where the coal was to be reshipped; and that no demurrage charges were made, though the coal was kept for periods beyond the 15 days allowed. *Held*, that as an indictment should contain averments of every fact necessary to constitute the crime charged, and as nothing can be charged by implication, the indictment was insufficient to show a discrimination, in that it did not show that the delay was at the request of the consignees or for their benefit, or that such delay was had at the point before the shipment reached destination to evade the terminal charges.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 96, 97; Dec. Dig. ⟸38.]

2. CARRIERS ⟸100(1)—DEMURRAGE—RIGHT TO CHARGE.
Demurrage charges cannot be imposed by a carrier, though notice of arrival of goods or car shipment is given, until the shipment has actually arrived.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 427–430, 432, 433; Dec. Dig. ⟸100(1).]

At Law. Indictments against the Philadelphia & Reading Railway Company. On demurrer. Demurrer sustained.

Alexander H. Elder, Sp. Asst. U. S. Atty., of Washington, D. C., Robert J. Sterrett, Asst. U. S. Atty., and Francis Fisher Kane, U. S. Atty., both of Philadelphia, Pa.

Wm. Clarke Mason and Charles Heebner, both of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. Indictment No. 19, in each of the several counts, charges the defendant with having knowingly granted to various consignees concessions in respect to transportation in interstate commerce of certain carloads of coal. It is alleged that the coal in question was shipped from points in West Virginia and Maryland over connecting lines and over the line of the defendant to Port Richmond, Philadelphia. The concessions are alleged to have consisted in failing and neglecting to assess against the respective consignees any demurrage charge for the detention of the respective carloads of coal, failing to make an entry upon the defendant's books covering the demurrage charge, and failing to collect payment for demurrage. The claim that a demurrage charge accrued is based upon a certain tariff published and filed with the Interstate Commerce Commission, and the tariff is described in the indictment as:

"Showing among other things the terminal demurrage charges assessable by said Philadelphia & Reading Railway Company in addition to the transportation charges aforesaid for the detention by or for consignees by reason of the failure of such consignees to release the same of cars used by the said corporation common carriers in the interstate transportation of bituminous coal shipped to Port Richmond (Philadelphia) aforesaid, for transshipment at that point direct to vessel when held for or by consignees for unloading, forwarding instructions, or for any other purpose, that is to say, showing that the charge for such demurrage was one dollar ($1.00) per car per day or fraction thereof for the time of such detention, such time to be computed as beginning fifteen days (excluding Sundays and holidays) after the first seven a. m. after the date on which notice of arrival is sent to the consignee."

It is then alleged that:

Immediately prior to the respective dates set out in the counts, "a certain carload of bituminous coal contained in a car bearing the initials" (varying in each count) "and the number" (varying in each count) "which had been shipped to Port Richmond, Philadelphia, aforesaid, for transshipment as aforesaid, was transported over one of the routes aforesaid, from" (place of origin of shipment and route) "into the said Eastern district of Pennsylvania to Woodlane Yard, a point on the rails of the Philadelphia & Reading Railway Company, in the state of Pennsylvania, about eight (8) miles from Port Richmond (Philadelphia) aforesaid, the transportation thereof being conducted into said district in the said car consigned to" (name of consignee); "that on the date last aforesaid a notice of arrival of said car containing said coal was sent by the said Philadelphia & Reading Railway Company from Port Richmond (Philadelphia) aforesaid to the said consignee; that said car was not promptly released by said consignee, but was held for said consignee by said Philadelphia & Reading Railway Company until" (date of end of detention and length of time beyond the free time allowed); "that after said detention said car was released by said consignee, and said coal was, upon the order of said consignee, dumped from said car into a vessel at Port Richmond (Philadelphia) aforesaid."

Then follow allegations that a demurrage charge had accrued to and should have been assessed and collected from the consignees in accordance with the tariffs and schedules, and an allegation of failure and neglect to assess any demurrage charge, failure to make or enter a charge upon the books of the defendant, and failure to collect the demurrage.

Then follows an allegation that the defendant transported the carload of coal into the Eastern district of Pennsylvania, "and by the device of detaining said car at Woodlane Yard aforesaid, and not assessing or collecting demurrage for such detention as hereinbefore set forth, unlawfully did knowingly offer, give and grant to the said consignee a concession * * * in respect to the said transportation in interstate commerce of said coal."

In indictment No. 20, the same facts are set out as a basis for a charge that the defendant willfully failed to strictly observe the provisions of the established demurrage tariffs.

[1] The demurrer is based upon the contention that the indictment does not sufficiently set out facts to sustain a charge that, under the schedules and tariffs alleged to have been published and filed by the defendant, any charge for terminal demurrage might lawfully have been assessed or collected by the defendant, and therefore does not charge a violation of the Elkins Act (Act Feb. 19, 1903,

c. 708, 32 Stat. 847 [Comp. St. 1913, §§ 8597–8599]), under which the indictment is framed.

The tariff is described as showing the terminal demurrage charges assessable for the detention for or by the consignees by reason of failure of such consignees to release cars used in transportation of coal shipped to Port Richmond when held for or by consignees for unloading, forwarding instructions, or for any other purpose. The carload is alleged to have been "shipped," which, the government contends, is synonymous with "billed," from a point outside the state of Pennsylvania to Port Richmond. It is not alleged in the indictment that the coal had been transported to Port Richmond at the time the alleged detention occurred, but the transportation alleged is to Woodlane Yard, a point on the rails of the defendant about eight miles from Port Richmond

There is no allegation that the tariff in question showed demurrage charges assessable for detention in transit, and there is no allegation that a delivery at Woodlane Yard was, within the terms of the shipment, a delivery at the terminus of the shipment, which is alleged to be Port Richmond, and there is no allegation that the carload was held at that destination for or by the consignee for unloading, forwarding instructions, or for any other purpose specified in the demurrage tariff.

It is alleged that the said car was not promptly released by said consignee, but was held for said consignee by the defendant, and that, after said detention, the car was released by the consignee, and the coal, upon the order of the consignee, dumped from the car into a vessel at Port Richmond. But there is no provision of the tariff set out showing that demurrage charges would accrue if the car was not released by the consignee while detained or held for the consignee at Woodlane Yard, and it is not alleged that the detention at Woodlane Yard was at the request or instance of the consignee.

In the absence of any allegation that the car was held for or by the consignee for unloading, forwarding instructions, or for any other purpose, under the terms of the tariff, or any allegation showing that Woodlane Yard was, at the instance or request of the shipper, substituted as a point of destination or delivery for Port Richmond, the mere allegation that it was held for the consignee leaves too much to implication and conjecture to bring the consignee's part in the detention within the terms of the tariff set out in the indictment.

An indictment is to be construed fortius contra proferentem. The language must necessarily import the offense charged, and, if susceptible of a different interpretation, it is bad. Every fact necessary to constitute the crime charged must be directly and positively alleged, and nothing can be charged by implication or intendment. United States v. Britton, 107 U. S. 655, 2 Sup. Ct. 512, 27 L. Ed. 520.

The allegation in indictment No. 19 that, by the device of detaining the car at Woodlane Yard and not assessing or collecting demurrage for such detention, the defendant granted a concession to the consignee, does not help the insufficient statement of the offense. If the pleader intended to allege a detention at Woodlane Yard, eight miles from the terminus of the transportation, as a device by which the consignee

would, under some arrangement with the carrier, be relieved of terminal demurrage charges, which would have accrued by reason of detention in case the transportation to the terminal point had been completed, there should have been an allegation of such fact. Facts, however, which are not set out with clearness and particularity, cannot be supplied by implication, when essential to a statement of the facts and circumstances constituting the offense.

Under indictment 20, the defendant is charged with having failed to strictly observe the tariff. It is difficult to perceive how such a charge can be sustained by the allegation of failure to make and collect terminal demurrage charges, when such charges could not have accrued under a strict observance of the tariff. There is nothing alleged in the indictment to show any obligation on the part of the shipper or consignee to pay anything but terminal demurrage charges, and the facts set out establish to the contrary a detention in transit without the allegation of any condition of the shipping or billing or any act upon the part of the consignee under which a demurrage charge would lawfully accrue.

[2] It was argued on the part of the government that the allegation that notice of arrival of the car was sent by the defendant to the consignee from Port Richmond is sufficient to sustain the charge that demurrage had accrued, because demurrage charges begin to run upon notice of arrival. Notice of arrival is merely effective in fixing the time when the liability to the charges accrue, but notice of arrival is immaterial unless the car has actually arrived at a point where the tariff fixes liability for detention, and it cannot be seriously considered as fixing liability for a detention not contemplated by the tariff.

The principles involved have been repeatedly ruled upon by the Interstate Commerce Commission, and the language of Commissioner Knapp in the case of United States v. Denver & Rio Grande R. Co., 18 Interst. Com. Com'n 7, is particularly applicable to this case:

"Demurrage does not ordinarily accrue except upon delivery of cars at the point specified in the bill of lading, and, where charges are imposed for detention of cars at a point other than that so specified, there must be definite tariff authority therefor."

See, also, rulings by the Interstate Commerce Commission cited by the defendant in Munroe & Sons v. Michigan Central R. R., 17 Interst. Com. Com'n 27; Tioga Coal Co. v. Chicago, Rock Island & Pacific Ry., 18 Interst. Com. Com'n 414; Crescent Coal & Mining Co. v. B. & O. R. Co., 20 Interst. Com. Com'n 559; Coomes & McGraw v. Railway, 13 Interst. Com. Com'n 192; New York Hay Exchange Ass'n v. Railroad, 14 Interst. Com. Com'n 178; Porter v. Railroad, 15 Interst. Com. Com'n 1; American Creosoting Works v. Illinois Central R. R., 15 Interst. Com. Com'n 160; Rossie Iron Ore Co. v. Railroad, 17 Interst. Com. Com'n 392.

It is apparent that the indictments do not set out the accrument of lawful demurrage charges under the tariff in question, and therefore do not sufficiently charge the offense of granting concessions as to such charges, nor of failure to strictly observe the tariff.

The demurrers are sustained.

EISENSTADT MFG. CO. v. J. M. FISHER CO.

(District Court, D. Rhode Island. May 18, 1916.)

No. 54.

1. TRADE-MARKS AND TRADE-NAMES ⟸75—UNFAIR COMPETITION.

A jeweler designed a friendship bracelet, consisting of numerous small links, which could be interchanged by friends, and until the bracelet was completed and united by metal wires should be worn on a velvet band. The company which originally manufactured the bracelets ceased manufacturing when the designer assigned to complainant the right to make and sell such bracelet. The completed bracelet was patented, but the links were not. Thereafter defendant began to make and sell similar links for bracelets. There was nothing in the nature of the links manufactured by the original manufacturer or by complainant to indicate the origin of the goods, nor did defendant's links purport to be made by the original manufacturer or complainant. *Held* that, as defendant advertised itself as the manufacturer of its own product, and as the separate links were not patented and the patent was not relied on, there was no actionable deceit of customers which would warrant the enjoining of defendant's continued manufacture.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 86; Dec. Dig. ⟸75.]

2. TRADE-MARKS AND TRADE-NAMES ⟸78—UNFAIR COMPETITION—ADVERTISING.

In such case, where complainant and defendant were competitors before complainant began its advertising campaign, the fact that defendant might have reaped benefit from the advertising does not warrant an injunction.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 88; Dec. Dig. ⟸78.]

3. TRADE-MARKS AND TRADE-NAMES ⟸32—UNFAIR COMPETITION—DEDICATION OF PRODUCT TO PUBLIC.

As the designer and original manufacturer, after describing the bracelet generally in trade journals abandoned manufacture, the public had the right to manufacture the article, and complainant could acquire no exclusive right, so as to prevent others from making bracelets.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 36; Dec. Dig. ⟸32.]

4. TRADE-MARKS AND TRADE-NAMES ⟸75—UNFAIR COMPETITION—WHAT CONSTITUTES.

In such case the fact that links sold by defendant were at times connected with wires furnished by complainant to jewelers does not warrant an injunction, in view of the fact that defendant also furnished similar wires to connect the friendship links.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 86; Dec. Dig. ⟸75.]

In Equity. Bill by the Eisenstadt Manufacturing Company against the J. M. Fisher Company. Bill dismissed.

E. E. Huffman, of St. Louis, Mo., and Wilmarth H. Thurston, of Providence, R. I., for complainant.

Frederick S. Hall and Stanley P. Hall, both of Tannton, Mass., Walter A. Briggs, of Attleboro, Mass., and George A. Rockwell, of Boston, Mass., for defendant.

BROWN, District Judge. The bill charges and seeks to enjoin unfair competition in making and selling an article which closely resembles an article made and sold by the plaintiff.

The Eisenstadt Manufacturing Company makes and sells "bracelet links," which, by structure and design, are adapted to be assembled to complete what is termed a "friendship bracelet." They have advertised these links under the name of "Bob-o-link." One of their advertisements thus describes the scheme of sale:

> Here's the Way It Works.
>
> A girl starts a bracelet by exchanging "Bob-o-links" with a friend. They each wear their "Bob-o-link" with the friend's initials engraved upon it, on a narrow black velvet ribbon around the wrist. Then they start other friends by exchanging "Bob-o-links" with them. Thus they complete their own bracelet, and in doing so start ten or a dozen other girls, who in turn start another ten or a dozen, and so it goes until everybody has a "Bob-o-link" bracelet. It takes from nine to twelve "Bob-o-links" to complete a bracelet, and a girl isn't satisfied until she has one completed—then she immediately starts another. There is no end to it.
>
> When a girl has enough "Bob-o-links" she goes to her jeweler and has them clamped together with the small silver links, which are provided for that purpose."

The plaintiff originated neither the special design of link which it seeks to enjoin the defendant from making, nor the scheme of sale.

In January, 1915, H. B. Pratt conceived the idea of making what he termed a "friendship bracelet."

As the amended bill alleges, for about three months prior to April 1, 1915, H. B. Pratt and Bullard Bros. Company had been continuously manufacturing the said links and selling them in various localities throughout the United States, and had created a substantial demand for said links, and all the business in said links was carried on in the name of Bullard Bros. Company. Newspaper articles explaining Pratt's bracelet link idea were published in various jewelry trade magazines and Bullard Bros. had disposed of about 25,000 of these links in many different states.

The article, already on the market, having been brought to the attention of officers of the plaintiff company by a traveling salesman some time in March, 1915, it made a proposal to Pratt by letter of April 1, 1915, for a contract to be in force for two years, with privilege of renewal for another year, "for the exclusive right to make and sell your 'friendship, interlocking link bracelet,' in silver, gold or other metals." The plaintiff agreed to pay royalties on sales. The following language was also used:

> "This exclusive right granted is to cover the patents now pending, and all improvements or subsequent patents which may be applied for and obtained on this bracelet, or any article of similar character."

This proposal was accepted by Pratt April 1, 1915, with a modification relating to an existing contract with a third person. The parties to the contract were Pratt and the plaintiff company, and the written contract apparently relates to rights in an invention or inventions of Pratt for which applications for patents were pending, or were contemplated. There is evidence, however, that after the making of this contract Bullard Bros. Company discontinued the manufacture and sale of the article, and that they received a share of royalties paid by plaintiff to Pratt.

A patent, No. 1,166,629, was issued January 4, 1916, on Pratt's ap-

plication of March 3, 1915, for a bracelet; but this patent, which claims only a complete bracelet and not the individual links is not relied upon in the present case, except to show good faith of the plaintiff in issuing certain notices in which patent rights were asserted, and to meet the defense that because of misrepresentations to the public in respect to patent rights the complainant does not come into equity with clean hands.

No evidence is produced to show that Bullard Bros. Company ever made any formal agreement with the plaintiff to discontinue the manufacture of the article, or assigned to it any supposed good will. Though plaintiff now claims to have succeeded to the business and good will of Bullard Bros. Company, there is no evidence of any contract between Bullard Bros. Company and the plaintiff to this effect, and the plaintiff advertised itself as "makers and distributors under license of H. B. Pratt, inventor." There is no evidence that it attempted to use any of the reputation of Pratt or Bullard Bros. Company as manufacturers.

The evidence shows that the article of the special design for which plaintiff seeks protection was not exclusively associated in the public mind with the Eisenstadt Manufacturing Company as manufacturers, but, on the contrary, was also associated with Bullard Bros. Company as manufacturers.

By stipulation in this case it appears also that the complainant issued a circular dated May 28, 1915, in the name of and by authority of H. B. Pratt, giving notice to the trade that applications for design and apparatus patents were pending, and warning against infringement. This circular contained the following statement:

"The Eisenstadt Manufacturing Company, of St. Louis, Missouri, the Standard Button Company, of Attleboro, Mass., and Bates & Bacon, of Attleboro, Mass., are the only authorized manufacturers and distributors of the genuine 'Bob-o-link' bracelet."

[1] In this case it is quite necessary to make what Mr. Wigmore refers to as "the distinction between actionable deception of the customer by imitation of the authorship, and nonactionable imitation of the merchandise without deception as to authorship." See Harvard Law Rev., April, 1916, p. 609; Flagg Mfg. Co. v. Holway, 178 Mass. 83, 59 N. E. 667.

It is true that in some cases the appearance of an article may indicate authorship, so that the offering of a copy in itself tends to deceive as to authorship.

There is some conflict between the exercise of the right to copy an unpatented design or manufacture and the right of a prior manufacturer to prevent a competitor from copying, where such copying in itself results in deception of the public as to the origin of the goods. When the article has become associated in the mind of the public with the manufacturer who first put the article on the market, and when the reputation of that manufacturer and of the quality of his goods is a matter of substantial importance to the public as well as to the manufacturer, the right to copy may be subject to the obligation to give such notice as may be necessary in the particular circumstances, in

order to prevent such mistake or deception of the public as might arise from putting a copy on the market.

The defendant relies upon Keystone Type Foundry v. Portland Pub. Co., 186 Fed. 690, 108 C. C. A. 508, which involved the question whether there was unfair competition in copying the design of a certain type, or type face, originated by the plaintiff and advertised as "Caslon Bold." In that case the court said:

"The defendant has not sought to avail itself of the complainant's reputation as a founder, but of its taste and skill as a designer. This it may do. It may copy the complainant's type, so long as it does not pretend that the copy is an original product of the complainant"

—and quotes with approval Flagg Mfg. Co. v. Holway, 178 Mass. 83, 59 N. E. 667. The defendant also cites Rathbone, Sard & Co. v. Champion Steel Range Co., 189 Fed. 26, 110 C. C. A. 596, 37 L. R. A. (N. S.) 258; Rice & Co. v. Redlich Mfg. Co., 202 Fed. 155, 122 C. C. A. 442, 44 L. R. A. (N. S.) 1057; Armstrong Seatag Corp. v. Smith's Island Oyster Co., 224 Fed. 100, 139 C. C. A. 656; Diamond Match Co. v. Saginaw Match Co., 142 Fed. 727, 74 C. C. A. 59; Pope A. M. Co. v. McCrum-Howell Co., 191 Fed. 979, 112 C. C. A. 391, 40 L. R. A. (N. S.) 463.

The complainant cites a number of cases in which the court apparently has been of the opinion that the copying, in view of the association of the article copied with a particular manufacturer, was a means of palming off goods as those of another, and of trading upon another's reputation. Steiff v. Bing (D. C.) 215 Fed. 204; Strause v. Weil et al. (C. C.) 191 Fed. 527; Enterprise Mfg. Co. v. Landers, Frary & Clarke, 131 Fed. 240, 65 C. C. A. 587; Yale & Towne Mfg. Co. v. Alder, 154 Fed. 37, 83 C. C. A. 149; E. B. Estes & Sons v. George Frost Co., 176 Fed. 338, 100 C. C. A. 258; Stewart v. Hudson (D. C.) 222 Fed. 584; U. S. Expansion Bolt Co. v. Kroncke Hdw. Co. (D. C.) 225 Fed. 383; Rushmore v. Manhattan S. & S. Works, 163 Fed. 939, 90 C. C. A. 299, 19 L. R. A. (N. S.) 269; Rushmore v. Saxon (C. C.) 158 Fed. 499; Baldwin v. Grier Bros. Co. (D. C.) 215 Fed. 735; Grier Bros. Co. v. Baldwin, 219 Fed. 735, 135 C. C. A. 433; Moxie Co. v. Daoust, 206 Fed. 434, 124 C. C. A. 316.

The complainant contends that the zither case, Flagg v. Holway, 178 Mass. 83, 59 N. E. 667, in so far as it supports the view that a second comer in the field may imitate unessential features of goods on the market to an extent likely to cause confusion, is overruled in Fox & Co. v. Glynn, 191 Mass. 344, 78 N. E. 89, 9 L. R. A. (N. S.) 1096, 114 Am. St. Rep. 619, wherein defendant was enjoined from copying the peculiar shape of plaintiff's loaves of bread.

From an examination of these cases it is evident that it would be unsafe to say as an abstract proposition either that a plaintiff may copy and offer in the market at will, and without notice, that which is not protected by patent or copyright, or that one who copies and offers for sale must always give notice that his copy is not the product of prior manufacturers. The object of the law of unfair competition is to prevent the palming off of goods as those of another, deception of the public, and trading on a reputation established by another.

In the present case the article involves both design and mechanical

structure, both of which the defendant may adopt, provided it does not seek to trade upon the reputation established by the complainant.

Upon the facts of this case I am of the opinion that the origin of the goods, the authorship of the design, or the reputation of the manufacturer have not been shown to be a matter of such interest to the public as to afford an inducement to the public to buy the plaintiff's goods rather than the goods of other manufacturers. Both in the matter of design and in the matter of function the article speaks for itself. It is not like a machine, with parts concealed or difficult to inspect, as to which the buyer relies, not upon his own judgment of quality or workmanship, but upon the name and reputation of a particular manufacturer as implying a representation of good workmanship and quality. Whether the article is made by the Bullard Bros. Company, by the Eisenstadt Manufacturing Company, by the Standard Button Company, or by Bates & Bacon, or possibly by other manufacturers, would seem to be a matter of indifference to the public, especially in view of the fact that the Bullard Bros. Company were first in the field and that the complainant itself gave notice that other persons were authorized manufacturers and distributors of the "Bob-o-link" bracelet.

The defendant has advertised itself as the manufacturer of its own product, and I am not satisfied that there is any attempt by the defendant to steal any of the reputation of the plaintiff as a manufacturer, or to avail itself of any desire of the public to have goods which are made by the Eisenstadt Manufacturing Company as distinguished from those made by any other company.

[2] In this particular case the real grievance, if it be a grievance, of the plaintiff seems to be that it has advertised the article extensively and has promoted and increased the demand for the article, and that the defendant, by supplying the market with the article in competition with the plaintiff, is reaping the benefit of the plaintiff's advertising, and thus, as counsel puts it, "is reaping where it has not sown."

A difficulty in the plaintiff's case, however, is that to a considerable extent this is true also of the plaintiff, as appears by the amendment to the bill and by the proofs. The scheme and the particular article had already been made known by newspaper articles and by traveling salesmen, and the plaintiff, in common with others, acquired its knowledge of the article in the ordinary course of an already established trade.

In the absence of any claim for protection under patent rights it is difficult to avoid the conclusion that the plaintiff stands merely in the situation of any other member of the public who may choose to disregard supposed patent rights, and to copy and promote the sale of an article that was already before the public and upon the market before the plaintiff adopted it.

The proofs do not show whether, as matter of fact, the defendant copied the article made by Bullard Bros. Company or that made by the plaintiff, nor does this seem to be of importance, for in either event the article in design and structure must be considered an old article of manufacture, and both plaintiff and defendant as copyists. If plaintiff's

and defendant's articles are so similar that one may be mistaken for another, it seems also true that both are likely to be mistaken for articles previously manufactured by Bullard Bros. Company.

[3] I am unable to see that it was possible for the plaintiff, after Bullard Bros. Company and Pratt had dedicated to the public all rights not protected by patents, or by applications for patents, and after Bullard Bros. Company, previously known as the manufacturers, had ceased to manufacture, to derive from Pratt or Bullard Bros. Company any exclusive rights, except patent rights.

The first copyist, by the claim that other copies may be mistaken for his copy, cannot abridge the rights of other copyists to follow the original design.

If we extend the established doctrine of trade dress, and say that the article itself may in some cases become a sign of authorship and origin, it could only lead to confusion if we should go further and follow this by saying that the best known manufacturer of copies, whose product may be even better known than the product of the original manufacturer, may enjoin others from copying because the public may be misled into buying the product of a later copyist as and for the product of an earlier copyist.

However, the argument that the distinctive appearance of the article itself may serve as a sign of origin does not seem applicable to the facts of this case.

The plaintiff has failed to show that the goods of its manufacture have in fact a distinctive appearance, which in itself points to the plaintiff as manufacturer. On the contrary, it appears that in appearance they are indistinguishable from those of an earlier manufacturer.

Whether a particular make of goods is exclusively associated in the mind of the public with a particular manufacturer is a matter of fact. Whether this association constitutes a substantial part of the inducement to buy these goods is also a matter of fact. It may be a matter of no practical consequence. That this defendant is profiting by the fact that the public mistakenly purchases its goods when they desire specially the plaintiff's does not seem to me to be established by the proofs.

The plaintiff insists that by advertising to the trade and to the public it has established a good will with which the defendant is interfering. It appears that a full-page advertisement in the Saturday Evening Post of May 22, 1915, of the plaintiff's links, under the plaintiff's name of "Bob-o-link," created a large demand, and that this was followed by other expensive advertisements.

The defendant, however, was in the field as a competitor before this, and as early as the middle of May seems to have been actively pushing its goods throughout the country. A demand for the article created by either party during competition naturally might inure to the benefit of either. There is this disadvantage in conducting an advertising campaign to promote the sale of an article which is not a proprietary article. But it is not inequitable for a defendant to profit by a general demand for old goods; it only is inequitable to seek to profit by supplying a special demand for goods of plaintiff's manufacture with goods

of the defendant's manufacture, thus trading on the plaintiff's reputation and deceiving the public.

[4] The plaintiff asks that the defendant be enjoined from making links of such size and design as adapt them to be used in connection with plaintiff's links to complete a bracelet.

It is shown that plaintiff's advertisements to the public represent that the purchaser of a requisite number of links will have the right to have them joined together without additional charge by connecting links supplied by the plaintiff to the jewelers, and it is urged that so far as defendant's links are purchased in place of plaintiff's, and so far as they are connected up by joining links supplied by plaintiff, the defendant is inequitably profiting by the plaintiff's offer to the public. Were the plaintiff the originator of both the scheme and the article, and had made promises to the public, so that the article had become a token of contract rights as well as a bracelet link, the case might present a different aspect, and involve questions of the law of tokens somewhat similar to those that arose in trading stamp cases. Sperry & Hutchinson Co. v. Mechanics' Clothing Co. (C. C.) 135 Fed. 833; Id. (C. C.) 128 Fed. 800; Bitterman v. Louisville & Nashville R. R., 207 U. S. 205, 222, 28 Sup. Ct. 91, 52 L. Ed. 171, 12 Ann. Cas. 693.

But there is no reason to believe that in fact the defendant is seeking to interfere with contracts between the plaintiff and the public in respect to this, or to profit by this promise by throwing upon the plaintiff the expense of connecting the defendant's links by use of plaintiff's connecting links. The defendant also supplies jewelers with such connecting links, and apparently follows the same plan that was used before the plaintiff entered the business. This must be regarded as one of the theoretical aspects of the case, rather than as a substantial matter.

Upon the whole case I am of the opinion that the defendant is not seeking to take advantage of the plaintiff's trade reputation, or of its reputation as a manufacturer, or to deceive the public by palming off its goods as the goods of the plaintiff. It has openly asserted its right to copy, and denied the plaintiff's right to a patent, or to a monopoly of the design. There has been some confusion of goods, but this results from the fact that both with equal right make the same article. The defendant's conduct does not, in my opinion, amount to fraud, actual or constructive; and if the defendant's competition interferes to some extent with the plaintiff's business scheme, this is merely because there is competition, and not because there is unfair or unlawful competition.

The bill will be dismissed.

UNITED STATES v. AKERS.

(District Court, N. D. Georgia. April 21, 1916.)

No. 1159.

POST OFFICE ⊂=35—USING MAILS TO DEFRAUD—ELEMENTS OF OFFENSE.

A scheme or artifice to defraud, or to obtain property by false pretenses, to be carried out by the use of the mails, within Criminal Code (Act

March 4, 1909, c. 321) § 215, 35 Stat. 1130 (Comp. St. 1913, § 10385), may consist of the making of false pretenses as to solvency and the doing of a legitimate business for the purpose of obtaining property of others on credit without intending to pay for the same.

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

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

Criminal prosecution by the United States against Simon A. Akers. On demurrer to indictment. Overruled.

Certain counts of the indictment are as follows:

United States of America, Northern Division, Northern District of Georgia.

In the District Court of the United States, in and for the division and district aforesaid, at the October term thereof, A. D. 1914, the grand jurors of the United States, impaneled, sworn and charged at the term aforesaid of the court aforesaid, on their oath present that Simon A. Akers, on the 10th day of March in the year of our Lord 1913, in the said division and district, and within the jurisdiction of said court, had theretofore devised a scheme and artifice to defraud each of the following persons, to wit: John Compton, W. E. Hooks, S. J. McLendon, and A. F. Windham Lumber Company, and other persons to the grand jurors aforesaid unknown, and for obtaining property from each of said persons by means of false and fraudulent pretenses and representations, which said scheme and artifice was and is in substance and to the effect as follows:

That the said Simon A. Akers, acting and doing business under the name and style of "Atlantic Lumber & Coal Company," would falsely pretend to be a responsible and reliable association of persons doing business in the city of Atlanta under the name and style aforesaid, as dealers in yellow pine and hardwood lumber, steam and domestic coal, and that he would use a business letter head so indicating, and would send letters through the mails bearing such letter head to the said John Compton, W. E. Hooks, S. J. Mclendon, A. F. Windham Lumber Company, and other persons doing a sawmill business, and would induce and cause the said John Compton, W. E. Hooks, S. J. McLendon, A. F. Windham Lumber Company, and other persons to the grand jurors aforesaid unknown, to ship large quantities of lumber in carload lots consigned to the said "Atlantic Lumber and Coal Company" at Atlanta, Ga., without the purchase money therefor first having been paid, under the belief, superinduced by the said Simon A. Akers, that the said so-called "Atlantic Lumber and Coal Company" was a bona fide business association of persons financially good, solvent, reliable, and responsible; whereas in truth and fact the said so-called "Atlantic Lumber and Coal Company" was not a bona fide business association of persons, and was not financially good, solvent, reliable, and responsible, and did not do a bona fide business as dealers in yellow pine and hardwood lumber, steam and domestic coal, all of which the said Simon A. Akers then and there well knew.

And it was the intent and purpose of the said Simon A. Akers, as a part of said scheme and artifice, to induce and cause the said John Compton to ship a carload of lumber, to wit, 9,270 feet of lumber, of the net value of $102, from Chauncey, Ga., consigned to the said "Atlantic Lumber and Coal Company," Atlanta, Ga., and that he, the said Simon A. Akers, would take said lumber so shipped into his custody and control, after the arrival thereof at destination at Atlanta, convert the said lumber and the proceeds arising from the sale thereof to his own use and benefit, and not pay the said John Compton for the same, nor give to him anything of value in return therefor; it being the intent and purpose of the said Simon A. Akers to injure and defraud the said John Compton in the sum of $102, by means of such scheme and artifice.

And it was also the intent and purpose of the said Simon A. Akers, as a part of said scheme and artifice, to induce and cause the said W. E. Hooks to ship a carload of lumber, to wit, 15,152 feet of lumber, of the value of $144, from Woodbury, Ga., consigned to said "Atlantic Lumber & Coal Company,"

Atlanta, Ga., and that the said Simon A. Akers would take said lumber so shipped into his custody and control upon its arrival at destination at Atlanta, convert the said lumber and proceeds arising from the sale thereof to his own use and benefit, and not pay the said W. E. Hooks for the same, nor give him anything of value in return therefor, but intending by means of said scheme and artifice to injure and defraud the said W. E. Hooks in the said sum and value of $144.

And it was also the intent and purpose of the said Simon A. Akers, as a part of said scheme and artifice, to induce and cause the said S. J. McLendon to ship two carloads of lumber, to wit, 18,000 feet of lumber, of the value of $207, consigned to the said "Atlantic Lumber & Coal Company," Atlanta, Ga., and that the said Simon A. Akers would take the said lumber so shipped into his custody and control upon its arrival at destination at Atlanta, and convert the said lumber and proceeds arising from the sale thereof to his own use and benefit, and not pay the said S. J. McLendon for same, nor give to him anything of value in return therefor, but intending by means of said scheme and artifice to injure and defraud the said S. J. McLendon in the said sum and value of $207.

"And it was also the intent and purpose of the said Simon A. Akers, as a part of said scheme and artifice, to induce and cause the said F. A. Windham Lumber Company to ship four carloads of lumber, to wit, 43,148 feet of lumber, of the value of $385, from Daleville, Ala., consigned to the said "Atlantic Lumber & Coal Company," Atlanta, Ga., and that the said Simon A. Akers would take said lumber so shipped into his custody and control upon its arrival at destination at Atlanta, convert the said lumber and proceeds arising from the sale thereof to his own use and benefit, and not pay the said F. A. Windham Lumber Company, nor give the said company anything of value in return therefor, but intending by means of said scheme and artifice to injure and defraud the said F. A. Windham Lumber Company in said sum and value of $385.

And the said Simon A. Akers, in and for the purpose of executing the said scheme, and in and for the purpose of attempting so to do, on the 10th day of March in the year of our Lord 1913, in said division and district, and within the jurisdiction of said court, with intent to defraud the said John Compton, did then and there unlawfully, knowingly, and fraudulently place and cause to be placed in the post office of the United States at Atlanta, in the state of Georgia, a certain letter inclosed in an envelope with the postage prepaid thereon, and directed to Mr. John Compton, Chauncey, Ga., to be sent by the post office establishment of the United States, which said letter was and is as follows, to wit:

"All agreements contingent on strikes, accidents, delays of carriers, or other causes unavoidable and beyond our control.

"P. O. Box 76. Telephone Connection.

"Atlantic Lumber & Coal Company,

"Yellow Pine and Hardwood Lumber, Steam and Domestic Coal.

"309 Fourth Natl. Bk. Bldg.

"Atlanta, Ga., March 10th, '13.

"Mr. John Compton, Chauncey, Ga.—Dear Sir: Please quote us the following stock f. o. b. mill or delivered Atlanta for shipment in 5 to 15 days:

1 car #1 shingles
1 " #2 "
4 " Framing, 2 x 4, 6, 8, 10 to 24 ft.
1 " B & B tr. flooring, 1 x 4.
1 " Com. #2 " "
2 " Cull " "

"If you cannot ship in time specified, advise how soon you can ship. Also furnish stock sheet and price list on all hardwood you have to offer.

"Yours very truly,

"A-G Atlantic Lumber & Coal Company,
"[Signed] S. A. Akers, Mgr."

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Second Count.

And the grand jurors aforesaid, on their oath aforesaid, do further present that the said Simon A. Akers, on the 17th day of May in the year of our Lord 1913, in the said division and district, and within the jurisdiction of said court, had theretofore devised a scheme and artifice to defraud John Compton, and for obtaining property, to wit, a carload of lumber, of the value of $102, from the said John Compton, by means of false and fraudulent pretenses and representations, which said scheme and artifice is more fully set forth in the first count of this indictment, and the same is now referred to and made a part hereof.

And the said Simon A. Akers, in and for the purpose of executing said scheme and artifice, and in and for the purpose of attempting so to do, on the 17th day of May in the year of our Lord 1913, in said division and district, and within the jurisdiction of said court, did then and there unlawfully, knowingly, and fraudulently place and cause to be placed in the post office of the United States at Atlanta, in the state of Georgia, a certain letter inclosed in an envelope with postage prepaid thereon, and directed to Mr. John Compton, Chauncey, Ga., to be sent by the post office establishment of the United States, which said letter was and is as follows, to wit:

"All agreements contingent on strikes, accidents, delays of carriers, or other causes unavoidable or beyond our control.

"P. O. Box 76. Telephone Connection.

"Atlantic Lumber & Coal Company,

"Yellow Pine and Hardwood Lumber, Steam and Domestic Coal,

"309 Fourth Natl. Bk. Bldg.

"Atlanta, Ga., May 17th, '13.

"Mr. John Compton, Chauncey, Ga.—Dear Sir: We wrote you recently in regard to rough and dressed lumber we were in the market for and as yet have not received any reply.

"We have now about completed our wants except what we list below. If you have any of the stock, we will be pleased to hear from you.

3 cars 2x4 10 ft. long rough.
2 " 2x8 14 " " "
3 " 1x6 to 12 boards "

"Quote all or any part of this stock.

"Yours very truly,

"A-G Atlantic Lumber & Coal Company,
"[Signed] S. A. Akers, Mgr."

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Third Count.

And the grand jurors aforesaid, on their oath aforesaid, do further present that the said Simon A. Akers, on the 30th day of May in the year of our Lord 1913, in said division and district, and within the jurisdiction of said court, had theretofore devised a scheme and artifice to defraud John Compton, and for obtaining property, to wit, a carload of lumber, of the value of $102, from the said John Compton, by means of false and fraudulent pretenses and representations, which said scheme and artifice is more fully set forth in the first count of this indictment, and the same is now referred to and made a part hereof.

And the said Simon A. Akers, in and for the purpose of executing said scheme, and in and for the purpose of attempting so to do, on the 30th day of May in the year of our Lord 1913, in the said division and district, and within the jurisdiction of said court, did then and there unlawfully and knowingly place and cause to be placed in the post office of the United States at Atlanta, in the state of Georgia, a certain letter inclosed in an envelope with the

postage prepaid thereon, and directed to Mr. John Compton, Chauncey, Ga., to be sent by the post office establishment of the United States, which said letter was and is as follows, to wit:

"All agreements contingent on strikes, accidents, delays of carriers, or other causes unavoidable or beyond our control.

"P. O. Box 76. Telephone Connection.

"Atlantic Lumber & Coal Company,

"Yellow Pine and Hardwood Lumber, Steam and Domestic Coal,

"309 Fourth Natl. Bk. Bldg.

"Atlanta, Ga., May 30th, '13.

"Mr. John Compton, Chauncey, Ga.—Dear Sir: In answer to your letter of May 26th, we beg to advise that you can ship us the 1x6 to 12—12 ft. and up long, 2x6 to 12—12 ft. and up long, and 2x4 and 4x4 random lengths. In regard to the 3x4 and 5x9, if you put these on we will have to reduce them to 2x4 and 4x8, as we do not handle any odd dimension stock and the people that we sell them to would reduce them to the next lowest dimension.

"Please advise by return mail how soon we can expect shipment.

"Yours very truly,

"A–G Atlantic Lumber & Coal Company,

"[Signed] S. A. Akers, Mgr."

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Fourth Count.

And the grand jurors aforesaid, on their oath aforesaid, do further present that the said Simon A. Akers, on the 5th day of June in the year of our Lord 1913, in said division and district, and within the jurisdiction of said court, had theretofore devised a scheme and artifice to defraud John Compton, and for obtaining property, to wit, a carload of lumber, of the value of $102, from the said John Compton, by means of false and fraudulent pretenses and representations, which said scheme and artifice is more fully set forth in the first count of this indictment, and the same is now referred to and made a part hereof.

And the said Simon A. Akers, in and for the execution of said scheme and artifice, and in and for the purpose of attempting so to do, on the 5th day of June, in the year of our Lord 1913, in the said division and district, and within the jurisdiction of said court, did then and there unlawfully and knowingly place and cause to be placed in the post office of the United States at Atlanta, in the state of Georgia, a certain letter inclosed in an envelope with the postage prepaid thereon, and directed to Mr. John Compton, Chauncey, Ga., to be sent by the post office establishment of the United States, which said letter was and is as follows, to wit:

"All agreements contingent on strikes, accidents, delays of carriers, or other causes unavoidable or beyond our control.

"P. O. Box 76. Telephone Connection.

"Atlantic Lumber & Coal Company,

"Yellow Pine and Hardwood Lumber, Steam and Domestic Coal,

"309 Fourth Natl. Bk. Bldg.

"Atlanta, Ga., June 5th, '13.

"Mr. John Compton, Chauncey, Ga.—Dear Sir: We have your letter of June 2d, and beg to advise that we note you will ship our lumber as soon as you can get car placed.

"Yours very truly,

"A–G Atlantic Lumber & Coal Company

"[Signed] S. A. Akers, Mgr."

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Fifth Count.

And the grand jurors aforesaid, on their oath aforesaid, do further present that the said Simon A. Akers, on the 30th day of June in the year of our Lord 1913, in the said division and district, and within the jurisdiction of said court, had theretofore devised a scheme and artifice to defraud John Compton, and for obtaining property, to wit, a carload of lumber, of the value of $102, from the said John Compton, by means of false and fraudulent pretenses and representations, which said scheme and artifice is more fully set forth in the first count of this indictment, and the same is hereby referred to and made a part hereof.

And the said Simon A. Akers, in and for the purpose of executing said scheme and artifice, and in and for the purpose of attempting so to do, on the 30th day of June, in said division of said district, and within the jurisdiction of said court, did then and there unlawfully and knowingly place and cause to be placed in the post office of the United States at Atlanta, in the state of Georgia, a certain letter inclosed in an envelope with the postage prepaid thereon, and directed to Mr. John Compton, Chauncey, Ga., to be sent by the post office establishment of the United States, which said letter was and is as follows, to wit:

"All agreements contingent on strikes, accidents, delays of carriers, or other causes unavoidable or beyond our control.

"P. O. Box 76. Telephone Connection.

"Atlantic Lumber & Coal Company,

"Yellow Pine and Hardwood Lumber, Steam and Domestic Coal,

"309 Fourth Natl. Bk. Bldg.

"Atlanta, Ga., June 30th, '13.

"Mr. John Compton, Chauncey, Ga.—Dear Sir: In answer to your letter of June 28th, we beg to advise that we have had some trouble selling car shipped by you on account of it having so many various lengths and dimensions, but we have ordered same moved to-day.

"Hoping this will be satisfactory, we beg to remain,

"Yours very truly,

"A–G Atlantic Lumber & Coal Company

"[Signed] S. A. Akers, Mgr."

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

There were similar counts relating to transactions with Hooks, McLendon, and the Windham Lumber Company.

Hooper Alexander, U. S. Atty., and John W. Henley, Asst. U. S. Atty., both of Atlanta, Ga.

Bell & Ellis and Little, Powell, Smith & Goldstein, all of Atlanta, Ga., for defendant.

NEWMAN, District Judge. There is a demurrer to the indictment in this case. I was very much inclined to believe that this case was controlled against the government in favor of the demurrer by the case of Etheredge v. United States, 186 Fed. 434, 108 C. C. A. 356; but I have re-examined it very carefully in the last few days, and I am not satisfied now that it is controlling in this matter, or hardly persuasive, in view of the language used. In the opinion by Judge Jones, towards the close of the opinion, this is said:

"A mere fraudulent promise to be performed in the future, whereby one obtains goods from another, without paying for them, disconnected from anything in the transaction which amounts to a 'scheme or artifice,' will not suf-

fice to uphold a conviction for a violation of section 5480 of the Revised Statutes as amended by the act of March 2, 1889. Whether such conduct would come within the statute, as it appears greatly enlarged in section 215 of the Penal Code (U. S. Comp. St. Supp. 1909, p. 1455), or whether the making of a fraudulent promise as a means of obtaining property, constitutes a 'scheme or artifice' within its meaning, is not involved in this writ of error, and no opinion is intended to be expressed as to it. The inclusion in the revision of the statute of the words 'for obtaining money or property by means of false or fraudulent pretenses, representations or promises,' not found in it before, after frequent amendments to broaden the scope of the legislation, is persuasive at least that Congress in its legislation prior to that amendment has not construed a mere false or fraudulent promise, standing alone, to constitute a 'scheme or artifice.'"

In the case of Bettman v. United States, decided by the Circuit Court of Appeals for the Sixth Circuit, 224 Fed. 819, 140 C. C. A. 265, the court, in the opinion by Circuit Judge Knappen, says this:

"We are asked to reject the Scheinberg Case upon the authority of Etheredge v. United States (C. C. A. 5) 186 Fed. 434, 108 C. C. A. 356, in which a construction is put upon section 5480 inconsistent with the construction of section 215 of the Code adopted in the Scheinberg Case [213 Fed. 757, 130 C. C. A. 271, Ann. Cas. 1914D, 1258]. We are not satisfied to follow the Etheredge Case, because we think some of the views there expressed are out of harmony with some of the decisions of this court (notably the Horman Case [116 Fed. 350, 53 C. C. A. 570], already cited), and because the case is opposed to the holding of the Circuit Court of Appeals for the Third Circuit in Culp v. United States, 82 Fed. 990, 27 C. C. A. 294 (cited with approval by this court in Milby v. United States, 109 Fed. 642, 48 C. C. A. 574), and with the decision of the Circuit Court of Appeals for the Fourth Circuit in Charles v. United States, 213 Fed. 707, 712, 130 C. C. A. 221, Ann. Cas. 1914D, 1251, decided since the adoption of the Criminal Code. It is, moreover, to be noted that the learned judge who wrote the opinion in the Etheredge Case expressly refrained from deciding whether the conduct involved in that case 'would come within the statute, as it appears greatly enlarged in section 215 of the Penal Code.'"

In the Scheinberg Case referred to (213 Fed. 757, 130 C. C. A. 271, Ann. Cas. 1914D, 1258) it is held:

"That the use of the words 'scheme or artifice' to defraud did not limit the offense to a predetermined plan or contrivance to mislead or seduce the public into parting with their money or property similar to several swindles expressly designated in the statute, but prohibited the use of the mails for the transmission of a false financial statement by defendant to commercial agencies, with intent that the same should be used as a basis for the purchase of goods by defendant on credit to which he was not entitled."

These cases and others which might be cited, and which were referred to by Judge Knappen in the Bettman Case, are not in harmony with the decision of our Circuit Court of Appeals. If our Circuit Court of Appeals, however, had determined what they did upon this statute as embodied in section 215 of the Penal Code, I should be disposed to follow them as being controlling authority in this circuit; but the language which I have quoted, in which the court states that "no opinion is intended to be expressed as to it"—that is, as to the new language used in section 215 of the Penal Code—makes that opinion no authority upon the question submitted in this demurrer.

I think the indictment states a case against the defendant, and the demurrer must be overruled.

UNITED STATES v. JOHNSTON et al.

(District Court, N. D. New York. May 23, 1916.)

1. COMMERCE ⟸82—UNLAWFUL IMPORTATION—INDICTMENT.

Act July 31, 1912, c. 263, § 1, 37 Stat. 240 (Comp. St. 1913, § 10416), declares that it shall be unlawful for any person to deposit in the mails or with any carrier, or to send or carry from one state or territory to another state or territory, or to bring or cause to be brought into the United States from abroad, any films or any pictorial representations of any prize fight, which are designed to be used or may be used for the purpose of public exhibition. An indictment averred that defendants did bring, and cause to be brought, into the Northern district of the state of New York, films and pictorial representations of a prize fight, which were designed to be used, and which might be and were used, for public exhibition by setting up and causing to be set up and operate a camera and moving picture machine and apparatus on the international boundary line between the United States and Canada, so that a part of the machine and apparatus were within the United States and the remaining portion of the machine and apparatus in Canada, and that from films and pictorial representations placed in the machine on the Canadian side through the mechanical operation of the machine and apparatus, and by means in use of air, sunlight, electric light, and otherwise, were caused to be brought into the United States for the purpose of public exhibition, contrary to the statute made and provided. *Held* that, as the indictment specifically affirmed that parts of the machine were in the United States, and by means of air, electricity, and sunlight, pictorial representations were brought into the United States, it charged a violation of the statute and a demurrer cannot be sustained on the theory that defendants were merely projecting pictures into the United States from a machine located in Canada.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 47; Dec. Dig. ⟸82.]

2. CONSPIRACY ⟸43(6)—INDICTMENT—CONSPIRACY TO COMMIT CRIME.

In such case, the indictment, charging that defendants conspired together in violation of Criminal Code (Act March 4, 1909, c. 321) § 37, 35 Stat. 1096 (Comp. St. 1913, § 10202), to violate Act July 31, 1912, c. 263, § 1, and pursuant to such violation committed the acts above charged, was sufficient to charge the offense of conspiring to commit an offense against the laws of the United States.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 86, 91; Dec. Dig. ⟸43(6).]

3. COMMERCE ⟸31—INTERSTATE COMMERCE—REGULATIONS OF.

Under its power to regulate interstate commerce, Congress may forbid the transportation from state to state, or from foreign countries into the United States, of articles or pictures tending to debase the public; and therefore, in view of the brutalizing nature of prize fights, Act July 31, 1912, c. 263, § 1, forbidding the introduction into the United States of films showing prize fights, or the transportation of such films from state to state, is constitutional.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 24; Dec. Dig. ⟸31.]

4. COMMERCE ⟸55—INTERSTATE COMMERCE—REGULATIONS OF.

Nor is such act invalid because it partakes of the quality of a police regulation.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 72–102; Dec. Dig ⟸55.]

At Law. James J. Johnston and others were indicted for crime. On demurrer to the indictment by all defendants, except James J. Orkeny. Demurrer qverruled.

D. B. Lucey, U. S. Atty., of Ogdensburg, N. Y.

George Gordon Battle, of New York City (D. F. Costello, of Syracuse, N. Y., of counsel), for defendants.

RAY, District Judge. On the grounds "that the said indictment does not state facts sufficient to constitute a crime under any statute of the United States, and upon the further ground that it appears upon the face of the indictment that the matters charged against the said defendants do not constitute a crime under any statute of the United States," and "that Congress has not constitutional power to prohibit the taking within the United States of pictures of objects beyond the border of the United States, as alleged in the said indictment, and that the statute defining the substantive offense charged in this indictment, in so far as it prohibits the acts therein described, is unconstitutional and void," the defendants, except defendant Orkeny, who has not been apprehended, demur to an indictment found and filed April 7, 1916, charging them, first, with having conspired to commit an offense against the United States in violation of section 37 of the Criminal Code of the United States, by agreeing to violate section 1 of the Act of July 31, 1912, c. 263 (37 Stat. 240, 4 U. S. Comp. St. 1913, § 10416), being an "act to prohibit the importation and the interstate transportation of films, or other pictorial representations of prize fights, and for other purposes," and, second, with having actually violated that provision of the criminal laws of the United States. That section reads as follows:

"It shall be unlawful for any person to deposit or cause to be deposited in the United States mails for mailing or delivery, or to deposit or cause to be deposited with any express company or other common carrier for carriage, or to send or carry from one state or territory of the United States or the District of Columbia to any other state or territory of the United States or the District of Columbia, or to bring or to cause to be brought into the United States from abroad, any film or other pictorial representation of any prize fight or encounter of pugilists, under whatever name, which is designed to be used or may be used for purposes of public exhibition."

[1] The indictment charges in count 1 that the defendants, naming them:

"In violation of the provisions of section 37 of the Criminal Code of the United States of America, did on and previous to the 2d day of April, 1916, unlawfully, knowingly and feloniously conspire, combine and confederate together among themselves to commit an offense against the United States of America, that is to say, to violate the provisions of section 1 of the act of Congress approved July 31, 1912, and known as an act to prohibit the importation and the interstate transportation of films or other pictorial representations of prize fights and for other purposes, in the manner following; that is to say: That the said James J. Johnston, Lawrence M. D. McGuire, Harold T. Edwards, Isaac W. Ullman, Harry A. Fishbeck, W. V. Brymer, and James J. Orkeny, should and would bring and cause to be brought into the United States of America, films and other pictorial representations of a prize fight, designed to be used and which might be used for the purposes of public exhibition, to wit, the Johnson-Willard prize fight, held at Havana, Cuba, April.

15, 1915, by setting up and operating a camera and motion picture machine or machines and apparatus upon the international boundary between the United States of America and the Dominion of Canada, in the town of Champlain, county of Clinton and state of New York, and within the jurisdiction of this court, and the parish of Lacolle, province of Quebec. Dominion of Canada, and about one mile north of Rouses Point, New York, and containing a film and pictorial representation of a prize fight, the prize fight aforesaid; that a portion of said camera and apparatus and machine would and should be placed in the Dominion of Canada, and the other portion thereof in the United States of America at the aforesaid place, through and by means of which said camera, machine and apparatus said pictorial representations of the aforesaid prize fight were to be brought and caused to be brought into the United States of America by means of the mechanical operation of said camera machine apparatus and the action of the atmosphere, sunlight and electric light transferring same and bringing from picture films of the said prize fight, placed and operated in the portion of said machine which would then be in the Dominion of Canada, to the said camera placed upon the American side, for the purpose of bringing the said pictures and pictorial representations into the United States of America, intending and designing such pictorial representations of such prize fight to be used and which might be used for the purposes of public exhibition in the United States and elsewhere.

"That in pursuance to the said conspiracy and during the continuance thereof, and in execution and to effect the object of the same, the said James J. Johnston, Lawrence M. D. McGuire, Harold T. Edwards, Isaac W. Ullman, Harry A. Fishbeck, W. V. Brymer, and James J. Orkeny did on or about the said 2d day of April, 1916, in the Northern district of New York and within the jurisdiction of this court, unlawfully, knowingly and feloniously set up a camera motion picture machine and other apparatus upon the said international boundary line between the United States of America and the Dominion of Canada, about one mile north of Rouses Point, New York, in the Northern district of New York, for the purpose of bringing and causing to be brought into the United States, from abroad, films and other pictorial representations of a prize fight, to wit, the Johnson-Willard prize fight, held at Havana, Cuba, April 15, 1915, intended to be used, designed to be used and which might be used for the purposes of public exhibition in the United States and elsewhere; that a part of said machine, namely, the camera and other apparatus was placed in the town of Champlain, Clinton county, in the state of New York, in the district aforesaid, and the other part thereof, containing films of and containing pictures of said fight and other apparatus was placed about one foot distant therefrom in the parish of Lacolle, province of Quebec, Dominion of Canada, and that said machine, camera and apparatus were controlled and operated on said date through means of a crank, chain, storage battery, electric lights, sunlight, air and other mechanical devices set in motion, propelled and operated by the said persons, to wit, James J. Johnston, Lawrence M. D. McGuire, Harold T. Edwards, Isaac W. Ullman, Harry A. Fishbeck, W. V. Brymer, and James J. Orkeny in both the United States and the Dominion of Canada, and that on account of and by means of the operation thereof on said date, pictures, pictorial representations and films of said prize fight were brought and caused to be brought from the Canadian side or portion of said machine and apparatus in the Dominion of Canada, into the camera and apparatus on the American side of the same, thereby bringing and causing to be brought into the United States, from abroad and from the Dominion of Canada, films and other pictorial representations of said prize fight which were intended and designed to be used and which might be used for the purpose of public exhibition in the United States and elsewhere, by means of the mechanical operation of the aforesaid machine, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America."

Count 2 charges that the defendants did on the 2d day of April, 1916:

"In the Northern district aforesaid and within the jurisdiction of this court, unlawfully, knowingly and feloniously bring and cause to be brought into the

United States of America, and into the county of Clinton in the state of New York, in the Northern district of said state of New York, films and other pictorial representations of a prize fight, to wit, the Johnson-Willard prize fight, held at Havana, Cuba, April 15, 1915, and which were then and there designed to be used, and were so brought in to be used, and which might be used for the purposes of public exhibition in the United States and elsewhere in the following manner: By setting up and causing to be set up and operated a camera and moving picture machine and apparatus upon the international boundary line between the United States and Canada, about one mile north of Rouses Point, New York. That a part of said machine and apparatus, viz., the camera portion thereof and other apparatus was placed within the United States, to wit, in the town of Champlain, Clinton county, state of New York, Northern district of New York, and within the jurisdiction of this court, and the remaining portion of said machine or machines and apparatus connected and operated together was placed in the parish of Lacolle, province of Quebec, Dominion of Canada, which said camera and machine and apparatus were then and there operated by means of mechanical devices set in motion by James J. Johnston, Lawrence M. D. McGuire, Harold T. Edwards, Isaac W. Ullman, Harry A. Fishbeck, W. V. Brymer, and James J. Orkeny, and on account of and by means of the operation thereof, films and other pictorial representations of said prize fight were taken from the films of said prize fight placed in said machine on the Canadian side thereof, and through the mechanical operation of said machine and apparatus and camera transmitted to the American side, which said mechanical operation was set in motion and propelled by the aforesaid persons, and by such means and by the use of air, sunlight, electric light and otherwise, said films and pictorial representations of the aforesaid prize fight were then and there brought and caused to be brought into the United States from the Dominion of Canada for use, and by said persons were designed to be used and which might be used, for the purpose of public exhibition of the same and of said prize fight and encounter of pugilists in the United States and elsewhere, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America."

The third count is substantially the same as count 2, except it charges that the offense was committed April 3, 1916.

The main contention of the defendants is that this indictment shows on its face that no film, or physical picture, or physical pictorial representation of a prize fight was actually brought into the United States from the Dominion of Canada, but that by an ingenious arrangement of apparatus, camera, film, etc., a picture of a prize fight was photographed on the United States side of the natural boundary from a film located on the Canadian side, and that such process and operation, even if the moving picture of the prize fight was reproduced on the United States side of the border line between the United States and Canada, does not constitute a bringing or a causing to be brought into the United States from abroad—that is, from Canada—of either a film or other pictorial representation of any prize fight, etc., within the meaning of the section quoted. The main weakness in this argument is that it assumes the indictment does not mean what it says when it charges in plain and unmistakable language that defendants—

"did on the 2d day of April, 1916, * * * bring and cause to be brought into the United States of America * * * films and other pictorial representations of a prize fight, to wit, the Johnson-Willard prize fight," etc.

Here is a plain charge of bringing in films and other pictorial representations of such prize fight. Then follows a description of

the mode and manner in which such physical objects, films, and other pictorial representations of such prize fight were actually brought into the United States. The indictment does not state and charge that a photograph was taken on the United States side of the international line of a film or picture of a prize fight located on the Canadian side, but, after describing to an extent an apparatus, etc., says:

"And on account of and by means of the operation thereof [such apparatus, etc.], films and other pictorial representations of said prize fight were taken from the films of said prize fight placed in said machine on the Canadian side thereof, and through the mechanical operation of said machine and apparatus and camera transmitted to the American side"

—that is, brought over and carried or forwarded to the American side. But, further, the indictment says:

"Which said mechanical operation was set in motion and propelled by the aforesaid persons [the defendants], and by such means [mechanism] and by the use of air, sunlight, electric light and otherwise said films and pictorial representations of the aforesaid prize fight were then and there brought and caused to be brought into the United States from the Dominion of Canada for use," etc.

Even if the indictment charges that "films and pictorial representations of said prize fight" were reproduced on the Canadian side from the films placed there, in plain and unequivocal language it further says that by the means and mechanism described and other means "said films and pictorial representations" were then and there brought and caused to be brought into the United States, etc. This court cannot be informed just what the evidence will show, and that is not the question here. It may appear from the evidence that no film or pictorial representation was brought into the United States, but the indictment plainly alleges that one or more films and one or more pictorial representations of the prize fight named were brought into the United States, and into the Northern district of New York, and that same were designed to be used and could be used and might be used for purposes of public exhibition. It would be a waste of time to consider a case which argument states the evidence will show. It will be time enough to consider that when the evidence is before the court. It is clear that no conviction can be had if the evidence fails to show the bringing in from abroad of a film or a pictorial representation of a prize fight.

[2] The conspiracy count plainly charges a conspiracy to commit a crime against the United States, and as plainly charges the commission of an overt act in execution of such conspiracy. The other counts charge the defendants with having actually brought into the United States from the Dominion of Canada, not only a film, but other pictorial representation of a prize fight, naming it, and that such film and pictorial representation was capable of being used and designed to be used and might be used for purposes of public exhibition. The times when and the place where these offenses were committed are plainly and clearly specified, and the defendants are also informed so far as possible as to the means claimed to have been used by them in bringing in such films and other pictorial representations of a prize fight.

These means, this apparatus and its workings, may have been a new mode of bringing in or transmitting films and other pictorial representations of this prize fight from Canada to the United States; but this is immaterial, provided the use and operation of the means employed did bring from the Dominion of Canada into the United States films and other pictorial representations of the prize fight which were intended to be used and which could be used for purposes of public exhibition in the United States. The indictment charges that this was actually done by the operation by defendants of the instrumentalities actually employed. No court has the right to assume, or presume, or guess, or speculate, or theorize that this could not be done by the use of such means. The indictment says it was done.

Constitutionality of the Law.

[3] The control of the importation of articles into the United States and of their transportation from state to state is within the constitutional power of Congress. It and it alone regulates interstate and foreign commerce. It has the right to say what aliens, and under what conditions such aliens, may come into the United States, and also what articles of use and commerce may come into the United States, or go from state to state. It has the right to prohibit the bringing into the United States of articles which it deems injurious to the morals and general welfare of the people of the United States, or their transportation from state to state. In Hoke v. United States, 227 U. S. 308, 322, 33 Sup. Ct. 281, 284 (57 L. Ed. 523, 43 L. R. A. [N. S.] 906, Ann. Cas. 1913E, 905), the constitutionality of the so-called "White Slave Act" (Comp. St. 1913, §§ 8812–8819) was under consideration, and Mr. Justice McKenna, in giving the opinion of the court, said:

"Our dual form of government has its perplexities, state and nation having different spheres of jurisdiction, as we have said; but it must be kept in mind that we are one people, and the powers reserved to the states and those conferred on the nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral. This is the effect of the decisions, and surely, if the facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of food and drugs, the like facility can be taken away from the systematic enticement to and the enslavement in prostitution and debauchery of women, and, more insistently, of girls."

The brutalizing and pernicious effect, especially on the young, of looking on physical encounters between human beings in the shape of actual fights, where the fight is "to the finish" and until the one or the other of the combatants is "knocked out" and rendered physically incapable of further action, offensive or defensive, are well known and recognized almost everywhere. In these days of "movies," or moving picture shows, it was seen that, while it was impossible for such brutal scenes to be enacted within the United States, because of state laws prohibiting them, still moving film pictures of the actual fight taking place outside the United States, showing it in all its harrowing details, might be taken and developed and brought into the United States, and the fight there reproduced in the so-called "moving picture shows"

as one of the attractions of the "movies." Therefore Congress, remembering that "the powers reserved to the states and those conferred on the nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral," saw fit to absolutely prohibit the bringing into the United States of any film or other pictorial representation of one of these prize fights which had taken place in some other country, and which might be used for purposes of public exhibition. Congress has determined by this legislation that, in enacting it, it was promoting the "general welfare, material and moral."

[4] Congress has closed our doors against the importation of lewd and indecent pictures, the exhibition of which has a tendency to debase, degrade, and demoralize, and it has placed its ban on the importation of pictures showing a brutal prize fight capable of public exhibition. I do not think any court will have the temerity to hold that by so doing Congress has trenched on the rights and liberties of the people. In Hipolite Egg Co. v. United States, 220 U. S. 45, 31 Sup. Ct. 364, 55 L. Ed. 364, the Supreme Court denominated adulterated drugs and foods as "outlaws of commerce," and said that their confiscation by law was appropriate to the right to bar them from interstate transportation, and completed the purpose of the law by not merely preventing their physical movement, but preventing trade in them between the states. The constitutional power of Congress over commerce extends, not only to interstate, but to foreign commerce, and what it may do with respect to the one it may do with respect to the other. It is no objection that these laws have the quality of police regulations, for, while the police power abides with the several states, still "Congress may adopt not only the necessary but the convenient means necessary to exercise its power over a subject completely within its power, and such means may have the quality of police regulations." 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; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. Ed. 158.

Congress has provided for the rejection of the diseased and immoral, and this legislation has the quality of police regulation. There is no inherent right in the enjoyment of liberty under our Constitution to do wrong, or to possess here or bring into the United States from other countries, articles, such as pictures, which, if exhibited, only tend to debase and degrade the beholder and lower the moral standard of our people. The general policy of nearly all, if not all, the states of the Union, is shown by the several laws prohibiting prize fights within their borders. So each state might prohibit the exhibition, or having in possession, of a pictorial representation of a prize fight or of a film which would reproduce one. This is for the states, but Congress can aid by prohibiting the bringing from any other country into any state or territory of the United States, or the District of Columbia, any pictorial representation of a prize fight which took place abroad, or any film calculated to reproduce same, and which, it is well known, may be done with nearly the same vividness as though the actual fight was going on before the eyes of the beholder. Weak and puny, indeed,

would that government be which is powerless to prohibit by the enactment and enforcement of appropriate laws the importation of articles which, when exhibited or put to use, degrade its people, or lower the standard of the morals of its people. Congress has not undertaken to say that such films and pictorial representations of a prize fight shall not be exhibited within a state, leaving that to the state itself; but it has said, acting under and by virtue of its constitutional right to absolutely control and regulate interstate and foreign commerce, that such films and pictorial representations shall not be brought or caused to be brought into the United States from abroad, or carried from state to state through or by means of the mails or otherwise.

But it is useless to discuss this question further, as the constitutionality of the act has been upheld by the Supreme Court of the United States in Weber v. Freed, Collector, etc., 239 U. S. 325, 36 Sup. Ct. 131, 60 L. Ed. ——, decided December 13, 1915, where the court, by Mr. Chief Justice White, said:

"The ground relied on for the relief was the averment that the prohibition of the act of Congress in question was repugnant to the Constitution because, in enacting the same, 'Congress exceeded its designated powers under the Constitution of the United States, and attempted, under the guise of its powers under the commerce clause, to exercise police power expressly reserved in the states.' The collector moved to dismiss on the ground that the bill stated no cause of action, because the assailed provision of the act of Congress was constitutional, and therefore on the face of the bill there was no jurisdiction to award the relief sought. The motion was sustained and a decree of dismissal was rendered, and it is this decree which it is sought to reverse by the appeal which is before us; the propositions relied upon to accomplish that result but reiterating in various forms of statement the contention as to the repugnancy to the Constitution of the provision of the act of Congress. But in view of the complete power of Congress over foreign commerce, and its authority to prohibit the introduction of foreign articles recognized and enforced by many previous decisions of this court, the contentions are so devoid of merit as to cause them to be frivolous. Buttfield v. Stranahan, 192 U. S. 470 [24 Sup. Ct. 349, 48 L. Ed. 525]; The Abby Dodge, 223 U. S. 166, 176 [32 Sup. Ct. 310, 56 L. Ed. 390]; Brolan v. United States, 236 U. S. 216 [35 Sup. Ct. 285, 59 L. Ed. 544]. It is true that it is sought to take this case out of the long-recognized rule by the proposition that it has no application because the assailed provision was enacted to regulate the exhibition of photographic films of prize fights in the United States, and hence it must be treated, not as prohibiting the introduction of the films, but as forbidding the public exhibition of the films after they are brought in—a subject to which, it is insisted, the power of Congress does not extend. But, aside from the fictitious assumption on which the proposition is based, it is obviously only another form of denying the power of Congress to prohibit, since, if the imaginary premise and proposition based on it were acceded to, the contention would inevitably result in denying the power in Congress to prohibit importation as to every article which, after importation, would be subject to any use whatever. Moreover, the proposition plainly is wanting in merit, since it rests upon the erroneous assumption that the motive of Congress in exerting its plenary power may be taken into view for the purpose of refusing to give effect to such power when exercised. Doyle v. Continental Ins. Co., 94 U. S. 535, 541 [24 L. Ed. 148]; McCray v. United States, 195 U. S. 27, 53–59 [24 Sup. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561]; Calder v. Michigan, 218 U. S. 591, 598 [31 Sup. Ct. 122, 54 L. Ed. 1163]."

It is claimed that this indictment shows on its face that all that was done was to photograph from the United States side of the national boundary line a film picture of a prize fight, which film so

photographed was located on the Canadian side of the said boundary line, and that as the film photograph so taken would have to be developed in order to be of use, and this is not alleged to have been done, no offense is charged. But this is not the allegation of the indictment, as we have seen. The making and existence of a film or pictorial representation of this prize fight on the Canadian side is plainly and specifically alleged, as is the bringing and transmission of same into the United States in a form intended for exhibition and which could be exhibited in the United States. If by some physical mechanical means, combined with the use of air, natural light and electric light and other means, a pictorial representation of the prize fight or pugilistic encounter which had taken place in Cuba was brought into the United States from Canada for public exhibition here, and it was of such a character it could or might be publicly exhibited in the United States, it is difficult to understand why the statute was not offended against. On the trial it will be incumbent on the United States to prove that substantially by the means referred to a film or other pictorial representation of such prize fight of the character required by the statute was brought into the United States from Canada through the action or procurement of the defendants or of some of them. We are not now concerned with the sufficiency of the testimony or proofs that will be adduced on the trial, but with the sufficiency of the allegations of the indictment. Each count of this indictment plainly and in unambiguous terms and words gives notice to these defendants of the ultimate facts to be proved, and is so specific and definite as to give no opportunity for a second prosecution for the offense charged. The averments of the indictment and of each count embrace and charge each and every element of the offense defined in the last clause of the Act of July 31, 1912, c. 263 (37 Stat. 240), and must be held sufficient. Cochran v. United States, 157 U. S. 286, 290, 15 Sup. Ct. 628, 39 L. Ed. 704; Rosen v. United States, 161 U. S. 29, 34, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; Markham v. United States, 160 U. S. 319, 323, 16 Sup. Ct. 288, 40 L. Ed. 441.

The demurrers are overruled.

DELAWARE, L. & W. R. CO. v. VAN SANTVOORD et al.

(District Court, N. D. New York. June 6, 1916.)

RAILROADS ⊜218—CARRIAGE OF PERSONS—FACILITIES—PUBLIC SERVICE COMMISSION—"PUBLIC NECESSITY."

Complainant operated a line of railroad between Oswego and Buffalo, N. Y. Passengers were carried by four trains daily, each way. Owing to other modes of travel and to the competition of an interurban road, travel decreased and the trains were being operated at an ever-increasing deficit. All of the principal towns on the route were served by the interurban road, and the other smaller agricultural communities were within a few miles of the road, and passengers desiring such service might board the cars after a short drive. Other railroads furnished facilities through the district. *Held* that, as the interurban cars ran at intervals of one-

half hour, the complainant railroad company could not be required to run four trains daily each way, but might withdraw two of the trains each way every day; there being no "public necessity," which means great or urgent public convenience requiring the operation of additional trains, and so an order requiring the maintenance of four trains daily each way is confiscatory.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 715; Dec. Dig. ⊂=218.

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

In Equity. Bill of the Delaware, Lackawanna & Western Railroad Company against Seymour Van Santvoord and others, as Commissioners of the Public Service Commission. Decree for Complainant.

Bill in equity, filed by the Delaware, Lackawanna & Western Railroad Company to restrain the Public Service Commission, Second District, State of New York, from enforcing certain orders of said commission which direct the restoration of two trains each way each day between the cities of Syracuse and Oswego, N. Y., a distance of some 35 miles, over a leased line known as the Oswego & Syracuse Railroad.

F. W. Thomson, of Syracuse, N. Y., for complainant.
Ledyard P. Hale, of Albany, N. Y., for Public Service Commission.
S. J. Kelly, of Syracuse, N. Y., for residents of South Granby, Lamson, and Little Utica.

RAY, District Judge. This matter was before this court on motion for an injunction pendente lite, and the injunction was granted. In deciding the application this court wrote an opinion which is reported in 216 Fed. 252. No additional evidence has been submitted, and the parties stipulated in the evidence taken before the Public Service Commission, Second District, State of New York. There is no dispute in regard to the facts, unless it be the inferences that may be drawn whether or not the public convenience demands that the complainant here restore the two trains ordered restored by the Public Service Commission prior to the bringing of this action. The facts are as follows:

The complainant is a corporation organized and existing under the laws of the state of Pennsylvania. Since 1869, the complainant has operated by virtue of a lease the Oswego & Syracuse Railroad, running from the city of Oswego on the shores of Lake Ontario to the city of Syracuse. The city of Syracuse is some 35 miles from Oswego and on the main line of the New York Central & Hudson River Railroad Company. The main line of the Delaware, Lackawanna & Western Railroad Company extends from Hoboken, opposite the city of New York, through New Jersey and the eastern part of Pennsylvania, to the city of Binghamton, in the state of New York, and thence on westerly to the city of Buffalo. The complainant company also leases and operates the Syracuse & Binghamton

Railroad, extending from the city of Binghamton aforesaid to the city of Syracuse, and by means of these leased lines has a continuous line of road from Hoboken, through Scranton, Pa., and Binghamton, N. Y., and thence on through the city of Cortland to Syracuse, and on to Oswego. The complainant, the Delaware, Lackawanna & Western Railroad Company does a large interstate and considerable intrastate business. The New York Central & Hudson River Railroad runs from the city of Buffalo, through Rochester, Syracuse, Utica, Albany, and thence down the Hudson river valley to the city of New York. That road also has a line connecting with its main line running from the city of Syracuse to the city of Oswego. The New York, Ontario & Western Railroad extends from Weehawken, opposite the city of New York, through New Jersey, and across the state of New York, through the city of Oneida, to the city of Fulton, on the Oswego river, and to the city of Oswego. These branch lines of the New York Central Railroad Company and of the complainant company also run through the city of Fulton. Two of them, as seen, run direct to the city of Syracuse from Oswego, and the New York, Ontario & Western connects with the New York Central at Oneida. There is also a line of road, a trolley line, running direct from the city of Oswego to the city of Syracuse, and this is one of the lines of the Empire United Railways. This trolley line practically parallels the leased line of the complainant company, Oswego & Syracuse Railroad, from Syracuse to Oswego. This trolley line passes through the city of Fulton, which is 24 miles from Syracuse and 11 miles from Oswego and has a population of 10,480. Syracuse has a population of 137,249, and Oswego has a population of 23,368. It is seen that the cities of Oswego, Fulton, and Syracuse have abundant railroad facilities, inasmuch as the Ontario & Western Railroad Company operates two passenger trains each way daily, and the New York Central Railroad operates four passenger trains each way daily, and the complainant company now operates two passenger trains each way daily, and the said Empire Railways operate or run a trolley car every half hour between Oswego and Syracuse each way all day and a part of the night.

For many years prior to November, 1913, the Delaware, Lackawanna & Western Railroad Company operated a passenger train service between the city of Oswego and the city of Syracuse in accordance with the following schedule, viz.: Four trains per day from Syracuse to Oswego, known as Nos. 911, 915, 903, and 919, and also four trains per day between Oswego and Syracuse, known as Nos. 904, 906, 916, and 912. This train service between the cities mentioned was established prior to the construction and operation of the trolley line referred to, and which, as stated, parallels the line of the complainant substantially. In recent years there has been a large increase in travel through this section between Oswego and Syracuse by means of automobiles, and of course the trolley line has taken a large portion of the travel formerly going to the Lackawanna. In 1884 the gross revenue of the Delaware, Lackawanna & Western Railroad Company for operating its four trains each way

on the Oswego & Syracuse Railroad, between the cities of Oswego and Syracuse, amounted to $103,660.37. By reason of the building and operating of the competing lines referred to, especially the trolley line, this revenue steadily decreased, without any change in the schedule of the complainant's trains, until in 1912 it amounted to only $36,111.36, a decrease in gross revenue of $67,549.01 for 1912, as compared with 1884. In 1908 the gross revenue of the complainant company from this passenger service was $58,452.64, while after the trolley line went into operation, and in 1912, it was reduced to $36,111.36. For the year 1912 the complainant operated these four trains each way between the cities of Oswego and Syracuse at a loss of $149,563.49. For some years the complainant has been operating this passenger service in this territory between Syracuse and Oswego at a large loss. The total passenger revenue of train 919 for the first 16 days of November, 1913, was only $35.73. On November 5, 1913, it was only 20 cents, and on November 3, 70 cents, and on November 7, $1, and on November 13, the same year, 40 cents. On the 2d day of November, 1913, the Delaware, Lackawanna & Western Railroad Company withdrew from its said service the trains known as Nos. 915 and 919, running from Syracuse to Oswego, and trains Nos. 904 and 916, running from Oswego to Syracuse.

Between Syracuse and Oswego, a distance of 35 miles, the Delaware, Lackawanna & Western Railroad (leased line) runs through Baldwinsville, 12 miles from Syracuse, with a population of 3,099, Lamson, 16 miles from Syracuse, with a population of 75, South Granby, 19 miles from Syracuse, with a population of 84, the city of Fulton, 24 miles from Syracuse and 11 miles from Oswego, with a population of 10,480, and Minetto, between Fulton and Oswego, with a population of 250. Lysander, with a population of 305, is 5 miles west of Lamson, and Little Utica is 3 miles west of Lamson, and has a population of 100. Baldwinsville is abundantly supplied with railroad and trolley service, without these two trains each way per day in question, and this is true of Fulton, as we have seen, and also of Minetto. The country between Syracuse and Oswego is agricultural, and of ordinary fertility, and not at all thickly populated. This trolley line operates from the business center of Syracuse, and through the business centers of Baldwinsville, Fulton, and Minetto, to the business center of Oswego, but passes Lamson and South Granby about 3½ miles east of the center of those hamlets. The highways are in good condition. It thus appears that the train service on the complainant's road is reduced to two trains each way per day so far as Lamson, South Granby, and Little Utica are concerned, and so far as the residents there desire to use that road. By driving by team or auto some 3½ miles these people can get a trolley car every half hour. In short, the only persons to suffer any inconvenience whatever by taking off these trains are those at Lamson, South Granby, Lysander, and Little Utica; but they still have two trains each way per day and also the trolley service mentioned.

The question is simplified to this: Should this complainant be compelled to operate these two trains at a loss of thousands of dollars

per annum for the greater convenience of the very few people desiring to use them at indefinite and uncertain times residing at Lamson, South Granby, Lysander, and Little Utica? It seems to me that to compel the operation of these trains for such a purpose under such circumstances amounts to confiscation of property. It seems to me that the order of the commission is unreasonable. The records in evidence show that the total revenue from the South Granby service, when four trains per day each way were running, was on the average $3.32, and from the Lamson service $5.82 per day, or 41.5 cents and 73 cents gross revenue per day per train, respectively. This includes the revenue from express and mail matter and excess baggage. In 1912, when the eight trains were running between Syracuse and Oswego, four each way, the average gross passenger train revenue, including mail, express, and baggage revenue between the two cities, was $20.58. Considering the size and population of Lamson, South Granby, and Lysander, and the small amount of business done there, it is readily seen that it would be a gross injustice to the complainant company to compel the restoration of these nonpaying trains—trains not only nonpaying, but trains run at the great loss mentioned. It would convenience a very few people occasionally no doubt, but this is far from a public necessity. The evidence in this case justifies and requires a finding that these two trains, discontinued by the railroad company and ordered restored by the Public Service Commission, were being run at a net loss to the company of over $3,000 per annum.

If we consider the entire Delaware, Lackawanna & Western Railroad system, operating between Hoboken, N. J., and Buffalo, N. Y., including these branches from Binghamton, via Cortland and Syracuse, to Oswego, and from Binghamton, via the city of Norwich, to Utica, where it connects with the New York Central & Hudson River Railroad Company for Syracuse, and with the Ontario & Western for Oswego, and the net earnings of the complainant, it is not claimed that the entire line is operated at a loss. The net revenues are largely in excess of the operating expenses, etc. But this does not justify a compulsory operation of two more trains between Syracuse and Oswego at a large loss to the complainant, when it appears that the running of such trains is not at all necessary for the convenience of the general public, but only for the greater convenience of a small number of persons residing at local points—only two actually on the line of road, Lamson and South Granby—between two large cities only 35 miles apart, and it also appears that such local points do but little business, and are reasonably well served by the railroad corporation by two trains each way per day, and also by a half hour trolley line only 3½ miles distant from the nearest of such local points. If a railroad company, like the complainant company, may be compelled to supply such small local hamlets with four passenger trains each way, under such circumstances, at a large loss per annum, at one point such as Lamson, it may be compelled to do so at all similar points along its entire line, and its revenues would be eaten up, and in time the line would be crippled, if not bankrupted, in an effort to compel it to give extraordinary railroad conveniences to

all the people along its entire line, including those several miles distant therefrom. Thus in serving mere *local* convenience, which is not *public* convenience or necessity, the final result would be great public inconvenience.

In Oregon R. R. & N. Co. v. Fairchild et al., State Railroad Commissioners, 224 U. S. 510, 32 Sup. Ct. 535, 56 L. Ed. 863, it is held that:

"An order of a railroad commission requiring a railroad company to expend money and use its property in a specified manner is not a mere administrative order, but is a taking of property. To be valid there must be more than mere notice and opportunity to be heard; the order itself must be justified by public necessity and not unreasonable or arbitrary. * * * A state, acting through an administrative body, may require railroad companies to make track connections. Wisconsin, etc., R. R. Co. v. Jacobson, 179 U. S. 287 [21 Sup. Ct. 115, 45 L. Ed. 194]. But such body cannot compel a company to build branch lines, connect roads lying at a distance from each other, or make connections at every point regardless of necessity. Each case depends on the special circumstances involved."

Accordingly the court held that the orders in that case were "not justified by public necessity, and therefore deprived the railroad company of its property without due process of law."

The principle involved is the same here. The order of the Public Service Commission of the State of New York is not justified by public necessity, or even by local necessity, but, if made operative, serves local interests only, and at times affords greater local convenience to a few people. This is not sufficient to justify such an order, involving such great annual loss to the complainant railroad company. In the case just cited the court said:

"Since the decision in Wisconsin, etc., R. R. v. Jacobson, 179 U. S. 287 [21 Sup. Ct. 115, 45 L. Ed. 194], there can be no doubt of the power of a state, acting through an administrative body, to require railroad companies to make track connection. But manifestly that does not mean that a commission may compel them to build branch lines, so as to connect roads lying at a distance from each other; nor does it mean that they may be required to make connections at every point where their tracks come close together in city, town, and country, regardless of the amount of business to be done, or the number of persons who may utilize the connection, if built. The question in each case must be determined in the light of all the facts, and with a just regard to the advantage to be derived by the public and the expense to be incurred by the carrier. For while the question of expense must always be considered (Chicago, etc., R. R. v. Tompkins, 176 U. S. 167, 174 [20 Sup. Ct. 336, 44 L. Ed. 417]), the weight to be given that fact depends somewhat on the character of the facilities sought. If the order involves the use of property needed in the discharge of those duties which the carrier is bound to perform, then, upon proof of the necessity, the order will be granted, even though 'the furnishing of such necessary facilities may occasion an incidental pecuniary loss.' But even then the matter of expense is 'an important criterion to be taken into view in determining the reasonableness of the order.' Atlantic Coast Line R. R. v. North Carolina Commission, 206 U. S. 1, 26 [27 Sup. Ct. 585, 595 (51 L. Ed. 933, 11 Ann. Cas. 398)]; Missouri Pacific Ry. v. Kansas, 216 U. S. 262 [30 Sup. Ct. 330, 54 L. Ed. 472]. Where, however, the proceeding is brought to compel a carrier to furnish a facility not included within its absolute duties, the question of expense is of more controlling importance. In determining the reasonableness of such an order the court must consider all the facts—the places and persons interested, the volume of business to be affected, the saving in time and expense to the shipper, as against the cost and loss to the carrier. On a consideration of such and similar facts the question of public necessity

and the reasonableness of the order must be determined. This was done in Wisconsin R. R. v. Jacobson, in which for the first time, it was decided that a state commission might compel two competing interstate roads to connect their tracks."

The complainant company has sustained the burden of showing that the restoration of these trains is not required or demanded by public necessity, and that, considering all the relevant facts and circumstances, and the great cost of the unnecessary service, and the annual loss involved, the order was and is unreasonable, and amounts, if enforced, to a taking of complainant's property in violation of its constitutional rights. In Com. v. Gilligan, 195 Pa. 504, 510, 46 Atl. 124, the word "necessity," when used with reference to public matters, is held to mean "great or urgent public convenience." It is clear that no such necessity exists here.

It is urged by the residents of Lamson and South Granby that, taking the trains retained by the complainant company, they cannot reach Syracuse until 12 o'clock noon, and must return on the train leaving Syracuse at about 6 o'clock p. m., and that, going from these places to Oswego, they must leave home at 8:30 o'clock in the morning and cannot return until about 9:30 in the evening. But the trolley service mentioned is still open to them, and in case of necessity or urgency the few people residing at these places may drive to the trolley station and be met there on their return without great inconvenience. It would be very convenient for the farmers along a trolley line to have the cars stop at every farmhouse along the line and at every highway crossing, and save driving to the stations; but we must balance all the conveniences and all the inconveniences, as well as the revenues and the expenses, gains and losses, of the service, in determining what is a public ncessity. See, also, 33 Cyc. 639, 640.

It is true, of course, that when a particular and specified duty is owed by a railroad company to the general public, and its performance is necessary for the convenience of the public, it cannot evade the performance of that duty on the plea that its discharge will entail some pecuniary loss. Atlantic Coast Line v. N. Carolina Corp. Commission, 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933, 11 Ann. Cas. 398. But when the duty is the general one to supply such train service as the public necessities demand and require, and two trains each way per day are furnished and retained, and the traveling public on that line of road generally is not affected by the reduction from four to two, as in this case, but only the people in two or three rural communities along the line, few in number, it cannot be said that the railroad company is evading or failing to perform its duty to the public by not retaining the four trains per day each way at a loss of over $3,000 per annum merely to serve such local convenience.

There may be and are cases where a considerable number of people residing in a small village or settlement travel to some larger place by rail daily, except Sundays, and perhaps Saturdays, for school or business purposes, and are required to take a particular train, or a train leaving and returning at a particular hour. The running of such trains may present a peculiar case, when their continuance would be

deemed a public necessity; but no fact or facts of this nature appear in this case. Here the convenience to the very few residents at Lamson, South Granby, Lysander, and Little Utica, who had occasion now and then to use these two discontinued trains, including those persons who at intervals used such trains in visiting those places, and who at some inconvenience are now compelled to use the remaining trains, is so out of proportion to the inconvenience and loss to the Delaware, Lackawanna & Western Railroad Company that it is impossible to find justification for judicially determining that their compulsory restoration is a public necessity.

Taking the complainant's line of railroad from Syracuse to Oswego as a whole, we find from the record that three steam railroads and one trolley line are competing for the traffic most of the way. Aside from the city of Fulton, there has been no material increase in population at any point for some 20 or more years. In 1865 Oswego had a population of 19,288, and in 1910 a population of only 23,368. It is well known that with improved state and county roads the use of automobiles has caused a considerable falling off in the use of railroads for public travel. Service by the complainant that was necessary 20 and 24 years ago, by reason of changed conditions and the facts referred to, is now unnecessary, and a burden on the complainant not justified or demanded by any sound consideration.

My conclusions are that the complainant, Delaware, Lackawanna & Western Railroad Company, has established its case and is entitled to the relief demanded. Formal findings of fact and conclusions of law may be prepared, if deemed necessary, and submitted for signature.

There will be a decree accordingly.

UNITED STATES v. CANYON COUNTY, IDAHO, et al.

(District Court, D. Idaho, S. D. April 29, 1916.)

1. TAXATION ⇐5—PROPERTY SUBJECT TO TAXATION—RIGHTS IN LAND WITHIN RECLAMATION PROJECT.

A patent to lands within a reclamation project, issued to a homestead entryman under Act Aug. 9, 1912, c. 278, § 1, 37 Stat. 265 (Comp. St. 1913, § 4728), on proof of compliance with the provisions of law as to residence, reclamation, and irrigation, conveys the legal title, the government reserving only a prior lien on the land and appurtenant water rights as security for the payment of all sums due or to become due on such water rights, and such lands are taxable by the state; the lien of the tax, however, being subject to the prior lien reserved by the government. Homestead entrymen on such lands, who have made proof of compliance with the general homestead laws, but have not fully complied with the additional requirements of the Reclamation Act as to reclamation and irrigation, have a vested interest, which may be sold, mortgaged, and inherited, and which also is subject to local taxation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 17, 31–44; Dec. Dig. ⇐5.]

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2. TAXATION ⊂⊃5—EQUITABLE INTEREST IN PUBLIC LANDS.
Generally speaking, one who has the right to real property and is not excluded from its use and enjoyment should not be permitted to use the legal title of the government to avoid his just share of taxation.
[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 17, 31–44; Dec. Dig. ⊂⊃5.]

In Equity. Suit by the United States against Canyon County, Idaho, L. C. Knowlton, Auditor, Sarah J. Handy, Treasurer, C. Q. Adams, C. B. Ross, and Carl W. Giesler, County Commissioners, and A. O. Christopher, Assessor of said County. On final hearing. Decree for defendants on the merits.

J. L. McClear, U. S. Atty., and B. E. Stoutemyer, both of Boise, Idaho, and A. A. Sessions, of Parma, Idaho, for the United States.
H. A. Griffiths, of Caldwell, Idaho, and Raymond L. Givens, of Boise, Idaho, for defendants.

DIETRICH, District Judge. The suit is brought to enjoin the defendant Canyon county and its officers from taxing lands, or the interests of settlers therein, in what is known as the Boise Reclamation Project, an irrigation system constructed by the government under what is popularly known as the Reclamation Act. For original act, see Act June 17, 1902, c. 1093, 32 Stat. 388 (Comp. St. 1913, §§ 4700–4708), amendment of February 8, 1905, c. 552, 33 Stat. 706 (Comp. St. 1913, § 4741). For amendment of March 3, 1905, 33 Stat. 1032, c. 1459 (Comp. St. 1913, § 4742); amendment of April 16, 1906, 34 Stat. 116, c. 1631 (Comp. St. 1913, §§ 4715–4719); amendment of June 12, 1906, 34 Stat. 259, c. 3288 (Comp. St. 1913, § 4709); amendment of June 27, 1906, 34 Stat. 519, c. 3559 (Comp. St. 1913, §§ 4720–4724); amendment of June 11, 1910, 36 Stat. 465, c. 284 (Comp. St. 1913, §§ 4725, 4726); amendment of June 23, 1910, 36 Stat. 592, c. 357 (Comp. St. 1913, § 4727); amendments of June 25, 1910, 36 Stat. 835, c. 407 (Comp. St. 1913, §§ 4710–4714), and 36 Stat. 864, c. 432 (Comp. St. 1913, § 4735); amendment of February 2, 1911, 36 Stat. 895, c. 32; amendment of February 13, 1911, 36 Stat. 902, c. 49 (Comp. St. 1913, § 4737); amendment of February 18, 1911, 36 Stat. 917, c. 111 (Comp. St. 1913, § 4714); amendment of February 21, 1911, 36 Stat. 925, c. 141 (Comp. St. 1913, §§ 4738–4740); amendment of February 24, 1911, 36 Stat. 930, c. 155 (Comp. St. 1913, § 4719); amendment of August 9, 1912, 37 Stat. 265, c. 278 (Comp. St. 1913, §§ 4728–4732); act approved August 13, 1914, 38 Stat. 686, c. 247. The project embraces about 350,000 acres of land in Canyon and Ada counties, Idaho, and Malheur county, Or., the larger portion of which is in the defendant county. The land constitutes a substantial part of the property of the county, and it will at once be apparent that, while formally the issue here is between the government and the county, in reality it also materially affects the interests of a large number of settlers and of many other persons owning property which is unquestionably subject to taxation. While in so far as concerns the state and county the exemption claimed would result only in shifting the burden to other property, when we consider that schools

are maintained and roads and bridges constructed almost exclusively through local taxation, it would, if recognized, give rise to the most perplexing problems of local government. If I rightly apprehend the facts, there are approximately 1,000 entrymen within the defendant county, the great majority of whom, it is to be presumed, are interested in having roads and bridges for their necessities or convenience and schools for the education of their children.

[1] All of the lands in question were public lands of the United States at the time the project was initiated, and were withdrawn for homestead entry under the provisions of the Reclamation Act. For the purposes of the present consideration they readily fall into two classes. The first class comprises entries in which the entrymen have made proof before the land office in conformity with the provisions of the general homestead law, but have not yet fully complied with the additional provisions of the Reclamation Act, requiring that at least one-half of the irrigable acreage of the entry shall be irrigated and reclaimed, and that payment be made for the water rights. The other class embraces entries where the entrymen have made proof, not only of compliance with the general homestead law, but also of the cultivation of one-half of the irrigable acreage, as required by the Reclamation Act, and to whom therefore, patent has issued under Act Aug. 9, 1912, c. 278, §§ 1, 2, 37 Stat. 265 (Comp. St. 1913, §§ 4728, 4729), which provides:

"That any homestead entryman under the act of June 17, 1902, known as the Reclamation Act, including entrymen on ceded Indian lands, may, at any time after having complied with the provisions of law applicable to such lands as to residence, reclamation and cultivation, submit proof of such residence, reclamation and cultivation, which proof, if found regular and satisfactory, shall entitle the entryman to a patent, and all purchasers of water-right certificates on reclamation projects shall be entitled to a final water-right certificate upon proof of the cultivation and reclamation of the land to which the certificate applies, to the extent required by the Reclamation Act for homestead entrymen."

And it further provides that:

"Every patent and water-right certificate issued under this act shall expressly reserve to the United States a prior lien on the land patented or for which water right is certified, together with all water rights appurtenant or belonging thereto, superior to all other liens, claims or demands whatsoever for the payment of all sums due or to become due to the United States or its successors in control of the irrigation project in connection with such lands and water rights.

"Upon default of payment of any amount so due title to the land shall pass to the United States free of all incumbrance, subject to the right of the defaulting debtor or any mortgagee, lien holder, judgment debtor, or subsequent purchaser to redeem the land within one year after the notice of such default shall have been given by payment of all moneys due, with eight per centum interest and cost. And the United States, at its option, acting through the Secretary of the Interior, may cause land to be sold at any time after such failure to redeem, and from the proceeds of the sale there shall be paid into the reclamation fund all moneys due, with interest as herein provided, and costs. The balance of the proceeds, if any, shall be the property of the defaulting debtor or his assignee: Provided, that in case of sale after failure to redeem under this section the United States shall be authorized to bid in such land at not more than the amount in default, including interest and costs."

There is attached to the bill a form of the patent held by each one of the entrymen falling within this class. The patent recites (from the act of August 9, 1912) not only the provision for a lien in favor of the government, above quoted, but the further provision to the effect that no person shall, so long as any reclamation charges remain unpaid, hold more than one farm unit upon a reclamation project, excepting in cases where the excess has been acquired "in good faith by descent, by will, or by foreclosure of any lien," in which case it may be held for two years after its acquisition. Subject to these provisions of the law the grant is in form absolute, the language of the patent being that the United States, in consideration of the premises—

"does give and grant unto the said ———, and to his heirs, the tract above described, together with the right to the use of the water from the Boise Reclamation Project as an appurtenance to the irrigable lands in said tract; to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said ———, and to his heirs and assigns forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; but excepting, nevertheless, and reserving unto the United States, rights of way over, across, and through said lands for canals and ditches constructed, or to be constructed, by its authority, all in the manner prescribed and directed by the act of Congress approved August 30, 1890 (26 Stat. 391). To secure payment to the United States, or its successors in the ownership or control of the works constituting and appertaining to the said reclamation project, of all sums due or to become due to the United States, or its successors in control of said reclamation project in connection with said lands and water rights, a lien prior and superior to all other liens, claims, or demands whatsoever upon the lands herein and hereby described and conveyed, upon all water rights thereto appurtenant, and upon the right to receive and use water from the reservoirs and canals of said reclamation project, is expressly reserved."

Admittedly, upon the issuance of such a patent, if not before, the entryman may exercise absolute dominion and control over the land and the water right, with full power to occupy, use, mortgage, and sell the same.

In relation to this class as well as the other the tax records of the county disclose an irregularity to which in the argument some significance was attached. At the time the suit was commenced it appeared upon the face of the assessment book that all of these lands were assessed in the same manner as other lands privately owned, without any reference to or express elimination of the lien or interest of the government. Shortly after the service of process in the case, at a meeting of the board of county commissioners, an order was entered authorizing and directing the assessor to insert before the name of each taxpayer the words "equity of," thus expressly limiting the assessment to such equity as the person named had in the tract of land described, and by implication recognizing an exemption in favor of the government. The assessor at once complied with the order, and preliminarily therefore we have the question of the validity and effect of these proceedings. While the evidence adduced at the trial leaves no doubt in my mind that in making and equalizing the original

assessment the county officers had in fact attempted to, and did, value only the private interest of the entryman, and intended to exclude the government's lien or interest, as against the taxpayer there is room for serious doubt whether, in view of the fact that the time for assessing and equalizing taxes had expired, the officers possessed the power to so change the record; but that question I do not decide, for the taxpayers are not seeking relief and the matter is of no substantial concern to the plaintiff. The plaintiff does not sustain such a relation to the taxpayers as to authorize it to maintain a suit of this character in their behalf, and indeed the bill does not purport to be brought in their interest. It is not like a case brought to enjoin the taxation of Indian lands, where, by reason of its relation of guardianship to the Indians, it is the duty of the government as well as its right to protect their interests. It is here professedly seeking injunctive relief against proceedings which it avers will cloud its title, and therefore, if its proprietary interests are not injured or imperiled, it is in need of no relief. Upon having its attention called to these proceedings by the institution of the suit, the county promptly and unequivocally disclaimed any intention to tax the plaintiff's interest or impair its lien, by passing and entering of record the resolution referred to and altering its assessment roll in conformity therewith. Moreover, the county is here conceding that it cannot tax or proceed against the plaintiff's interest or prejudice its lien, and therefore, to put at rest any question touching the effect of the resolution, the decree herein may, as of course, place such a limitation upon the operation of the assessment, and forbid further proceedings out of harmony therewith. The discussion of the substantive issues will therefore be upon the assumption that the county is assessing and proceeding against only the interest or equity of the entryman, exclusive of that of the government.

Both the facts and the statutory provisions relating to the second class of lands have already been set forth with considerable fullness, and as a matter of convenience we may as well dispose of this branch of the case first. The averment made in the complaint and the position taken by complainant at the argument that the patent is conditional, and conveys to the entryman only "a conditional right to the use and occupation" of the land, are untenable. The patent is absolute, and conveys title in fee simple to the entryman. While the government has apparently been careful to exclude from the case lands which were privately owned when the project was started, but which by purchase obtain water therefrom, it must be clear that no substantial distinction can be drawn between the status of such lands and that of the lands in question. In either case a patent has been issued purporting wholly to divest the government of title, and to convey it to the entryman. In both cases liens of the same quality are reserved in favor of the government, to secure the discharge of obligations identical in character. Default of the owner in one case is followed by the same consequences which ensue in the other, for in either case "upon default of payment of any amount" due, "title to the land shall pass to the United States," etc. The plaintiff complains that its title will be clouded by the tax proceedings, when in truth it has no title at all.

It has voluntarily alienated its title, and for security has reserved a lien upon the property transferred. Suppose that it were here asking for relief against taxes upon land within the project for which patent issued a quarter of a century ago, and which has been brought and sold and mortgaged and taxed, as any other land privately owned. It could bring to the support of its prayer every consideration which it now urges. Under the provisions of the statute it would have a paramount lien upon the land for the unpaid purchase price of the water right certified therefor. This lien would have the same origin, would be for the same purpose, and would be quite as sacred, as the liens here involved. If the enforcement of the tax would impair or render inefficient the liens here, it would operate with like effect there, and if there is anything in the suggestion that the state cannot tax because at a tax sale persons already holding farm units on the project are disqualified from becoming purchasers at a tax sale, it would have the same force in the hypothetical case. It follows that, if the plaintiff's position is well taken, we would have the anomalous condition where property privately owned has been taxed for 25 years, and though continuing to be privately owned, and though having a value greatly enhanced to the owner through the acquisition of the water right, it ceases to be taxable because the government has acquired a lien thereon for deferred payments on account of the purchase price of the water right. The suggestion that the assessment is invalid because, under one of the provisions of the statute and of the patent above quoted, no person may hold more than one irrigable farm unit on a project, and that therefore entrymen would be disqualified from becoming purchasers at a possible sale, is without substance. It would be quite as reasonable to argue that, because the state limits the real estate holdings of corporations and disqualifies certain aliens from holding real estate at all, it is therefore powerless to levy a tax on real property. Qualified purchasers for these lands, in case they are offered at a tax sale, there doubtless would be in great numbers, and the county need have little concern lest the tax fail for the want of bidders. However that may be, it is a consideration which the plaintiff is not in a position to urge.

The other objection has more semblance of merit; but it, too, I think must be denied. It is that to be valid at all the tax must of necessity be deemed to create a lien superior to that of the government. It is to be borne in mind that the county is not putting forth such a claim of superiority. On the contrary, it concedes that its tax is in subordination to the government's lien. The plaintiff's position is that such a concession is incompetent, and hence ineffective, and that the county must tax all or nothing, and cannot sell subject to the lien. Authority for this view is supposed to be found in N. P. Ry. Co. v. Trail County, 115 U. S. 600, 6 Sup. Ct. 201, 29 L. Ed. 477. But whatever significance might legitimately be attached to this case, if it stood as the only or the last expression of the Supreme Court upon the subject, it is unnecessary to inquire, for in so far as it is pertinent to the present issue it must be deemed to have been limited in its application, if not modified, by the more recent opinion of that court in Baltimore Ship Building Co. v. Mayor, et al., 195 U. S. 375,

25 Sup. Ct. 50, 49 L. Ed. 242, which enunciates principles so conclusive, in favor of the defendants, of the issues under this branch of the case, that further discussion is thought to be unnecessary.

The right to tax the first class of lands is not so clear. The legal title thereto remains in the government, the entrymen have not paid in full for their water rights, and they have not brought the requisite acreage under cultivation and irrigation. Still it must be apparent that they have something more substantial than a mere contingent interest. Upon proof of compliance with the general homestead law and the issuance of a certificate to that effect, they became possessed of rights of which they can be divested only through their default or voluntary relinquishment. It is a vested interest which they have, and not a bare option to purchase when and if the government sees fit to sell. They not only have the full and exclusive use of the lands, but they may by assignment transfer them in whole or in part, and thus realize in money the entire value thereof. Act June 23, 1910, 36 Stat. 592. They may also mortgage, and the mortgagee may foreclose and protect himself by bidding at the foreclosure sale. General Reclamation Circular of Sept. 6, 1913, p. 28. On the death of the entryman his heirs succeed to his rights. If, then, the entryman has the valuable right of possession and use, and the unqualified power to acquire the legal title—in other words, if he has a vested interest which may be sold, mortgaged, and inherited—it is difficult to see why it may not also be taxed without impairing or clouding the title of the United States or infringing upon its rights. The interest would seem to be quite as substantial as, and of equal dignity to, the right of the holder of an unpatented mining claim, and it has been repeatedly held that such a claim is taxable. Elder v. Wood, 208 U. S. 226, 28 Sup. Ct. 263, 52 L. Ed. 464, and cases therein cited.

[2] Generally speaking, one who has the right to property and is not excluded from its use and enjoyment should not be permitted to use the legal title of the government to avoid his just share of taxation. Wisconsin Central R. R. v. Price, 133 U. S. 496, 505, 10 Sup. Ct. 341, 33 L. Ed. 687; N. P. R. R. Co. v. Patterson, 154 U. S. 130, 14 Sup. Ct. 977, 38 L. Ed. 934; Maish v. Arizona, 164 U. S. 599, 17 Sup. Ct. 193, 41 L. Ed. 567; N. P. R. R. Co. v. Myers, 172 U. S. 589, 19 Sup. Ct. 276, 43 L. Ed. 564; Baltimore Ship Building Co. v. Mayor, et al., 195 U. S. 375, 25 Sup. Ct. 50, 49 L. Ed. 242. At the hearing it was urged with much earnestness that the tax is upon an instrumentality employed by the government in effectuating its purpose of reclaiming its arid lands, and that for that reason it must be held to be void. The same contention was made and rejected in the Baltimore Ship Building Case, supra. In support of their position counsel for the plaintiff place much reliance upon United States v. Rickert, 188 U. S. 432, 23 Sup. Ct. 478, 47 L. Ed. 532, but a marked distinction is to be drawn between that case and this. There the question related to the right of the state to tax property which was being used by the government for the civilization of the Indians. The Indians, it was said, were still wards of the government, in a condition of pupilage or dependency. They occupied the lands with the consent of the government, and not only were without title thereto, but were

without any right to make contracts with reference to them, or to do more than occupy and cultivate them. The improvements in question constituted a part of such lands. The personal property was purchased with the money of the government, and was furnished to the Indians in order to maintain them on the allotted land during the period of the 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 the execution of the purpose of the government in reference to them." To permit the state by tax proceedings to wrest from the Indians the property which, in a very wide sense, was owned by, and was under the control of, the government, and which it was not within the power of the Indians to dispose of, would very clearly interfere with the working out of a 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."

No such case is here presented. There is no suggestion of guardianship or paternalism in the Reclamation Act, and in its administration the entrymen are not to be treated as wards of the government. To be sure, the government has a concern for their welfare, as it has for its citizens generally, but the primary purpose of the Reclamation Act is the reclamation of arid lands; the policy thereof pertains to property and not to persons. If its purposes relative to the Indians are to be carried out, the government must see that the Indian, and the land allotted to him, and the cattle and horses and plows furnished to him, are kept together. To permit the state through tax proceedings to take from the allottee his cattle and his allotment would be fatal. Here the conditions are entirely different. One may take up where another lays down the work of reclaiming a farm unit, and therefore there may be a change of ownership and a succession of entrymen without interfering with the government's purpose. Hence it is that it has been found not only feasible, but the part of wisdom, to clothe the entryman with the power to mortgage and assign his entry. Whatever enhances the value of such an entry and makes it more attractive tends to further, rather than impede, the policy of the government. It is a matter of common knowledge that the earlier development of these projects was hampered by reason of the inability of the settlers to utilize their holdings as security for money required for reclamation and improvement purposes, and the want of revenues with which to provide public conveniences. It is not improbable that it was out of consideration for these conditions that the act of June 23, 1910, was passed. There is in fact no substantial ground for the assumption—and it is nothing more than an assumption—that taxation of the settlers' property rights in these entries will interfere with the government in the execution of its purposes. It is not to be assumed that the state will impose an oppressive or discriminating tax for the deliberate purpose of destroying the project. If such were its desire, it could accomplish it as well by levying taxes upon the stock, implements, and other personal property which the settler needs for his maintenance and for carrying on the work of reclamation, and in such property it will be conceded the government

has no interest, and hence could not interfere. We must assume that the tax will be fair and equitable, and sufficient only to provide such public institutions and such public conveniences, and to maintain such governmental agencies, as are reasonably necessary for the comfort, health, and well-being of the community, and that being true we have the right further to assume that government lands in such a community and under such conditions will be more attractive to settlers, and will be more eagerly sought after, and hence more rapidly reclaimed, than in a community where the settler must live under harsh and primitive conditions. In the Indian country the government assumes the responsibility of providing or requiring the Indians to provide for these conditions of civilized society; but in the case of reclamation projects it has and recognizes no such responsibility. If, therefore, as is necessary, the local government must take up the task, it should not be required to make "bricks without straw."

Without further prolonging the discussion, upon full consideration I have concluded that the interest of the settlers in this class, as well as in the other class of lands, is subject to taxation. Such, also, it may be added, has been the conclusion of the Supreme Court of the state. Cheney v. Minidoka County, 26 Idaho, 471, 144 Pac. 343.

Accordingly, the substantial relief prayed for will be denied, but, for the purpose of setting at rest any doubt as to the validity and effect of the order of the board of county commissioners and the subsequent action of the assessor in conformity therewith, a decree will be entered restraining the defendants from asserting any claim against the interest of the government by reason of the tax proceedings, or selling at tax sale any interest other than that of the settler.

THE HORSA.

(District Court, E. D. South Carolina. October 1, 1915.)

1. ADMIRALTY ⊜47—SUITS IN PERSONAM—ATTACHMENT—FORM OF WARRANT.
While the warrant of attachment, prescribed by admiralty rule 2 (29 Sup. Ct. xxxix) in suits in personam, is one in form for the arrest of the defendant, and if he cannot be found the attachment of his goods and chattels, the fact that such form was not followed, but the warrant issued merely directed the attachment of the vessel named, is not fatal to the jurisdiction of the court, where the libel and affidavit on which the order for attachment was issued showed that the vessel was a foreign vessel about to leave the jurisdiction, and that her owners were unknown, and where, after the attachment, her master appeared and gave bond as in suits in rem.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 396–403; Dec. Dig. ⊜47.]

2. ADMIRALTY ⊜21—ACTION FOR WRONGFUL DEATH—ENFORCING STATE STATUTE.
A court of admiralty will, in a proper case, enforce by proceedings in personam a right given by a state statute to recover damages for wrongful death.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 218–220; Dec. Dig. ⊜21.]

3. DEATH ⇐44—ACTION FOR WRONGFUL DEATH—SUBSTITUTION OF PARTIES.
The statutes of a state gave a right of action for wrongful death to the executor or administrator of the deceased for the benefit of his wife and children. An injury resulting in death occurred on a foreign vessel lying in a port of the state. Under the state statutes a number of weeks must elapse before an administrator could be appointed. *Held* that, upon a showing of such facts, that the vessel was about to leave the jurisdiction, and that her owners were unknown, a court of admiralty had jurisdiction to permit the filing of a libel by the widow, with an order of attachment against the vessel, subject to amendment by substituting the administrator, when appointed, as libelant.
[Ed. Note.—For other cases, see Death, Dec. Dig. ⇐44.]

In Admiralty. Suit by Corie Simmons against John Doe and Richard Roe, unknown owners of the steamship Horsa. On motion to dissolve attachment. Denied.

J. Waties Waring and Joseph Fromberg, both of Charleston, S. C., for libelant.

Alfred Huger, of Charleston, S. C., for respondents.

SMITH, District Judge. In this case a libel in personam was filed by Corie Simmons against John Doe and Richard Roe, the unknown owners of the steamship Horsa. The libel alleges that the steamship Horsa is a foreign owned steamship, to wit, a British steamship, the owners of which are unknown to the complainant, and that whilst at the port of Charleston, through the carelessness and negligence of the agent of the owner of the steamship, to wit, the negligence of the master, one Dennis Simmons, a laborer engaged in unloading the vessel, was through the defective, unsafe, and insecure machinery of the ship, provided for the purpose of the unloading, so badly injured that he died from the injury. Under the rule of this court (rule 106) it is provided that in suits in personam no warrant of arrest shall issue for the arrest of the property of the defendant for an amount exceeding $500, unless by the special order of the court. Upon application to the court, and the presentation of the verified libel showing the above facts, an order was made directing that the warrant of arrest should issue, in this case for the arrest of the steamship Horsa, provided that no such process should issue until the libelant had filed with the clerk a bond or stipulation in the usual form on the issue of process in rem in the sum of $250, with sufficient security to be approved by the clerk of this court. Thereupon the stipulation was given, and the clerk issued a monition and warrant for arrest in the usual form of a monition and warrant for arrest on a libel in rem in admiralty, and thereupon the Horsa was attached. After the attachment, upon giving bond to abide by and perform the decree of the court in the cause, the vessel was released, and has since departed from the jurisdiction.

The respondent now appears and makes this motion to dissolve the attachment or warrant of arrest, on the ground that the libel does not disclose any admiralty or maritime claim or lien whereupon an attachment could be founded, and at the same time moves upon exceptions to the libel that the same be dismissed and the attachment

dissolved upon the grounds, first, that the allegations of the libel do not disclose any admiralty or maritime claim or lien whereupon attachment should be issued; second, that the libel does not allege by whom Dennis Simmons, mentioned and referred to in article 2 thereof, was employed on board of the steamship Horsa; third, that said libel does not allege in what way the winch mentioned in article 3 thereof was defective, unsafe, and insecure, or in what way said winch gave way and failed to work; fourth, because the libel does not allege in what respects the winch referred to in article 4 was not sufficiently strong, safe, and secure for the purposes described; fifth, that the damages of $10,000, referred to and stated in allegation 7 thereof, are stated too indefinitely; sixth, that the libel does not disclose any claim or cause of action on behalf of libelant.

[1] It will be noticed that these exceptions raise very serious questions to the merits of the pleadings; that is to say, to the sufficiency of the libel and to the right of the libelant to bring this proceeding. The questions that come before the court upon this motion are, first, whether or not this warrant of arrest is in proper form to justify the arrest of the vessel under the present libel; and, next, whether the libelant is without standing in court because the proceeding is not brought by any person authorized to bring the proceeding. On the first point the respondent relies upon the provisions of rule 2 of the Rules and Practice for the Courts of the United States in Admiralty and Maritime Jurisdiction (29 Sup. Ct. xxxix), prescribed by the Supreme Court in pursuance of Act Aug. 23, 1842, c. 188, 5 Stat. 516. Rule 2 of those rules prescribes that in suits in personam the mesne process may be by a simple warrant of arrest of the person of the defendant in the nature of a capias, or by a warrant of arrest of the person of the defendant, with a clause therein, if he cannot be found, to attach his goods and chattels to the amount sued for, or, if such property cannot be found, to attach his credits and effects to the amount sued for in the hands of the garnishees named therein, or by a simple monition in the nature of a summons to appear and answer to the suit, as the libelant shall in his libel or information pray for or elect.

The process issued by the clerk in this case has practically two clauses, viz., a simple monition in the nature of summons to appear and answer to the suit, and an order of arrest to the marshal to seize and hold the vessel, and to notify all parties claiming the same, or knowing or having anything to say why the vessel should not be condemned and sold to appear on the return day named and make their answers in that behalf. The respondent claims that the whole proceeding is now irregular, and null and void, in that the process issued by the clerk should have been in the form of a warrant of arrest of the persons of the owners of the vessel, and then have provided that, if such owners could not be found, then, and then only, to attach their goods and chattels, to wit, the ship Horsa. The process issued by the clerk not having been in this form, according to

respondent's claim, the whole attachment was invalid and should be dissolved.

Under the process as actually issued by the clerk the marshal attached the ship Horsa and by publication in the form usual in proceedings in rem notified all claimants to appear. Thereupon the master, the representative of the owners, appeared, claimed the vessel, and had the vessel released upon giving bond under the provisions of the United States Revised Statutes—section 941, as amended March 3, 1899 (Act March 3, 1899, c. 441, 30 Stat. 1354 [Comp. St. 1913, § 1567])—in double the amount claimed by the owner, conditioned to perform the decree of the court in this cause. The claimant, as the representative of the owners of the vessel, has therefore appeared in this cause and given bond, in double the amount of the claim, to answer the decree in the cause. Whilst the form of the process is not in artistic form, yet it complied in the opinion of the court substantially with the requirements of rule 2 of the Rules in Admiralty. The vessel was seized, and the owners were notified by the marshal, and have appeared to the proceedings. This is in effect exactly what would have resulted if the form had been different, and it had run in the shape of a warrant of arrest of the person of the defendants, with a clause that, if they could not be found, their goods and chattels should be attached to the amount sued for.

At the time when the court made the order for the warrant of arrest to issue, the sworn allegations of the libel, and of the affidavit submitted along with the libel, showed that the owners were unknown to the libelant, that the ship was a foreign ship, being a British-owned ship, and she was about to leave the jurisdiction. The libel and affidavit therefore informed the court in effect that the owners could not be found within the jurisdiction because they were not known to the libelant, and they were foreigners, to wit, citizens of Great Britain, and that the vessel was about to depart. At the time of making the order to issue the warrant for arrest the court had before it all the information which would have been obtained, had the warrant of arrest contained a clause that the property should be arrested only if the persons of the defendants could not be found within the jurisdiction, for the affidavit and sworn libel advised the court when the process was issued that the defendants could not be found within the jurisdiction. In substance, therefore, the entire requirements of rule 2 have been performed.

To dissolve the attachment simply because the process in this case was not in the form in exact words of first directing the persons of the defendants to be arrested, and then following that with a clause, if they could not be found, to attach their goods and chattels, when there now is in the court the bond of the defendants, in consideration of which they secured the release of the vessel, that they would abide by the decree of the court, would be practically to deprive the plaintiff of all remedy. The vessel has gone, its owners are citizens of a different country, the vessel is without the jurisdiction, the owners are not themselves, and have no known property, in the jurisdiction, and to dissolve the attachment at this time

would be to deprive the party injured of all remedy, when in reality the respondents have had full process and opportunity to be brought into and have their day in court. The sworn libel has been filed, with which libel the affidavit was submitted to the court; upon that the court made an order for the warrant of arrest of the property to issue; upon that the marshal arrested the property and gave notice to the master of the vessel, the representative of the owners; and upon that notice the master came in, filed his claim, gave his bond to abide by the decree of the court, and obtained the release of the vessel, and has further filed exceptions to the form and substance of the libel. Under all these circumstances it appears to the court that there is no reason for the dissolution of attachment upon this ground.

[2] The next question, however, is whether or not the libel should not be dismissed and the attachment dissolved, because the proceedings were not brought by the person qualified to bring them. The proceedings were instituted by Corie Simmons, the widow of the party who was killed, and who sued for the benefit of herself and the children of the deceased, Dennis Simmons. The position of the respondent is that nobody was authorized to bring these proceedings, except the personal representative duly appointed. The rule in the courts of admiralty in the United States is that, although originally admiralty did not enforce damages for death for the benefit of the next of kin or heirs of the dead party, yet that a court of admiralty will enforce in admiralty, by proceedings in personam, damages in cases in which the right of action is given to the next of kin or the representatives of the deceased party by the state law, at the place where the injury was caused. Deslions v. La Compagnie Generale, 210 U. S. 95, 28 Sup. Ct. 664, 52 L. Ed. 973; Maryland v. Miller, 194 Fed. 775, 114 C. C. A. 495; Atlantic Transport Co. v. Maryland, 193 Fed. 1019, 113 C. C. A. 408; Aurora Shipping Co. v. Boyce, 191 Fed. 960, 112 C. C. A. 372; Monongahela v. Schinnerer, 196 Fed. 375, 117 C. C. A. 193; Trauffler v. Detroit (D. C.) 181 Fed. 256.

[3] The state statute of South Carolina gives a right of action for injuries causing death for the benefit of the wife and children, and provides that the action shall be brought by or in the name of the executor or administrator of such person. Code of Laws 1912, § 3956. The libel in this case alleges that the libelant, who is the widow of the deceased, had made application to the probate court for the county of Charleston, state of South Carolina, to issue letters of administration on the estate of the said Dennis Simmons, and that the wife and children of the said Dennis Simmons are the persons entitled as beneficiaries under the statute. The law is that it requires two weeks from the time of the application for administration before administration can be issued. The affidavit submitted to the court at the time of the filing of the libel showed that the vessel was about to leave the jurisdiction. It follows, therefore, that if two weeks had been waited for in order to have the administrator appointed the vessel would have left the jurisdiction and the parties would have been deprived of all remedy, simply because an administration could not be procured early enough in time for the suit to be brought in the name of the legal representative.

The matter for consideration, then, is whether a party who may have a perfectly meritorious right of action is to lose all remedy in the jurisdiction, because it is impossible to have an administrator appointed in time to take action before the property which alone gives jurisdiction to the court in which the injury was committed shall have been so far removed from the jurisdiction as to leave the party without remedy. There is this period of delay required by the statute between the date of application for administration and the appointment. During that period the party to be sued could either himself depart entirely from the jurisdiction, or could remove the property which could be subjected to the claim entirely from the jurisdiction, and the party having the right of action would be wholly without remedy. This would seem to be a very anomalous and inequitable result. The statute gives a right, creates a remedy, and at the same time, under this state of facts, not from any fault or negligence on the part of the party injured, but from the delay required by the orderly procedure in the administration of justice, the entire jurisdiction of the court would be defeated and the party be without a remedy.

It may be that proceedings could have been instituted to enjoin the removal of the property by any one acting as guardian ad litem or next friend for the infants or beneficiaries according to the terms of the statute. This proceeding, however, was not instituted, but the property has been actually arrested, and a bond substituted for it, which bond is now in this court subject to its enforcement if it should hold that it has the proper jurisdiction to award the relief to which the parties may prove themselves to be entitled. Everything has been done which would have been done, had proceedings for an injunction been instituted to prevent the removal of the property until an administrator could be appointed. Should this proceeding now be dismissed, or the attachment dissolved, and the party deprived of all remedy in this jurisdiction, simply because of the circuity of action involved in first filing a bill for injunction and obtaining an injunction, until an administrator was appointed, and then having an administrator appointed to bring the action? The result would be exactly the same if the court now permitted the administrator to come in and maintain the action, so that the party defendant would have the controversy tried in a single action and any judgment rendered rendered in an action to which administrator duly appointed is a party.

This seems to be the practice approved in the case of Missouri, Kansas & Texas Ry. Co. v. Wulf, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1915B, 134. There an action was brought by a plaintiff, who was sole beneficiary, and who took out letters of administration only after the commencement of the action. The action, however, was commenced before the letters of administration were issued, and by the beneficiary alone, instead of being brought by the administrator, in whom alone under the statute was vested the right to bring the action. The court, however, permitted an amendment to the complaint, alleging that since the commencement of the action the plaintiff had been appointed administratrix, and

that the action was brought in her individual capacity and also as administratrix. This amendment was allowed by the court, and an order was made permitting the plaintiff to sue as the personal representative of the deceased, as well as in her individual capacity. The Supreme Court of the United States held that the court below acted properly in allowing the amendment; that such an amendment was not equivalent to the commencement of a new action, but was simply an amendment in which one party plaintiff was substituted for another suing upon exactly the same cause of action, and therefore was an amendment which related back to the beginning of the suit.

In the case of Bussey v. Railway, 73 S. C. 215, 53 S. E. 165, the Supreme Court of South Carolina, while holding that the action must be brought in the name of the executor or administrator of the deceased person, yet also held that the substitution could be made upon the record without bringing another action. The Code of Civil Procedure of the state of South Carolina in section 224 expressly provides that the court may, before or after judgment, allow an amendment by adding or striking out the name of any party. Under rule 24 of the Rules in Admiralty, amendments in matters of substance may be made upon motion at any time before final decree, and in the case of The Beaconsfield, 158 U. S. 303, 15 Sup. Ct. 860, 39 L. Ed. 993, the United States Supreme Court decided that an amendment striking out the libelant and substituting the real party in interest for the nominal party as libelant would not in admiralty avoid a stipulation as against the sureties, if the cause of action remained the same. The statutory provision that the action must be brought in the name of the executor or administrator of the deceased does not appear to be a condition precedent essential to the existence of the right and a necessary jurisdictional prerequisite to the power of the court to entertain the action, but is a matter amendable by making the person of the party ultimately to recover conform to the requirements of the statute. The right is created when the tort is complete; the party to assert that right is a matter of incident and within the sphere of amendment.

It is therefore ordered and decreed that the motion to dissolve the attachment be and the same is hereby refused. It is further ordered and adjudged that unless the libelant shall within 20 days from the date of this order procure administration to be issued upon the estate of the deceased, Dennis Simmons, and shall file an application in this court to have the administrator substituted as libelant in this proceeding in the room and stead of the libelant, Cori Simmons, the respondent may move before this court for the dissolution of the attachment and the dismissal of the proceedings.

ALABAMA GREAT SOUTHERN R. CO. v. GEORGE H. McFADDEN & BROS.

(District Court, E. D. Pennsylvania. May 25, 1916.)

No. 3500.

1. CARRIERS ⟸30—CARRIAGE OF GOODS—RATES.
Under Interstate Commerce Act Feb. 4, 1887, c. 104, § 6, 24 Stat. 380 (Comp. St. 1913, § 8569), a shipper is liable for the rate fixed by the tariff filed, regardless of a mistake of the carrier's servant, or the fact that the shipper made prices in reliance on the rate quoted to him, for all persons are charged with notice of such rates.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 81; Dec. Dig. ⟸30.]

2. COMMERCE ⟸33—"INTERSTATE COMMERCE"—WHAT CONSTITUTES.
Where cotton was shipped to a point within the state where the shipments originated and there compressed, from thence being carried to points without the state, the shipments to the point where the cotton was compressed were not intrastate commerce shipments, there being no change of ownership, but were part of an interstate shipment, and interstate rates should be charged; the mere fact that the cotton was not always billed to its ultimate destination until after compression not affecting the matter.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 26, 81; Dec. Dig. ⟸33.

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

3. CARRIERS ⟸30—CARRIAGE OF GOODS—RATES—VALIDITY.
Under Interstate Commerce Act, § 6, requiring carriers to file joint rates when they have been agreed upon, if not, the separate rates when no joint rates have been agreed upon, and requiring them to charge and receive no greater compensation than the rates prescribed, plaintiff, an interstate carrier, which had filed with the Interstate Commerce Commission a through rate for interstate shipments from points in one state to a point in another, must charge such rate, though the connecting carrier filed an intrastate tariff of local rates to the point of intersection of the two lines within the state, and there was a considerably less rate to the point of destination without the state from the point of intersection; the local rates not having been filed with the Interstate Commerce Commission.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 81; Dec. Dig. ⟸30.]

At Law. Action by the Alabama Great Southern Railroad Company against George H. McFadden & Bros. On rule for judgment for want of sufficient affidavit of defense. Rule absolute.

Allen S. Olmsted, 2d, of New York City, and E. B. Richards and Robert D. Jenks, both of Philadelphia, Pa., for plaintiff.

John G. Johnson, of Philadelphia, Pa., for defendants.

THOMPSON, District Judge. Suit is brought to recover a balance alleged to be due for freight charges upon shipments of cotton between October 1, 1909, and March 31, 1912, transported in part from points of origin in Alabama upon the lines of the Nashville, Chattanooga & St. Louis Railroad, and thence over the lines of the plaintiff and connecting carriers to New Orleans and Port Chalmette, La.,

and Savannah, Ga., and in part from Birmingham, Kimbrel, and McCalla, Ala., points on plaintiff's lines, to Savannah, Ga., and from Birmingham, Ala., to New Orleans and Port Chalmette, La. The undisputed facts for the purposes of the present rule are as follows:

During the period in question the defendants purchased cotton for export and for sale and shipment outside of Alabama. The shipments originating on the line of the Nashville, Chattanooga & St. Louis Railroad were billed from Boaz, Albertville, and Guntersville, Ala. The junction of the initial carrier with the plaintiff's railroad is at Attalla, Ala. Kimbrel and McCalla are south of Birmingham.

As the conditions covering the shipments from Boaz, Albertville, and Guntersville were similar, except as to the amount of the rate, the case was, for convenience, argued and will be considered upon the basis of the shipments from Albertville to New Orleans. At Birmingham, Ala., on the plaintiff's line, was a compressing plant at which the plaintiff delivered for compression and compressed cotton coming over its line from Attalla. In accordance with the practice and a right reserved in the tariffs filed, shipments of cotton are stopped in transit for compression at points convenient to the carriers and are compressed by the carrier, for its own convenience in order to reduce bulk. The defendants' cotton shipped from Albertville was billed to Birmingham, where it was stopped for compression. When purchases of uncompressed cotton were made by the defendants at Albertville, they were not at all times certain to what point they would ultimately ship the cotton after compression, and therefore maintained an agency at Birmingham, and shipped cotton to Birmingham on bills of lading which called for delivery to the order of the defendants, or with notice to them. Birmingham was the assembling point at which the defendants assembled, not only uncompressed cotton purchased at Albertville, but uncompressed cotton purchased at Birmingham and other points in Alabama, and after compression the defendants, through their agency at that point, routed the bales of compressed cotton to such points as they might determine according to their trade contracts. The cars on which the cotton arrived at Birmingham via Attalla were not retained during compression for the shipment of the same cotton, but the transportation of such cars, so far as their contents were concerned, ended at Birmingham. All of the cotton received by the defendants at Birmingham was compressed without any care to preserve the identity of that received from any particular points, and the compressed cotton in bales was reshipped in different cars. After the compression of the cotton by the plaintiff, it was shipped by it from Birmingham to New Orleans upon the surrender of the bills of lading from Albertville to Birmingham, and the original bills of lading were then exchanged for bills of lading reading either from Albertville or from Attalla to New Orleans.

During the period in question the Nashville, Chattanooga & St. Louis Railway Company had on file with the Interstate Commerce Commission a tariff published by it containing, inter alia, a rate of 57 cents per 100 pounds on cotton "uncompressed with privilege to carrier of compressing," for transportation from Albertville, Ala., to New

Orleans, La., over the lines of the plaintiff and other connecting lines. Certificates of concurrence in this rate had been filed by the plaintiff and the other connecting carriers. At the same time the plaintiff had on file with the Interstate Commerce Commission a tariff published by it, in which the various other carriers concerned had filed concurrence with the Interstate Commerce Commission stating a rate on cotton in bales uncompressed with privilege to carrier of compressing from Attalla, Ala., to New Orleans, and containing as a footnote to the statement of rates the following:

"From Attalla, Alabama, to Savannah, Georgia, New Orleans and Port Chalmette, La., on cotton originating at N., C. & St. L. Ry. stations 32 cents."

By "N., C. & St. L. Ry." is meant the Nashville, Chattanooga & St. Louis Railway. The Nashville, Chattanooga & St. Louis Railway had on May 25, 1909, published and filed according to law its Alabama Intrastate Commodity Tariff No. 1, effective June 1, 1909, under which it fixed a local rate of 11.7 cents per 100 pounds for the shipment of cotton from Albertville to Attalla, there to be forwarded to points in Alabama on the plaintiff's lines. Under the two latter tariffs the agents of the plaintiff in Alabama fixed a rate upon the shipments involved in this suit, composed of the 32-cent rate from Attalla to New Orleans plus the 11.7-cent rate from Albertville to Attalla.

[1] The defendants relied upon the plaintiff's agent for information and had no knowledge of the 57-cent rate covering the through route from Albertville to New Orleans. The defendants, in fixing the price of their cotton, fixed it upon the basis of the combination rate, published and declared by the plaintiff and charged and collected by it from them, of 32 cents with the local rate. The plaintiff now claims that the joint through rate published and filed with the Interstate Commerce Commission was the only lawful rate, and that the defendants are liable to them for the difference between that rate and the rates charged and paid. If the 57-cent joint through rate is the lawful charge, the consequent hardship which would be imposed upon the defendants, if they are now called upon to pay the difference, would not excuse a departure from that rate by the carrier or the shippers, even though the latter acted upon the representation of the agents of the plaintiff and continued their shipments, supposing the rate to be the legal one for the entire period.

The rule is summarized in the case of Louisville & Nashville Railroad Co. v. Maxwell, 237 U. S. 94, 35 Sup. Ct. 494, 59 L. Ed. 853, L. R. A. 1915E, 665, as follows:

"Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict, and it obviously may work hardship in some cases; but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination."

[2] I fail to see how the shipments from Albertville to Birmingham, under the circumstances of the present case, can be construed as intrastate. The stoppage in transit for compression at Birmingham, the assembling of the cotton originating at Albertville with other cotton purchased at Birmingham and other points in Alabama, and the subsequent routing of the compressed cotton to points determined by the defendants according to their trade contracts, do not relieve the shipments originating at Albertville and billed to Birmingham, and subsequently billed from Albertville or Attalla to New Orleans, of their character as interstate commerce. There was no change of ownership from the time the cotton left Albertville until its arrival at New Orleans. It was continuously in the possession, custody, and control of the carrier, and the stoppage of the cotton at Birmingham for compression, still in the possession of the carriers, was merely for a service incidental to its transit over the entire interstate route.

That the essential character of the commerce, not its mere accidents, such as its billing, its handling and concentration at Birmingham, or the loss of identity of the actual cotton shipped from Albertville, determines its interstate character, is no longer open to dispute. Texas & New Orleans Railroad Co. v. Sabine Tram Co., 227 U. S. 111, 33 Sup. Ct. 229, 57 L. Ed. 442; Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 31 Sup. Ct. 279, 55 L. Ed. 310; Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, 32 Sup. Ct. 22, 56 L. Ed. 83; Ohio Railroad Commission v. Worthington, 225 U. S. 101, 32 Sup. Ct. 653, 56 L. Ed. 1004.

[3] The question, then, is whether the 32-cent rate applying to shipments from Attalla to New Orleans upon cotton originating at Nashville, Chattanooga & St. Louis Railway stations, plus the rate from Albertville to Attalla of 11.7 cents, fixed by the Nashville, Chattanooga & St. Louis Railway in its Alabama Intrastate Commodity Tariff, is a lawful rate. It cannot be questioned that the 57-cent through joint rate, included in the tariff duly published and filed with the Interstate Commerce Commission, is a lawful rate which would govern this shipment, unless some other rate equally lawful was in existence and effect at the same time. The part of the combination rate covering the shipment from Albertville to Attalla, although set out in an Alabama Intrastate Tariff, is not included in the tariff of the plaintiff filed with the Interstate Commerce Commission under which the 32-cent rate was charged from Attalla to New Orleans, nor is there any cross-reference in the latter tariff to the local intrastate tariff. The effect of the tariff providing for the 32-cent rate, therefore, is to leave the rate from Albertville to Attalla entirely indefinite and uncertain.

The language of section 6 of the act to regulate commerce is very clear. It provides that:

"Every common carrier subject to the provisions of this act shall file with the Commission created by this act * * * schedules showing all the rates, fares and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier * * * when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file * * * as aforesaid, the separately established rates, fares and charges applied to the through transportation.

* * * Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time."

The tariff fixing a rate of 32 cents from Attalla upon shipments originating at stations on the Nashville, Chattanooga & St. Louis Railway, and leaving the rate from Albertville to Attalla to be determined from a tariff not published and filed with the Interstate Commerce Commission, is not, within the language, meaning, or intent of the terms of the act, a publication of a rate for a continuous through route. It does not show a joint through rate, nor the separately established rates of the several carriers for the through route, to be applied to the through transportation. The effect of the combination rate is to enable the carrier to charge, and the shipper to pay, a less and different compensation for the transportation between Albertville and Louisiana from that specified in the tariff lawfully published and filed and in effect at the time, by permitting the shipper and carrier to apply to a part of the continuous through transportation a rate not filed with the Interstate Commerce Commission. Such a practice is contrary to the interpretation of the law in a long line of undisputed rulings by the Interstate Commerce Commission, and was held unlawful by the Circuit Court of Appeals for the Second Circuit in Standard Oil Co. v. United States, 179 Fed. 614, 103 C. C. A. 172.

It is held, therefore, that the 57-cent rate under the tariff published and filed with the Interstate Commerce Commission is the only legal rate applicable to this transportation, and, under the authorities, the defendants are liable for the difference between the amounts which should have been paid under that tariff and the sums actually paid by them. There is no defense set up as to the shipments originating at Birmingham, McCalla, and Kimbrel, and the Attalla rate does not apply to them.

Rule absolute.

In re ALL STAR FEATURE CORP.

Ex parte WILLAT FILM MFG. CO.

(District Court, S. D. New York. April 21, 1916.)

1. CONTRACTS ⟸71(1)—CONSIDERATION—FORBEARANCE TO EXERCISE LEGAL RIGHT.

Forbearance to exercise a legal right, even without an express agreement to forbear, constitutes a good consideration for the giving of security.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 298, 316, 322, 324; Dec. Dig. ⟸71(1).]

2. CORPORATIONS ⟸409—LANDLORD AND TENANT ⟸240—LIEN FOR RENT—ACTS OF CORPORATE OFFICERS.

Bankrupt, a film company, leased a studio, and as part of the consideration, expressed in the same instrument, employed the lessor to do certain work in developing its films. Under the terms of the lease, the lessor

was authorized to re-enter on default in payment of rent. At a time when rent was in arrears the lessor refused to release certain films until the rent was paid or secured, and it was then agreed by the managing officers of bankrupt that the lessor should have a lien on whatever films should be in its possession for all sums due it for rent or work, and bankrupt was permitted to remain in possession of the leased premises. *Held*, that such agreement was within the powers of the managing officers of bankrupt as pertaining to the management of its business, and that it gave the lessor a valid lien on such films as were in its possession at the time of the bankruptcy.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1620–1622; Dec. Dig. ⊂⊃409; Landlord and Tenant, Cent. Dig. § 982; Dec. Dig. ⊂⊃240].

3. BANKRUPTCY ⊂⊃471—CONTESTED CLAIM TO PROPERTY—COSTS.

When a trustee contests the claim of an outsider, the controversy is inter partes, and costs follow as in any other case.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 873–877; Dec. Dig. ⊂⊃471.]

In Bankruptcy. In the matter of All Star Feature Corporation. On review of order of referee allowing claim of Willat Film Manufacturing Company to a lien on certain assets. Affirmed, with modification as to costs.

This is a petition by a trustee in bankruptcy to review the order of a referee in bankruptcy allowing a claim of the respondent upon certain assets of the bankrupt kept from the trustee under assertion of a pledge or lien. The property in question was a moving picture film which eventually, by the consent of the parties, was sold for $13,490, against which the claim of the respondent was $4,942.77. All the facts appear in the report of the referee and need not be repeated here.

On March 6, 1916, Referee Stanley W. Dexter filed the following memorandum on settlement of order allowing lien on special fund:

The claimant (Willat Studio) will be allowed interest of 2 per cent. (trust company interest) on the fund derived from the sale of the property covered by the lien from the date the money was received by the trustee, June 14, 1915. The claimant will be charged with actual costs incident to determination, sale, and payment of the lien, including the commissions of the trustee and referee on the amount of the lien paid to the claimant. Matter of Rauch, 36 Am. Bank. R. 75, 226 Fed. 982 (D. C. Va.) October 15, 1915.

I do not think that Judge Holt's decision to the contrary (In re Anders, etc., Co., 136 Fed. 995) applies to the case at bar, where the very existence of the lien was contested, and only allowed after a trial before the referee. The claimant sought the assistance of the bankruptcy court to adjudicate the merits of its claim, as well as to realize on its lien and enforce payment, and as a matter of law and discretion should be made to pay the officers of the court. As the matter is not free from doubt, I will certify the question to the district judge for his opinion.

In the matter of the reclamation claim of Willat Studios & Laboratories, Incorporated, the following is the decision of Referee Dexter:

A petition in bankruptcy was filed against the All Star Feature Corporation on January 30, 1915, an adjudication had on February 16, and Mr. Jeffries was appointed trustee on March 15, 1915. Among the assets claimed by the trustee were certain negatives and prints of motion pictures in the pos-

session of the Willat Studios & Laboratories, Inc., at Ft. Lee, N. J., retained for a lien for $4,942.77, claimed, but not conceded. Under these circumstances, an arrangement was made between the two corporations, whereby the Willat Studios delivered the property in question to the trustee of the All Star Corporation to be sold, expressly reserving its lien on the proceeds of sale. Thereupon the trustee proceeded to sell most of the property, realizing $13,490 therefor, and retaining certain negatives and prints still unsold. A stipulation gives in detail the proceeds of sale. (Stip. of Nov. 5, 1915.)

The original contract between the predecessor in title of the Willat Studios and the All Star Corporation (Exh. 1 of August 3, 1915) was entered into in May, 1914, and provided for a lease of a studio at Ft. Lee, N. J., belonging to the Willat Company (described as the lessor), for a period of one year, beginning not later than August 1, 1914; the lessor to furnish sufficient heat and lighting for photographic purposes (but not electric current) at a rental of $10,000, payable at the rate of $833.33 monthly in advance. "As a further consideration of the letting of these premises the lessee agrees that it will order printed from its negatives a yearly average of 1,200,000 feet of positive and negative films, to be printed and developed by the lessor on stock supplied by the lessee for the purpose which the lessee agrees that it will pay 1¼ cents per foot."

The lessor agrees to accept orders for 1,200,000 feet of printing and developing, on the same terms, and the lessee agrees in addition to the rental to pay for electric current and water, not to assign the lease nor sublet without the lessor's consent, and if any rent shall "be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said lessor to re-enter the said premises and the same to have given, repossess and enjoy."

The lessee covenants to pay the yearly rent "as herein specified" and to quit and surrender the demised premises in good condition, and the lessor covenants for quiet possession.

These are all the covenants in the agreement. "The method of execution" of the agreement, except as to the monthly installments of rent, is not stated. Time of delivery and payment of the film work are not specified; but, in the absence of these terms, it must be presumed that such work was to be delivered on completion and paid for then.

It will be observed that any common-law lien under the agreement would be confined to the ordinary artisan's lien. Section 180 of the N. Y. Lien Law (Consol. Laws, c. 33). The contract was made in New York between two New York corporations and is to be construed by the law of New York, the lex loci contractus, and not by the law of New Jersey. It does not appear on the face of the agreement that the film work was to be performed exclusively in New Jersey, and as to the rent claim it does not appear that the law of New Jersey differs from that of New York. Dyke v. Erie R. R., 45 N. Y. 113, 6 Am. Rep. 43. There is no statutory lien for rent in New York, nor is it claimed for New Jersey. But the lienor claims a lien against the funds in the hands of the trustee arising from the sale of the property delivered under the stipulation, as of the date of adjudication for the entire balance then due, both for rent and film work. This lien is claimed to have arisen by agreement under the following circumstances:

The All Star Company entered into possession of the studio on September 1, 1914, and rent began from that date. One negative, the "Nightingale," was released October 10, 1914, without any payment being demanded. At that date the September rent was due and in arrears, and certain other charges, besides work done on the "Nightingale" negative. The next film to be released was "Shore Acres"; but, before it was released, Baumann (the president of the studio company) insisted on a personal assurance from Farnham, the general manager of the All Star Company, that before the "Shore Acres" prints would be released he would agree to pay the entire indebtedness on or before a certain date. The assurance was given, and a few days later the payment demanded was made; the picture "Shore Acres" having been released prior thereto on the strength of the personal assurance. Rent and charges for September were thus settled.

At a conference between Baumann and Farnham, held just prior to the re-

lease of "Shore Acres" above mentioned, it was also arranged that all future releases should be paid for "C. O. D.," or the All Star Company would refuse delivery. "Mr. Pipp" was the next film released, November 21, 1915. The Willat Studio again refused to release it, until the entire balance then due it was paid; accordingly, the sum of $8,100 was paid in two installments and the picture released. This payment covered the October rent and other charges in arrears and left an over payment of $97.50, which was credited to the All Star account.

The next film to be released was one known as the "Pope." This account stood originally in the name of Raver, the president of the All Star Company, but was transferred directly to that company, at Raver's request. The "Pope" positives produced by the Willat Studios and upon which they had an artisan's lien were released December 10th, without any payment being demanded, under the express agreement arrived at between Farnham and Willat (the general manager of the Willat Studio) that they could hold the remaining negative of the "Garden of Lies" of much greater value, as security for the entire indebtedness.

There is no question in my mind that these oral arrangements were made as stated, and that the parties by their course of dealing clearly showed that all property in the possession of the Willat Studio should stand as security for the entire balance due, rent included. The Willat Studio was unwilling to depend on the credit of the All Star Company. The contract of May, 1914, was a single and entire contract.

All film work had been delivered under it except the film the "Garden of Lies," and I think that, if the Willat Studios acquired any lien upon the goods, that lien attached to any goods left in the lienor's possession to the extent of the whole balance due for work done. By returning a portion of the goods, the lienor waived its lien pro tanto, but could retain its lien for the residue which remained in its possession. Wiles Laundry Co. v. Hahlo, 105 N. Y. 234, 11 N. E. 500, 59 Am. St. Rep. 496; Conrow v. Little, 115 N. Y. 387, 22 N. E. 346, 5 L. R. A. 693.

I am not impressed by the argument of the trustee that no lien could attach to the negatives because the Willat Studios did not in any way enhance the value of the negatives, as in the case of type, De Vinne v. Rianhard, 9 Daly (N. Y.) 406. That may be true, if the lienor claimed only a strict artisan's lien under the statute or at common law; but, in this case, the lienor claims under an express oral agreement, and does not depend on a prior valid lien. The work done in developing and printing the negative and positive of the "Garden of Lies" is conceded to be a lien. I see no material difference between that case and the others.

As to the rent in arrears: The same agreement covers that also. If the parties choose to give a lien for the rent item, it was within their power, and cannot be disputed now. The contract was single and entire. The rent and film work are not severable, the guaranty of 1,200,000 feet of film work being a part of the consideration for the lease of the studio. The parties have construed the agreement in the manner set forth, and have acted on this understanding on two previous occasions.

It is true that the lien was created in conversations between the respective officials. This was not a modification of the written contract, but "a change rendered necessary by subsequent events in the method of its execution only." Hurley v. Atchison, T. & S. F. R. R., 213 U. S. 134, 29 Sup. Ct. 469, 53 L. Ed. 729. It was a subsequent arrangement caused by the All Star's financial condition, and enabled it to retain its studio, notwithstanding default in payments, and was distinctly for its benefit. If any consideration was necessary for the oral agreement, the Willat Company's forbearance of dispossess proceedings was sufficient, and the bankrupt company, having received the benefit of this forbearance and thus enabled to market its films, cannot be heard to question the verbal arrangement made and is estopped to deny its validity. Hamilton Trust Co. v. Clemes, 17 App. Div. 152, 45 N. Y. Supp. 141.

While the lienor was not bound to extend forbearance for any definite time, still its actual forbearance furnishes a good consideration. Hobart v. Verrault, 74 App. Div. 444, 77 N. Y. Supp. 483; Strong v. Sheffield, 144 N. Y. 392, 39 N. E. 330.

The trustee claims that the liens asserted by the lienor were of different characters and could not be transferred to other property, viz., a right of withholding delivery of goods in which the seller has the property right cannot be transferred to goods held under an artisan's lien, though both are commonly called liens. One is regulated by the Sales Act, and the other by the Lien Law. But this is not applicable to the present case, for the contract was not one of sale, but of lease; the lessee, the All Star Company, to supply the stock to the lessee for completion. The fact that the bankrupt did not actually supply the stock, but that the stock was purchased by the lessor and charged to the lessee, was to enable the lessee to carry out its contract, and must be construed "as a change rendered necessary by subsequent events in the method of its execution only." Hurley v. Atchison, T. & S. F. Ry., 213 U. S. 134, 29 Sup. Ct. 469, 53 L. Ed. 134.

Whether the title to the stock passed to the bankrupt is a question of intention. I think that title did pass to the bankrupt, and that the printing thereon was work done on the property of the bankrupt which enhanced its value. N. Y. Sales Law (Laws 1911, c. 571), § 134; N. Y. Lien Law (Consol. Laws, c. 33) § 180; Blumenberg Press v. Mutual Mercantile Agency, 177 N. Y. 362, 69 N. E. 641; s. c., 77 App. Div. 87, 78 N. Y. Supp. 1085.

As to the provability of the claim of the Willat Studio against the bankrupt, the rent for February accruing after the filing of the petition January 30, 1915, must be disallowed and the claim allowed for $4,109.44 only. But as the lien covers a reasonable period after the bankruptcy the lien extends to the February rent, when the trustee abandoned the lease, and the claim is immaterial. Courtney v. Fidelity Trust Co., 219 Fed. 57, 134 C. C. A. 595.

There is no preference involved, as the record is bare of any evidence of insolvency.

I think that the lien of the Willat Studio is valid and the trustee should pay the lienor the full amount due it, viz., the sum of $4,942.77.

The referee's certificate, filed April 9, 1916, was as follows:

I, Stanley N. Dexter, one of the referees of the court of bankruptcy, do hereby certify that in the course of proceedings in said cause before me an order, a copy of which is annexed, was made and filed in my office on the 11th day of March, 1916; that on March 30, 1916, the parties herein, feeling aggrieved thereat, filed petitions for review within the time provided by stipulation of the parties.

The question presented for review is: Did the referee err in adjudging that the Willat Studios & Laboratories, Inc., had a valid lien on certain property of the bankrupt and in directing the payment from the funds of the bankrupt the full amount of the claim of said "Willat Studios & Laboratories, Inc.," in priority of the claims of the general creditors, and in refusing to charge said lien or with the actual incident to the determination, and in charging said lienor with the expenses of the sale and the commissions of the trustee and referee on the amount of the lien.

A summary of the evidence on which such order was based is more fully set forth in the decision of the referee hereto annexed.

The following papers are handed up for information from the court:

1. Claim filed by Willat Studios & Laboratories, Inc.
2. Stipulation of the parties and order dated May 5, 1915.
3. Petition and order to show cause filed July 6, 1915.
4. Decision of referee dated February 10, 1916.
5. Further decision of referee dated March 6, 1916.
6. The various exhibits of the parties.
7. Stipulation dated November 5, 1915.
8. Minutes of hearing beginning August 31, 1915.
9. Order allowing claim of Willat Studios.
10. Order extending time to appeal.

11 and 11A. Petitions for review filed March 30, 1916.

The said questions are hereby certified to the judges for an opinion thereon.

John L. Lockwood, of New York City, for petitioner.
Gilbert W. Roberts, of New York City, for respondent.

LEARNED HAND, District Judge. [1, 2] I do not think it is necessary to suppose that the parties made a bilateral contract of forbearance and security. Perhaps the lessor might have evicted the lessee at any time and the lessee have reclaimed the films without paying for more than the work actually done on each particular film reclaimed. That question I leave open. Yet the parties intended that the lessor should have some security for the rent and the other charges, and this security was to be by retaining the films. So much indeed is too plain for dispute; the only question is whether the lessor gave up any quid pro quo for that security. De facto it did, because it let the time pass and it let the lessee keep possession. Under the ninth article of the agreement it could have taken away that possession at any time, and its failure to do so would have been a good enough consideration, if the parties actually intended an exchange. Forbearance, even without an agreement to forbear, will serve as a consideration, if it be completed. Morton v. Burn, 7 Ad. & El. 19; Crears v. Hunter, L. R. XIX Q. B. D. 341; Alliance Bank v. Broom, 2 Drewry & Sm. 289; Edgerton v. Weaver, 105 Ill. 43. The lessor gave the forbearance and relied only on the lien. That was a performance.

It is quite true that here there was no express reference to forbearance in the contract and no statement that the lien was in exchange for it, but the situation reasonably implied that the parties so intended it. If the lessor had not received the assurance, and if the lessee had tried —it would not doubt have been successful—to take away the films without paying the rent, there can be no doubt that the lessor would have eventually asserted its rights under the ninth article. The cause of its inaction was the promised lien; it cannot be supposed that the connection between that inaction and the agreement to give security was wholly unconscious. It may be that the lessor did not actually contemplate eviction, yet even that is likely; certainly it contemplated an immediate assertion of such rights as it had, and that was enough. Hurley v. At., Top. & Santa Fé, 213 U. S. 126, 29 Sup. Ct. 466, 53 L. Ed. 729, seems to have nothing to do with the case.

The final question is of authority. Farnham was the assistant manager, in charge of the details under Raver, who was the president and general manager. The two were generally intrusted with the active conduct of the affairs of the company. In the everyday management of the affairs of the company they were faced with the alternative of insisting upon an immediate release of the property at the risk of the landlord's resort to his remedies, or of telling him to hold the goods till he got payment. The practical decision that the second alternative was for the company's benefit seems to me quite within the powers to be naturally implied in such officers. It is quite wrong to speak of it as though it were a pledge de novo of the assets. The films were already pledged for part of the charges; the term was in effect pledged by the right of re-entry. All the officers did was to substitute a more convenient security for a less convenient, and this arose in the daily dispatch of business of the company.

[3] As to costs, I award them against the estate. I have repeatedly held that, when a trustee contests the claim of an outsider, the contro-

versy is inter partes, and costs follow as in any other case. Why the creditors of a bankrupt should have any warrant for litigation free from the usual risks, I confess I have never been able to see. If the bankrupt had resisted the claim unsuccessfully, no one would think of asking exemption for him; but, when it is the creditors, it seems to be very hard, at least in this district, to dislodge the notion that they are in some sense wards of the court and entitled to special consideration.

Petition to review dismissed. Order affirmed, but with costs to the Willat Film Manufacturing Company.

ALLEN v. ROYDHOUSE.

(District Court, E. D. Pennsylvania. June 5, 1916.)

No. 2962.

1. CORPORATIONS ⟸319(8)—ACTION TO ENFORCE LIABILITY OF DIRECTOR—QUESTION FOR JURY.
   The question of the negligence of a director of a corporation in the performance of his duties *held*, on the evidence, one for the jury.
   [Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1415; Dec. Dig. ⟸319(8).]

2. TRIAL ⟸214—INSTRUCTIONS—DUTY TO STATE LAW.
   The standard of duty of a director of a corporation is one prescribed by law, and in an action by a receiver against a director to recover for losses due to mismanagement, it is the duty of the court to instruct the jury as to such standard.
   [Ed. Note.—For other cases, see Trial, Cent. Dig. § 480; Dec. Dig. ⟸214.]

3. CORPORATIONS ⟸310(2)—LIABILITY OF DIRECTOR FOR MISMANAGEMENT—STANDARD OF DUTY.
   The standard of duty by which the acts or omissions of a director of a corporation is to be measured is that set by the ordinary director, and not that of the ordinary man.
   [Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1353–1357, 1359–1361; Dec. Dig. ⟸310(2).]

4. TRIAL ⟸295(1)—INSTRUCTIONS.
   A charge to a jury is to be considered as a whole, and not tested by the standard of absolute verbal accuracy in every isolated phrase.
   [Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 713, 714, 1717; Dec. Dig. ⟸295(1).]

5. CORPORATIONS ⟸319(8)—ACTION TO ENFORCE LIABILITY OF DIRECTOR—INSTRUCTIONS.
   Instructions in an action by the receiver of a corporation against a director to recover for losses alleged to have resulted from negligent management considered, and *held* without error.
   [Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1415; Dec. Dig. ⟸319(8).]

At Law. Action by William F. Allen, receiver, against George W. Roydhouse. Sur motion by plaintiff for a new trial. Motion denied.

G. P. Middleton and John Blakeley, both of Philadelphia, Pa., and Henry F. Parmelee, of New York City, for plaintiff.

Charles S. Wesley and A. M. Beitler, both of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. The trial of this case was conducted with conspicuous ability and in a justice-seeking spirit, and with a display of fairness and frankness which is refreshing. The defense was presented with a like ability and in a like spirit. The trial, so far as within the control of counsel, could not have been more satisfactory or conducted with greater ability. This removes from the case as now presented all except the appellate questions which arise out of the trial, and disposes of all features which call for an exercise of the power of the court to interfere with the verdict. Even stripped of everything except the features which present the complaints of trial errors, a recital of the facts of the case as submitted to the jury must necessarily be lengthy.

The Seaboard Portland Cement Company, whose business purpose is indicated by its name, was brought into existence in a familiar way. The company was organized and its capital stock fixed at $5,000,000. A $2,000,000 bond issue was then authorized. At the same time it was arranged that the real promoters of the enterprise raise the required cash capital to build a plant and carry out the work of erecting it. The general scheme was that when the plan was carried out the company would have a complete working plant of a certain per diem producing capacity, whose efficiency had been proven by a six-months test, under operating conditions, and be supplied with a cash working capital of $100,000. For this fully equipped plant the promoters were to receive the $2,000,000 bond and the $5,000,000 stock issue. It may be stated, in passing, as an admitted fact, that the expected success of the general business purpose embraced in the plan had a justified basis in general business conditions and the favorable opportunities which the plan created. The plan was open to criticism only in the two respects of a possible improvidence in what was to be given for the plant and the possible absence of a safe assurance that the company would receive the consideration for the issue of its securities. The necessity to provide the cash to build the plant was planned to be met by organizing the promoters into a company to sell the bonds. Approximately $1,500,000 in money was required. The sale of bonds was sought to be promoted by giving the stock as a bonus to bond purchasers.

Another feature of the plan was the constructive work of building the plant. To secure this the promoters organized themselves into another company, which undertook this work. Had the constructing company been financially responsible, or had the financing company been able to supply the needed money, so that the constructing work could be done, it is obvious that the labors and duty of the directorate of the Cement Company, which came into office after these preliminary contracts had been made, would have been limited to seeing to it that the company received in plant and equipment that to which it was entitled. The absence of responsibility in both the constructing and the financing companies put upon such directorate the further duty of supervising the sale of the bonds and the construction of the plant, so as to assure the proper application of the proceeds of the sale of its securities, in order that the Cement Company should receive value for

the securities issued. The Cement Company was incorporated, and the attempt to carry out this general plan had been continued to about April or May, 1912, before this defendant was brought into the management. Changes had been made in the plan until at that time it had reached the actual condition of its being realized that the Cement Company must do both the financing and the constructive work of the project. That each might be well done the services of the defendant were sought, because of his large experience and admitted skill and judgment in constructive work, and the services of others of like experience, training, and knowledge of financial methods were also secured. The advantages of the application of the principle of the division of labor were sought by assigning to the defendant the special duty of looking after the constructive work and committing to others the charge and control of all financial matters. Indeed, the defendant consented to serve on condition that he was to be relieved of all concern with the financing part of the problem. It may be further stated, in passing, to be an admitted fact that the defendant did the special work assigned him faithfully and well. The evils of which plaintiff complains developed wholly in the financing department.

It is well to pause here to get a view of conditions as we now know them to have existed when the defendant became a director. These are stated with the reservation of the difference between conditions now known and conditions of which the defendant knew or should have known. We now know that the financing of the promoters prior to May, 1912, was done in a way which can only be explained as consistent with good faith on the theory that the dominating personality among the promoters looked upon the securities of the Cement Company as his property, subject only to the obligation on his part to complete the plant, in his ability to do which he had unquestioning confidence. Whatever the motives which actuated him, he used the Cement securities to carry mining operations in which he was interested, and exchanged Cement bonds for what proved to be worthless stocks in other enterprises, and made over-liberal advances to himself and to agents who were selling the Cement securities. The net result was that $600,000 in bonds and a corresponding share of the stock issue had been parted with, for which the company had nothing to show except $150,000 or $160,00 expended in constructive work of doubtful value, and what is known as the Scott note for $25,000, and certificates for $50,000 of the stock of the Glazier Stove Company, both of which were valueless. This situation had evoked criticism which centered upon one of the promoters.

The plaintiff, of course, concedes the nonresponsibility of the defendant for losses which befell the company before he became a director. The cause of action in the instant case is based upon the averments of loss to the company flowing from like transactions occurring after the defendant became a director, and which he could and should have prevented, resulting in the dissipation of all of the securities of the company, none, or very little, of which were applied to the work of construction, or in any way to the use of the company. Knowledge on the part of the later directors of what had before been done is

claimed to have an important bearing upon the necessity for the exercise of watchfulness on their part over the future acts of those who had shown themselves not to be trusted.

This outline statement of the fact situation will present with substantial clearness the appellate features of the case as now presented. The limits of an opinion will not permit room for a discussion of all the points of complaint. They will therefore be grouped in classes.

[1] 1. Complaint is made of the verdict. If this defendant is to be judged by the results of the management of which he was part, the verdict is wrong. If, however, the test of his responsibility is not the results of this management (for which the very able counsel for plaintiff does not contend), but is to be found in a fair judgment of his conduct as a director, based upon a compared view of what he did with what, as a director, he should, under all the circumstances, have done, the verdict was not baseless. The verdict is one to which may be applied a quotation from the opinion of Mr. Justice Holmes in Louisville v. Stewart, 241 U. S. 261, 36 Sup. Ct. 586, 60 L. Ed. ——:

"Whatever might have been our opinion, had we been in the jury's place, we do not feel warranted in saying that they had no evidence to go upon."

The verdict is accepted as one well within the proper province of the jury to have rendered. Unless, therefore, it is marred by trial errors, it should not be disturbed.

2. One of the errors alleged, which is worthy of special comment (although in substance embraced in the complaint of the verdict), is that the defendant stood self-condemned of culpable neglect because, although informed that the assets of the company were being diverted to improper purposes, he admits he did nothing. On its face this is a strong statement of condemnation. The meaning of the expression used by the defendant was, however, one to be interpreted by a jury. It might well not have (nor do we think it did have) quite the absolute significance given to it by the plaintiff. For the present we pass this without further comment, because embraced in a feature of the case to be later discussed with more fullness.

[2] 3. A feature of the trial which has more than a mere color of complaint of error is that of the standard of duty by which the jury were instructed to judge of the acts of the defendant. We are in accord with the proposition of counsel for plaintiff that the standard of duty is one prescribed by law, and the jury should have been instructed to apply the standard of the law, and not any standard of their own. If this standard was not laid down, and this instruction given, however, the charge wholly failed in its purpose. To foreclose the possibility of the error being made (which plaintiff complains was made) the jury were first instructed as to what the standard was and then directed to measure the conduct of the defendant by it. A perusal of the charge confirms us in the thought that it is free from error in this respect. The further complaint, however, that the standard set in the charge was lower than that fixed by law, has some basis. That this was due to inadvertence of phrasing rather than to a misconception of the true standard we concede can make no difference.

[3] We are again in accord with counsel for complainant (although

counsel for defendant contest this) that the true standard is that set by the "ordinary director," and not the standard of the ordinary man on the street. This was the thought in mind and meant to be conveyed to the jury. We still think it was the thought conveyed, although it must be confessed the cold type of the transcribed charge leaves this in some doubt. The exigencies of the case compelled the statement and restatement of the thought with a reiteration which became painful. It was unavoidable that changes of phrase should be made. The expressions "ordinary director" and "ordinary man" were used alternately, if not indiscriminately. On the whole, however, we think the charge was understood in the sense intended. The attention of the jury was directed, in the effort to impress their minds with the importance of the case, to the two evils, one of a standard of responsibility so low as to be no standard at all, resulting in "dummy directors" and "directors who don't direct," and having it so high that the director of reasonable and ordinary capacity could not measure up to it, and, in consequence, driving away a class of men of whose services on directorates the business of the country should have the benefit. The jury were enjoined to get into their minds this standard of the law—that measure of attention, care, and ability which the ordinary director of corporations of this kind would be reasonably and properly expected to bestow upon the affairs of this corporation.

[4] There is this further thought to be suggested. If charges to juries, in cases the trial of which runs into weeks, are to be tested by the standard of absolute verbal accuracy in every isolated phrase, separated from its context and the general trend of the whole charge, few cases would come to a final judgment, or charges would become statements of abstract principles, absolutely meaningless and colorless to the jury, and take no vital hold on the merits of the case. Verbal slips, therefore, must on an appellate hearing be held to be innocuous, unless attention is called to them in time to have them corrected. It is too late to make the correction now.

[5] 4. The several remaining complaints (including again the one already mentioned under the numerical heading 2) may be bunched. Exception is taken to that part of the charge in which the court referred to a possible phase of the case as to which the jury might wish instructions. This was the case of a director acting in entire good faith in a management which was also free from complaints, other than of honest mistakes of judgment. The exception is that such instructions were aside from any fact features which called for them. As the plaintiff views the case, this is doubtless true. The defendant, however, strenuously insisted upon this theory, and his counsel urged it at length in his presentation of the defense. The transactions which the plaintiff arrayed as evidence of a plain exploitation of the company, negligently permitted by the directors to go on unchecked, the defendant argued were transactions all of which looked to be for the best interests of the company, and some of which were such as even the after-view judgment would approve. If some of them showed errors of judgment, they were the mistakes of honest judgments, which any careful, prudent director of good judgment might nevertheless

have made. We are still unconvinced how, without error, we could have ignored this phase of the defense as presented. Whatever view the trial judge may have had of this phase, it was the province of the jury to pass upon it. The further complaint of error in the charge on the subject of the bearing of a division of duties among the directors resolves itself into a complaint of the verdict. The jury were instructed that the affairs of a corporation were committed to its board of directors, and that no director could absolve himself from the discharge of any part of this duty by an arrangement among the directors, or any agreement with the officers or otherwise. The principle of organization and of division of labor applies to the work of corporations as well as to other work, and when it is applied through the appointment of committees having special duties, the fact enters into the case as one of the circumstances, in the light of which the action of the particular director is to be judged. The charge in this respect was as favorable to the plaintiff as, without successful complaint on the part of the defendant, it could have been made.

This brings us back to the second complaint. The corporation had two things, each of special importance. One was the management of its franchises; the other, the construction of its plant. The defendant was invited into its directorate because of his special equipment to look after the latter. He had no aptitude and knew his unfitness for the former. Men specially trained and well fitted to cope with the financial problems, but who in their turn knew nothing of the constructive work, had in charge its finances. The defendant doubtless felt that the one was his especial job; the other was the task of others. Noninterference with those in charge of special work, when confidence is justified, does not mean neglect or abandonment of the duty of supervision, but is sometimes its wisest exercise. As already stated, no complaint is made of that part of the management of this company with which this defendant had especially to do. The complaints which came to him of the financial management partook largely of a quarrel between the management and dissatisfied employés. When the defendant said he did nothing, it does not necessarily mean that he refused or neglected to interfere when interference was a duty; but it might well mean the mere statement of the fact that he took no definite action, and that an intelligent director, both willing and eager to do his full duty, situated as he was, would have seen neither occasion nor opportunity to do more than was done by him.

This case was tried as well as a case could be tried, the jury reached a conclusion which had the approval of their deliberate, carefully formed judgments, and we see no justification for interference by the court with the verdict.

The motion for a new trial is dismissed, and the defendant has leave to enter judgment in his favor, with costs.

In re GURLER & CO. et al.

In re HUNTER, WALTON & CO.

(District Court, N. D. Iowa, Cedar Rapids Division. June 5, 1916.)

No. 851.

1. BANKRUPTCY ⟸91(2)—INVOLUNTARY BANKRUPTCY—ADJUDICATION—EVIDENCE.

In involuntary bankruptcy, evidence *held* sufficient to show that bankrupts' principal place of business was within the district where they were adjudicated bankrupts.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 138; Dec. Dig. ⟸91(2).]

2. BANKRUPTCY ⟸15—PROCEEDINGS—JURISDICTION.

Though the members of a firm who were adjudicated bankrupts resided in another district, the court of the district wherein their principal business was carried on has jurisdiction to adjudicate them bankrupts.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 21; Dec. Dig. ⟸15.]

In Bankruptcy. In the matter of the bankruptcy of Gurler & Co., a copartnership composed of G. H. and C. H. Gurler. Petition by Hunter, Walton & Co., a copartnership, to set aside the order of adjudication and dismiss the proceedings. Petition denied.

Deacon, Good, Sargent & Spangler, of Cedar Rapids, Iowa, for original petitioning creditors.

Merrick A. Whipple, of Chicago, Ill., for Hunter, Walton & Co.

REED, District Judge. An involuntary petition in bankruptcy was filed against the bankrupts on October 2, 1915, upon which they were in due time adjudged bankrupts. It is alleged in the petition that the bankrupts, for the greater portion of the six months immediately preceding the filing of the petition, had their principal place of business at Cedar Rapids, Linn county, within the jurisdiction of this court, and that they had absconded, so that personal service of the subpœna could not be made upon them, and an order for the publication of the subpœna as authorized by the Bankruptcy Act was asked for and granted. The order fixed October 30, 1915, as the return day, and was published in the paper designated in the order, and, the bankrupts not appearing or pleading to the petition within the time fixed in the order, they were on November 5, 1915, adjudicated bankrupts.

On January 23, 1916, Hunter, Walton & Co., of Chicago, a copartnership, claiming to be creditors of Gurler & Co., filed a petition asking that the adjudication of Gurler & Co. as bankrupts be set aside and the proceedings dismissed, for the reason, as alleged, that at the time of the filing of the petition in bankruptcy against them, and during the greater portion of the six months immediately prior thereto, the principal place of business of said bankrupts was in the city and county of De Kalb, in the Northern district of Illinois, and not in Cedar Rapids, or Linn county, within the Northern district of Iowa, and that because of this the court had and has no jurisdiction of this proceeding. Some

other allegations are made which challenge the sufficiency of the order requiring the defendants to appear and plead, and the publication of such order, to confer jurisdiction upon this court of the proceedings against the bankrupts; but the ground mainly relied upon is that the principal place of business of the bankrupts at the time of the filing of the petition was, and for six months or more prior thereto had been, in the Northern district of Illinois, and not in Iowa. The petitioning creditors answered, denying the allegation of the petition to set aside the adjudication and dismiss the proceedings, and reaffirmed the allegations of the petition in bankruptcy. The testimony upon the issues so formed was taken in shorthand in open court, but no transcript thereof has been made or filed in this proceeding. Only the conclusion reached from the testimony so taken can now be stated.

[1] The testimony shows without dispute that for more than six months immediately prior to the filing of the petition in bankruptcy Gurler & Co. had been engaged in the butter and cream business at Cedar Rapids, in the Northern judicial district of Iowa, where it had a factory and gathered milk and cream from a large territory around Cedar Rapids, and there manufactured it into butter, and shipped most of it to Eastern markets, and transacted the larger part of its business and kept full accounts thereof, and incurred the larger part of its indebtedness; one member of which firm regularly visited Cedar Rapids, and there had general charge and management of its business at that place, through a manager or superintendent, who had charge of the details of such business, for more than six months prior to the filing of the petition in bankruptcy. The actual residence of the individual members of the copartnership, however, was in De Kalb county, Ill., where it was also engaged in the butter and cream business, and kept a storage room, where some of its manufactured product was kept for shipment to market when sold; but the larger part and greater volume of its business was done at Cedar Rapids under the direction of one of its members and a superintendent, as before stated. The amount of the indebtedness of the concern incurred at Cedar Rapids and owing at the time of the bankruptcy was some $16,000 to $18,000, while the amount incurred and owing at De Kalb was approximately only $3,000 to $4,000, at the most; that many of its accounts due and owing to it arose out of its business at Cedar Rapids. That the firm was doing business at both places is not disputed; in fact, is conceded. That a person, firm, or corporation may reside in one state and do business in another is quite common, but what may be his or its principal place of business may be difficult to determine in some cases. In this case I reach the conclusion, from all the testimony bearing upon that question, that the principal place of business of Gurler Company was at Cedar Rapids, in this state, and within the jurisdiction of this court, at the time of the commencement of this proceeding and during six months prior thereto, and not in De Kalb, Ill.

[2] It follows that this court has and had jurisdiction of this proceeding. See In re Mackey (D. C.) 110 Fed. 355; Dessel v. North State Lumber Co. (D. C.) 107 Fed. 255; In re Pennsylvania Coal Company (D. C.) 163 Fed. 579; Tiffany v. LaPlume Milk Company (D. C.) 141 Fed. 444; In re Duplex Radiator Company (D. C.) 142 Fed.

906. See, also, In re Brice (D. C.) 93 Fed. 942; and Guinn v. Iowa Central Ry. Co. (C. C.) 14 Fed. 323, 324. Cases may be cited not in entire harmony with the above; but upon the authority of In re Southwestern Bridge & Iron Co. (D. C.) 133 Fed. 568, I reach the conclusion that the petition to set aside or vacate the order of adjudication and dismiss the proceedings should be and is overruled; and it is accordingly so ordered.

The petitioners, Hunter, Walton & Co., except.

In re MARKUN.

(District Court, E. D. Pennsylvania. May 19, 1916.)

ALIENS ⊂=65—NATURALIZATION—RIGHT TO APPLY—"DISCHARGED."

Rev. St. § 2166 (Comp. St. 1913, § 4355), declares that any alien of the age of 21 years and upwards, who has enlisted or may enlist in the armies of the United States and has been honorably discharged, shall be admitted to become a citizen upon his petition without any previous declaration of intention. Section 1342, under Articles of War, art. 4 (section 2313), declares that no discharge shall be given to any enlisted man before his term of service is expired, except by order of the President, Secretary of War, the commanding officer of a department, or by sentence of court-martial. Applicant was given a certificate of furlough under Act Aug. 24, 1912, c. 391, § 2, 37 Stat. 590 (Comp. St. 1913, § 1892), declaring that enlistments in the regular army shall be for seven years, but that any enlisted man at the expiration of three years' active service may be furloughed and transferred to the Army Reserve in the discretion of the Secretary of War, in which case he shall be on the reserve list. The applicant had served three years with the United States army. *Held*, that his certificate of furlough was not an honorable discharge, entitling him to apply for citizenship under section 2166.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 129; Dec. Dig. ⊂=65.

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

In the matter of the application of Witold Markun for leave to file a petition for naturalization under Rev. St., § 2166 (Comp. St. 1913, § 4355). Application denied.

THOMPSON, District Judge. Witold Markun appeared in person in open court on May 17, 1916, and applied for leave to file a petition for naturalization as an honorably discharged soldier under section 2166, Revised Statutes (Comp. St. 1913, § 4355), and, as proof of honorable discharge presented a certificate from the First Lieut. Cavalry, Commanding Casual Detachment, Recruit Depot, Ft. McDowell, Angel Island, Cal., dated April 15, 1916, certifying that Witold Markun, having completed three years' service with the colors, had been furloughed to the Reserve of the Army of the United States and that his service has been honest and faithful.

Section 2166 provided that any alien of the age of 21 years and upward, who has enlisted, or may enlist, in the armies of the United States, and has been, or may be hereafter, honorably discharged, shall

be admitted to become a citizen of the United States, upon his petition, without any previous declaration of his intention to become such; that he shall not be required to prove more than one year's residence within the United States previous to his application, and the court admitting him shall, in addition to proof of residence and good moral character, be satisfied by competent proof of such person's having been honorably discharged from the service of the United States. Under article 4 of the Articles of War, section 1342, Revised Statutes (Comp. St. 1913, § 2313), it is provided that:

"No discharge shall be given to any enlisted man before his term of service has expired, except by order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general court-martial."

The certificate presented by the applicant is not a certificate of discharge. It is merely a certificate of furlough, issued under the provisions of Act Aug. 24, 1912, 37 Stat. p. 590, c. 391, § 2 (Comp. St. 1913, § 1892), which provides that on and after November 1, 1912, all enlistments in the Regular Army shall be for the term of seven years, the first four years in the service with the organization of which those enlisting shall form a part, and, except as otherwise provided therein, the last three years on furlough and attached to the Army Reserve thereinafter provided for: Provided, that any enlisted man, at the expiration of three years' continuous service with such organization, either under a first or any subsequent enlistment, upon his written application, may be furloughed and transferred to the Army Reserve, in the discretion of the Secretary of War, in which event he shall not be entitled to re-enlist in the service until the expiration of his term of seven years; Provided further, that except upon re-enlistment after four years' service, or as now otherwise provided for by law, no enlisted man shall receive a final discharge until the expiration of his seven-year term of enlistment, including his term of service in the Army Reserve.

Under the provisions of the above act, it is apparent that the applicant has no standing to petition for naturalization under section 2166, as he has not been and cannot be discharged until he has served for a total period of seven years, made up of his term with the colors and his time on furlough attached to the Army Reserve. The applicant, having presented for the inspection of the court a declaration of intention dated October 17, 1910, is at liberty to proceed under the general provisions of the naturalization laws, if and when otherwise qualified.

Application for leave to petition under section 2166 is denied.

MEMORANDUM DECISIONS

Ex parte AINSWORTH. (Circuit Court of Appeals, Ninth Circuit. May 25, 1916.) No. 2796. Appeal from the District Court of the United States for the First Division of the Northern District of California. John W. Preston, U. S. Atty., and Caspar A. Ornbaum, Asst. U. S. Atty., both of San Francisco, Cal., for appellee. Pursuant to stipulation, signed by counsel for the respective parties, filed May 16, 1916, to dismiss the appeal therein, ordered, appeal in the above-entitled cause dismissed.

BUSCH et al. v. STROMBERG–CARLSON TELEPHONE MFG. CO. (Circuit Court of Appeals, Eighth Circuit. May 29, 1916.) No. 4659. Appeal from the District Court of the United States for the Eastern District of Missouri. Appeal dismissed at costs of appellee, attorney's fee waived, and mandate granted forthwith, per stipulation of parties. Franklin Ferriss, Joseph H. Zumbalen, and Allen C. Orrick, all of St. Louis, Mo., for appellants. Warwick M. Hough, Walter H. Saunders, and Irvin V. Barth, all of St. Louis, Mo., for appellee. See, also, 226 Fed. 200, 141 C. C. A. 130.

CINCINNATI EXHIBITION CO. v. MARSANS. (Circuit Court of Appeals, Eighth Circuit. January 14, 1916.) No. 4562. Appeal from the District Court of the United States for the Eastern District of Missouri. Appeal dismissed, with costs, per stipulation of parties. George H. Williams, of St. Louis, Mo., and Ellis G. Kinkead, of Cincinnati, Ohio, for appellant. Charles C. Madison, of Kansas City, Mo., for appellee. See, also, 216 Fed. 269.

CITY OF RATON v. RATON WATERWORKS CO. (Circuit Court of Appeals, Eighth Circuit. May 12, 1916.) No. 4633. Appeal from the District Court of the United States for the District of New Mexico. Dismissed, with costs, per stipulation of parties. Pershing, Titsworth & Fry, of Denver, Colo., for appellant. Jesse G. Northcutt, of Denver, Colo., and H. W. Coil, of Trinidad, Colo., for appellee.

COAL & COKE RAILWAY CO. v. DEAL. (Circuit Court of Appeals, Fourth Circuit. March 3, 1916.) No. 1394. In Error to the District Court of the United States for the Northern District of West Virginia, at Parkersburg. Order filed allowing writ of error to Supreme Court from 231 Fed. 604, — C. C. A. —. Geo. 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.

DWYER v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. May 3, 1916.) No. 4695. In Error to the District Court of the United States for the Eastern District of Missouri. Writ of error docketed and dismissed, without costs to either party in this court, for want of prosecution, pursuant to sixteenth rule (150 Fed. xxix, 79 C. C. A. xxix), on motion of defendant in error. Walter N. Davis, of St. Louis, Mo., for plaintiff in error. Arthur L. Oliver, U. S. Atty., of St. Louis, Mo.

ELLIS v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. March 11, 1916.) No. 4669. In Error to the District Court of the United States for the Eastern District of Missouri. Writ of error docketed and dismissed as to Albert Ellis, without costs to either party in this court, on motion of defendant in error. Vance J. Higgs, Asst. U. S. Atty., of St. Louis, Mo.

FIREBALL GAS TANK & ILLUMINATING CO. et al. v. COMMERCIAL ACETYLENE CO. et al. (Circuit Court of Appeals, Eighth Circuit. May 1, 1916.) No. 3781. Appeal from the District Court of the United States for the Eastern District of Missouri. Appeal dismissed, with costs, for want of prosecution. Hugh K. Wagner and John H. Bruninga, both of St. Louis, Mo., for appellants. Fordyce, Holliday & White, of St. Louis, Mo., for appellees.

GOTTLIEB v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. May 23, 1916.) No. 4463. In Error to the District Court of the United States for the Western District of Oklahoma. Motion of plaintiff in error for a continuance denied. Writ of error dismissed, without costs to either party in this court, for want of prosecution, on motion of defendant in error. John A. Remy, of Guthrie, Okl., for plaintiff in error. John A. Fain, U. S. Atty., of Lawton, Okl.

LUMINOUS UNIT CO. v. FRANK ADAM ELECTRIC CO. (Circuit Court of Appeals, Eighth Circuit. May 2, 1916.) No. 4631. Appeal from the District Court of the United States for the Eastern District of Missouri. Appeal dismissed, with costs, for want of prosecution, on motion of appellee, with leave to appellant to move for good cause shown to have appeal reinstated. Edwin E. Huffman, of St. Louis, Mo., for appellant. Paul Bakewell, of St. Louis, Mo., for appellee.

McCALLUM v. WESTERN COAL & MINING CO. (Circuit Court of Appeals, Eighth Circuit. January 13, 1916.) No. 4557. In Error to the District Court of the United States for the Western District of Arkansas. Writ of error voluntarily dismissed by plaintiff in error at her costs, pending the consideration by the court of the motion of defendant in error to dismiss. Winchester & Martin, of Ft. Smith, Ark., for plaintiff in error. Ira D. Oglesby, of Ft. Smith, Ark., and Thomas T. Railey, and Edward J. White, both of St. Louis, Mo., for defendant in error.

McCLINTIC-MARSHALL CO. v. IBOS et al. (Circuit Court of Appeals, Fifth Circuit. April 17, 1916.) No. 2898. In Error to the United States District Court for the Eastern District of Louisiana; Rufus E. Foster, Judge. Action at law by John Ibos against the McClintic-Marshall Company, with John B. O'Leary as interpleader. Judgment for plaintiff, and defendant brings error. Affirmed. Richard B. Montgomery and Gustave Lemle, both of New Orleans, La., for plaintiff in error. P. M. Milner, Armand Romain, and T. Semmes Walmsley, all of New Orleans, La., for respondents. Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

PER CURIAM. Assuming that under the Louisiana practice, in a suit for damages for a tort, the defendant may have a right to a call in warranty (see Muntz v. Algiers Ry. Co., 114 La. 438, 38 South. 410), we are of opinion (1) that the motion to dismiss the writ should be overruled; and (2) that on the case made by the call in warranty against John B. O'Leary the exception of no cause of action was well taken and the call properly dismissed. This leads to an affirmance of the judgment of the trial court. However, in order that the plaintiff in error may not be prejudiced hereafter in asserting any

rights that may have grown out of the correspondence referred to in the call in warranty, we think the judgment of the trial court should be amended by adding to the same "without prejudice," and, as so amended, the judgment of the District Court is affirmed, with costs.

McCLURE et al. v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. March 16, 1916.) No. 4510. In Error to the District Court of the United States for the Western District of Missouri. Writ of error dismissed, without costs to either party in this court, per stipulation of parties. George F. Anderson, of Kansas City, Mo., and Moman Pruiett, of Oklahoma City, Okl., for plaintiffs in error. Francis M. Wilson, U. S. Atty., of Kansas City, Mo.

MAYTAG v. MAYTAG–MASON MOTOR CO. (Circuit Court of Appeals, Eighth Circuit. April 6, 1916.) No. 4588. Appeal from the District Court of the United States for the Northern District of Iowa. Appeal dismissed, at costs of appellant, per stipulation of parties. Haffenberg & Friedman, of Chicago, Ill., for appellant. Edward R. Mason, of Des Moines, Iowa, for appellee. See, also, 223 Fed. 684.

MORGAN v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. May 23, 1916.) No. 4460. In Error to the District Court of the United States for the Western District of Oklahoma. Motion of plaintiff in error for a continuance denied. Writ of error dismissed, without costs to either party in this court, for want of prosecution, on motion of defendant in error. John A Remy, of Guthrie, Okl., for plaintiff in error. John A. Fain, U. S. Atty., of Lawton, Okl.

MURPHY v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. March 11, 1916.) No. 4668. In Error to the District Court of the United States for the Eastern District of Missouri. Writ of error docketed and dismissed, without costs to either party in this court, on motion of defendant in error. Vance J. Higgs, Asst. U. S. Atty., of St. Louis, Mo.

NEFF v. NATIONAL INVESTMENT & SECURITIES COMPANY et al. (Circuit Court of Appeals, Eighth Circuit. May 12, 1916.) No. 4696. Appeal from the District Court of the United States for the District of Colorado. Appeal docketed and dismissed, with costs, for want of prosecution, pursuant to sixteenth rule (150 Fed. xxix, 79 C. C. A. xxix), and mandate granted forthwith, on motion of appellees. E. M. Sabin, of Denver, Colo., for appellant. Simon J. Heller, of Denver, Colo., for appellees.

PACIFIC PHONOGRAPH CO. v. SEARCHLIGHT HORN CO. (Circuit Court of Appeals, Ninth Circuit. June 2, 1916.) No. 2770. Appeal from the District Court of the United States for the Second Division of the Northern District of California. Frank Parker Davis, of Chicago, Ill., and Frank P. Deering, of San Francisco, Cal., for appellant. John H. Miller, of San Francisco, Cal., for appellee. Upon motion of Mr. John H. Miller, counsel for the appellee, ordered, appeal dismissed for noncompliance by appellant with rules 23 and 24, 150 Fed. xxxii, xxxiii, 79 C. C. A. xxxii, xxxiii (failure of appellant to print record under rule 23, and to file a printed brief under rule 24). with costs in favor of the appellee and against the appellant.

POPE HARTFORD MOTOR CAR CO. v. WAVERLY CO. (Circuit Court of Appeals, Eighth Circuit. January 19, 1916.) No. 4120. In Error to the District Court of the United States for the Eastern District of Missouri. Writ of error dismissed, with costs, for want of prosecution. John K. Lord, Jr., and F. J. McMaster, both of St. Louis, Mo., for plaintiff in error. Sears Lehmann, of St. Louis, Mo., for defendant in error.

TSIOUSLI v. COYKENDALL, Immigration Inspector. (Circuit Court of Appeals, Eighth Circuit. March 31, 1916.) No. 4682. Appeal from the District Court of the United States for the Western District of Missouri. Appeal docketed and dismissed, without costs to either party in this court, on motion of United States Attorney for appellee and stipulation of parties. A. R. McClanahan, of Kansas City, Mo., for appellant. Francis M. Wilson, U. S. Atty., of Kansas City, Mo., for appellee.

UNITED SHOE MACHINERY CO. et al. v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. May 1, 1916.) No. 4617. Appeal from the District Court of the United States for the Eastern District of Missouri. Upon announcement by government of abandonment of claim to preliminary injunction, the order of District Court granting preliminary injunction (227 Fed. 507) is reversed, without prejudice, etc., and without costs to either party in this court, to which appellants do not consent. C. A. Severance, of St. Paul, Minn., Charles F. Choate, Jr., and Frederick P. Fish, both of Boston, Mass., and Chester H. Krum and Douglas W. Robert, both of St. Louis, Mo., for appellants. C. J. Smyth, Sp. Asst. Atty. Gen., and Arthur L. Oliver, U. S. Atty., of St. Louis, Mo.

VALENTINE et al. v. CITY OF JUNEAU. (Circuit Court of Appeals, Ninth Circuit. May 24, 1916.) No. 2743. Appeal from the District Court of the United States for Division No. 1 of the District of Alaska. J. H. Cobb, of Juneau, Alaska, for appellants. Hellenthal & Hellenthal, of Juneau, Alaska, for appellee. Upon motion of Mr. Simm Hellenthal, counsel for the appellee, ordered appeal dismissed for noncompliance by appellant with rules 23 and 24, 150 Fed. xxxii, xxxiii, 79 C. C. A. xxxii, xxxiii (failure of appellant to print record under rule 23, and to file a printed brief under rule 24), with costs in favor of appellee and against appellant.

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